

THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS

**A Call to Action for More Effective Promotion and Recognition
of Effective Compliance and Ethics Programs**

Executive Summary



Report of the Ethics Resource Center's Independent Advisory Group on the 20th Anniversary of FSGO

Library of Congress Cataloging-in-Publication Data

ISBN: 978-0-916152-18-5

This report is published by the Ethics Resource Center (ERC). All content contained in this report is for informational purposes only. The Ethics Resource Center cannot accept responsibility for any errors or omissions or any liability resulting from the use or misuse of any information presented in this report.

©2012 Ethics Resource Center.

All rights reserved. Printed in the United States of America.

The full report may be obtained by calling 703-647-2185, or by
visiting www.ethics.org.

ABOUT THIS REPORT

Marking 20 years since the enactment of landmark federal sentencing guidelines to spur development of strong organizational compliance/ethics programs, the Ethics Resource Center (ERC) created a special panel to assess the impact and policy implications of those Federal Sentencing Guidelines for Organizations (FSGO). The distinguished 21 member panel includes federal judges; former Justice Department, Sentencing Commission, and Congressional officials; current and former general counsels; senior in-house compliance practitioners; and professors of law.

Over a period of 11 months, the Advisory Group (AG) convened by telephone and in person in order to review and consider information gathered through a research study of enforcement agencies, two surveys of compliance and ethics practitioners, meetings with members of Congressional Oversight Committees, and to contribute their own professional experiences as thought leaders themselves. On November 1, 2011, the Advisory Group released a discussion draft of its report, and the AG subsequently revised the document based on comments received from the public.

The following is the executive summary of the findings and recommendations from the Advisory Group.

ABOUT THE ETHICS RESOURCE CENTER

The Ethics Resource Center (ERC) is America's oldest nonprofit organization devoted to independent research and the advancement of high ethical standards and practices in public and private institutions. Since 1922, ERC has been a resource for public and private institutions committed to a strong ethical culture. ERC's expertise informs the public dialogue on ethics and ethical behavior. ERC researchers analyze current and emerging issues and produce new ideas and benchmarks that matter — for the public trust.

ETHICS RESOURCE CENTER'S INDEPENDENT ADVISORY GROUP ON THE 20TH ANNIVERSARY OF FSGO

Co-Chairs:

Patricia Harned

President, Ethics Resource Center

Win Swenson

Partner, Compliance Systems Legal Group; formerly Deputy General Counsel,
U.S. Sentencing Commission

Members (in alphabetical order):

Scott Avelino

Principal, Compliance Systems Legal Group

Jeff Benjamin

Retired Chair of the Ethics & Compliance Committee of Novartis Corporation; formerly Member,
Board of Directors, Ethics and Compliance Officer Association

Judge Ruben Castillo

U.S. District Court, Northern District of Illinois; formerly Member, U.S. Sentencing Commission

Paul Fiorelli

Professor, Legal Studies, Xavier University

Scott Harshbarger

Senior Counsel, Proskauer; formerly Massachusetts Attorney General

Ben Heineman, Jr.

Senior Fellow at Harvard Law School and Harvard Kennedy School; formerly Senior Vice
President for Law and Public Affairs, General Electric

Nancy McCreedy Higgins

Vice President & Chief Ethics and Compliance Officer, Bechtel Group, Inc.

Hon. Sven Erik Holmes

Vice Chairman, Legal, Risk and Regulatory and Chief Legal Officer, KPMG; formerly U.S. Chief
District Judge

Michael Horowitz*

Partner, Cadawaler, Wickersham & Taft, LLP; formerly Deputy Assistant Attorney General and
Chief of Staff in the Criminal Division of the U.S. Department of Justice

*Michael Horowitz served as a member of the Advisory Group until his confirmation as the new Inspector General of the
U.S. Department of Justice on March 29, 2012.

Thurgood Marshall, Jr.

Partner, Bingham McCutcheon, LLP; formerly Assistant to the President of the United States and Secretary to the Cabinet

Paul McNulty

Partner, Baker & McKenzie, LLP; formerly Deputy Attorney General, U.S. Department of Justice

Judge Diana Murphy

U.S. Court of Appeals for the Eighth Circuit; formerly Chair, U.S. Sentencing Commission

Joseph E. Murphy

Director of Public Policy, Society of Corporate Compliance and Ethics; Of Counsel, Compliance Systems Legal Group.

Michael Oxley

Partner, Baker Hostetler; formerly Member of Congress (R-OH)

Susan Ponce

Senior Vice President, Special Assistant to the General Counsel, Halliburton Co.

Alexandra Rebay

Senior Vice President, Deputy General Counsel and Chief Compliance Officer, Verizon; formerly Assistant United States Attorney, Southern District of New York

Dan Roach

Vice President, Compliance and Audit, Dignity Health

Charles V. Senatore

Head of Corporate Compliance and Ethics, Fidelity Investments; formerly Director of the Securities and Exchange Commission's Southeast Region

Larry Thompson

John A. Sibley Chair in Corporate and Business Law, University of Georgia School of Law; formerly Deputy Attorney General of the United States and United States Attorney

Special Thanks

The Advisory Group wishes to thank the following staff members of the Ethics Resource Center for their support in the development of this report:

Paula Bongino

Nick Fetzer

Michael Gelb

FOREWORD

Just over two decades ago, in November 1991, the U.S. Sentencing Commission promulgated the Federal Sentencing Guidelines for Organizations (FSGO) in an attempt to bring greater consistency in sentencing when organizations, especially corporations, were convicted of violations of U.S. law. Previously, sentencing had been left largely to the discretion of federal judges and the result was a wide variation in punishment for the same violations. The range of outcomes not only offended basic fairness, but at times tended to minimize the incentives for good conduct.

Under U.S. law, corporations are responsible for the wrongdoing of their employees – even when those actions violate company policy. Before the FSGO, companies that worked hard to obey the law and ensure that employees did as well were often treated in the same way as organizations in which misconduct was not only tolerated, but even encouraged.

The FSGO sought to change all of that. By offering reduced sentences for corporate offenders that cooperated with investigators and/or established effective compliance and ethics programs to promote respect for the law, the Guidelines extended a metaphorical “carrot” to induce good corporate behavior. Bad actors, on the other hand, would receive stiffer sentences. Because of subsequent trends in law enforcement, including the preference for negotiated plea agreements instead of trial, the FSGO have turned out to have minimal impact on sentencing. But evidence shows that the Guidelines have achieved significant success in reducing workplace misconduct by nurturing a vast compliance and ethics movement and enlisting business organizations in a self-policing effort to deter law-breaking at every level of their business.

The success of the Guidelines hardly means they are perfect. Like any set of standards or rules, the Guidelines must continue to evolve based on real-life experience, including changes in the way companies themselves have adjusted their structures and the way they operate. Much as the FSGO charge companies with continuous evaluation of their compliance and ethics programs, the Guidelines – and especially their directives regarding compliance and ethics – also must be the focus of continuous improvement.

To that end, the Ethics Resource Center in 2011 initiated an independent assessment of the FSGO, the experience of the past 20 years, and the Guidelines' effectiveness. ERC assembled a distinguished panel of former law enforcement officials, judges, prosecutors, academics, and compliance/ethics practitioners to review the Guidelines and offer suggestions for improvement. The group also solicited public input through the release of a discussion draft in November 2011. After adjustment for that feedback, the Advisory Group is now offering the attached Final Report to stimulate further discussion and spur necessary revisions to the FSGO.

We believe that the FSGO have helped inspire a major culture change among American businesses over the past two decades. To be sure, headline-grabbing instances of corporate fraud during that period have provided dramatic reminder that organizational misconduct has not been eliminated. However, we are convinced that for most companies, compliance with the law and the development of high integrity are some of management's top priorities.

Simply put, workplaces with programs based on the FSGO are better places to work. Our economy and our society are better off when corporations and their employees obey the law and operate within ethical frameworks that direct them to "do the right thing." The FSGO contribute mightily to this objective by establishing standards to guide company management in the development and implementation of effective compliance and ethics programs and ethical cultures. We believe that the findings in this Report can play a vital role in the continued development of high integrity in U.S. businesses.

In that spirit, we respectfully offer it for careful consideration by the U.S. Sentencing Commission, the U.S. Department of Justice, the Federal Judiciary, the Congress, and the President as well as corporate managers, boards of directors, and the compliance and ethics community.

Finally, we express our deepest appreciation and gratitude to the members of the Advisory Group for the time and energy they volunteered to this initiative and also to the ERC staff for its assistance to the panel.



Patricia J. Harned, Ph.D.
President, Ethics Resource Center
Advisory Group Co-Chair



Winthrop M. Swenson, Esq.
Partner, Compliance Systems Legal Group
Advisory Group Co-Chair

ABBREVIATIONS USED FREQUENTLY IN THIS REPORT

CECO	Chief Ethics and Compliance Officer
DOJ	Department of Justice
DPA	Deferred Prosecution Agreement
ECEP	Effective Compliance and Ethics Program
ERC	Ethics Resource Center
FSGO	Federal Sentencing Guidelines for Organizations
GAO	Government Accountability Office
NPA	Non-Prosecution Agreement
USSC	U.S. Sentencing Commission

EXECUTIVE SUMMARY

Twenty years ago, on November 1, 1991, the U.S. Sentencing Commission (USCC) put into effect new guidelines to help federal judges impose fair and consistent sentences when corporations violated U.S. law. Formally known as the Federal Sentencing Guidelines for Organizations (FSGO), the new rules were mandated by Congress to address wide variation in sentences by federal judges who, at the time, were guided only by their own subjective thinking.

The FSGO established, for the first time, a uniform framework for punishing corporations that broke the law. But the FSGO did something else that was just as important: they created incentives for companies to self-police. Recognizing that under American law corporations “stand in the shoes” of their employees and, thus, are generally accountable for their acts – even when their actions violate the company’s stated rules – the FSGO sought to distinguish between companies that worked hard to prevent crime and those that turned a blind eye to misconduct or even created circumstances that encouraged it.

Believing the Guidelines could be a tool to encourage ethical business conduct, the Commission created a “carrot and stick” regime for assessing corporate culpability and giving credit, including sharp reductions in penalties, when an effective compliance and ethics program (ECEP) was in place “to prevent and detect violations of law.” On the other side of the coin, FSGO penalties would be severe for companies that “tolerated, encouraged or condoned” improper behavior.

This carrot-and-stick approach aimed to convert organizations from passive bystanders who hoped employees would behave well, into active advocates of an ethical culture in the workplace – in short, enlisting companies themselves in the fight against corporate crime. Given the potentially serious consequences of corporate misconduct and the limited ability of after-the-fact prosecutions to undo the damage or deter future law breaking, the Commission hoped that corporate self-policing through strong compliance and ethics programs could reduce the frequency and severity of misconduct.

Now, two decades later, the Ethics Resource Center (ERC) empanelled an Advisory Group of distinguished former law enforcement officials, federal judges, prosecutors, academics, and compliance/ethics experts to examine the FSGO, its successes and failures, and to identify possible areas of improvement. This Report is the product of that effort. It reflects the views and experience of Advisory Group members as well as public comment by enforcement officials, compliance practitioners, and members of the legal community in response to a draft released in November 2011.

Companies Have Widely Embraced Compliance/Ethics Programs

The FSGO have achieved significant successes, notably the vigorous efforts by many U.S. companies and other organizations to adopt comprehensive compliance/ethics programs. The new rules led to the creation of a new profession of compliance/ethics professionals, who now number in the thousands, to develop and implement the new corporate programs. In addition, as the FSGO have matured and their requirements been toughened by the Commission, boards of directors and senior corporate management in many companies have taken on leadership roles in promoting law-compliant and ethical cultures. Numerous books and articles have been written and conferences convened to help them know how to do that, and companies have identified best practices to help build compliance into everyday decision-making.

Survey data indicate that these efforts are producing tangible results. The ERC's 2011 National Business Ethics Survey (NBES), for example, shows that employees in companies with effective, meaningful codes of conduct and programs based on the FSGO witness fewer incidents of misconduct, and are far more likely to report misconduct when observed. In part, this is because organizations with FSGO-based programs are more likely to have strong ethical cultures, and employees observe misconduct less often in organizations with stronger cultures than in those with weaker cultures.

The FSGO's "seven-step" standards for compliance/ethics programs have become the de facto framework for U.S. corporations and also serve as a reference point for many U.S. regulatory and enforcement agencies.

Most significantly, with the exception of the Antitrust division, the U.S. Department of Justice now recognizes as a matter of policy that an ECEP should be a factor in deciding whether or not

DOJ will file criminal charges in cases of organizational misconduct. The DOJ view on compliance was first spelled out in 1999 by then Deputy Attorney General Eric H. Holder, Jr. in the so-called “Holder Memo” and later ratified in subsequent memoranda by two of Holder’s successors, Paul McNulty and Larry Thompson.

But Substantial Challenges Remain

Notwithstanding these successes, this Report identifies a number of developments and government policies that could erode the effectiveness of the FSGO and cause some businesses to reduce their commitment to ECEPs. The Report concludes that pro-compliance corporate practices and government policies created by the FSGO are not working together in the most effective and self-sustaining ways. It pinpoints four specific challenges:

Challenge 1: There are few FSGO cases involving large companies because criminal cases against bigger corporate defendants are largely being detoured around the judges for whom the Sentencing Guidelines were intended.

Corporate offenders are not receiving credit for ECEPs at sentencing because cases are being steered out of the traditional criminal justice process. Prosecutors are, instead, opting to resolve most cases involving large companies through Deferred Prosecution Agreements (“DPAs”), non-prosecution agreements (“NPAs”), or other administrative/civil settlement agreements – and, without convictions, there are no sentences to which the FSGO apply. For both parties, settlement has benefits. It eliminates the cost and risks of litigation. DPAs and NPAs also avoid the potentially devastating collateral damage, often to innocent parties, that can occur when a company is convicted of a crime.

DOJ policy directs prosecutors to consider the existence of an effective compliance program in deciding whether to prosecute, enter into a DPA or NPA, or take no action in cases of alleged misconduct. But there is little hard evidence that organizations are receiving the promised consideration for their compliance programs and prosecutors rarely point to compliance/ethics programs when publicly discussing case resolutions. A Conference Board study in 2009 found that after-the-offense compliance program requirements are often mandated in settlements, but it found very few cases where DOJ acknowledged granting credit for – or even carefully assessing – a pre-existing compliance/ethics program.

The failure to publicly recognize the role of ECEPs suggests that they do not matter to prosecutors, which creates the risk that corporations will scale back their commitment to compliance/ethics. As one corporate compliance/ethics officer explained in response to a 2010 ERC survey:

The current DOJ approach allows cynical executives to conclude that any violation justifies a DOJ conclusion that the compliance program was ineffective no matter how robust the program was in preventing other problems. As a result, additional resources are diverted elsewhere, an outcome potentially harmful to society at large and in opposition to what the DOJ probably intended.

Challenge 2: There is a lack of consistency in policies toward ECEPs across the various government agencies that play a role in corporate law enforcement and regulation because there is neither a requirement that these policies be aligned nor a mechanism available for doing so.

More than 20 federal agencies play a role in enforcing laws that govern corporate conduct, but each agency – and even divisions within agencies – has its own approach to corporate compliance/ethics programs. Businesses organizations are left to parse the differences. This lack of consistency is compounded by a lack of transparency.

It is often difficult to even discern an individual agency's policies on ECEPs. Some agencies have an official policy embedded in regulation or statute. At others, one may be able to infer the agency's policies by reviewing official remarks or comment letters or by examining particular cases. For still other agencies, it is hard to discern any particular policy, practice, or point of view at all. The Antitrust Division at the Justice Department (DOJ) even takes a position on compliance programs contradictory to the rest of DOJ.

It is often difficult to determine what elements agencies look for in evaluating compliance/ethics programs. While some agencies rely heavily on the FSGO framework, others do not. Nor is it always clear that an agency, in fact, grants credit for effective programs even when that agency has a policy that ostensibly supports their adoption.

Challenge 3: Many compliance/ethics programs fall short of their potential because portions of the FSGO remain underemphasized or unclear.

The ability of business managers to embrace and implement the ECEP criteria outlined in the FSGO is tied to their ability to understand the specific actions or decisions expected of them. On the one hand, FSGO criteria are principles-based, which provides organizations with valuable flexibility in tailoring an approach that best fits their circumstances and avoids a “one-size-fits-all” standard for compliance. This flexibility encourages innovation and discourages the “check the box” type of mentality that discourages critical judgment about how to instill effectiveness.

The benefits of flexibility and innovation notwithstanding, the principles-based nature of the FSGO criteria means that reasonable minds can disagree on what certain high-level principles mean. To address this issue, the FSGO would benefit from ongoing review and a greater use of “plain English.”

Challenge 4: Too many business executives take a “check the box” approach to their programs, rather than satisfying the full intent of the FSGO.

It is impossible to meet the FSGO standards with a mechanistic approach. The FSGO’s emphasis on diligence, actual effectiveness, and an inherent philosophy of structured flexibility are all intended to promote results-oriented innovation by individual companies within the Guidelines’ general framework. This intent needs to be better understood and applied. Moreover, priority needs to be given to two areas that are fundamental to compliance/ethics. First, the mission of for-profit companies needs to be seen as comprising *both* strong financial performance *and* a strong commitment to integrity. Second, the chief ethics and compliance officer must be properly positioned to ensure that he or she has the independence, access, authority, and empowerment necessary to effectively discharge these vital corporate responsibilities.

This Report focuses largely on the efforts needed by government to promote compliance/ethics programs, but the ultimate responsibility for corporate integrity rests with the private sector. While many business leaders are genuinely passionate about ethical performance and operate best-in-class compliance/ethics programs, many others ignore the level of diligence and

commitment needed to follow the FSGO. As a result, often times the individuals responsible for implementing effective compliance/ethics initiatives face more internal resistance than they should because they lack stature, access to key decision makers, and the necessary resources.

The FSGO contain language emphasizing that creditworthy compliance/ethics programs are not ones thoughtlessly built on a check-the-box framework. The FSGO make clear that the overarching goal of a creditworthy compliance program is that it will actually “be effective” in most circumstances, and they direct companies to exercise “due diligence” and “evaluate periodically” their programs to make sure this goal is met. Moreover, the FSGO are built around a philosophy of structured flexibility that is meant to encourage each company to find its own particular path to effectiveness within the FSGO’s general framework. This approach enables companies to take into account their own unique characteristics (e.g., nature of its business, history, risk profile, size, etc.) in developing compliance/ethics strategy.

Ultimately, when companies are truly committed, the board and management have defined the very mission of the company as fusing financial performance *with* an equally strong commitment to integrity. Moreover, committed companies ensure that the compliance and ethics program, including the person with day-to-day responsibility for the program, is fully empowered, autonomous, properly positioned, and resourced to help support this mission. Ideally, the chief ethics/compliance officer is a member of senior management and, at the very least, has meaningful and regular access to the company’s board and senior management. Ideally, too, the board of directors has a member or committee with specific expertise in compliance and ethics.

The private sector must apply the types of effective management steps called for in the FSGO with the goal of achieving an ethical culture sustained by best-in-class programs. Merely “going through the motions” in implementing a compliance/ethics program will neither meet the intent of the FSGO standards nor result in the kind of ethical cultures in companies that society increasingly expects.

Recommendations

To address these challenges and to reinforce the carrot-and-stick framework that promotes ethical performance, this Report presents recommendations for the Sentencing Commission, the Department of Justice, the President, the Congress, the federal Courts, and the private sector:

Recommendations to the U.S. Sentencing Commission

Recommendation 1.1 - The Commission should renew – and regularly – focus on the FSGO with an eye toward continuous improvement to take account of changes in the business world.

Companies' embrace of the FSGO as a guide for their compliance/ethics efforts creates a responsibility for the Sentencing Commission to monitor and update the FSGO, as necessary, on an ongoing basis. Over the last 20 years, the Commission has devoted most of its attention to its separate Guidelines for sentencing individuals who have violated federal law and struggled to maintain a significant focus on the FSGO. The Commission must do what the Guidelines ask of companies: continuously improve. To this end, the Commission might establish an advisory group of FSGO practitioners analogous to its Practitioners Advisory Group for the individual Guidelines.

Recommendation 1.2 - Clarify portions of the FSGO.

This Report identifies specific areas for improvement in the FSGO and also says the Commission should promote further study on the issue of evaluation of their compliance/ethics programs. The Report suggests that the FSGO should:

- 1) More strongly encourage companies to use incentives to promote their programs, including compliance/ethics as a key component of employee evaluations and reviews;

- 2) Emphasize and clarify commentary language pertaining to the role of managers and supervisors in promoting “an organizational culture that encourages ethical conduct and a commitment to compliance with the law;”

- 3) Give new emphasis to language relating to the compliance and ethics officer, including a strong relationship with the organization's highest governing authority and providing sufficient autonomy, empowerment, and resources;
- 4) Encourage large organizations with more complex compliance/ethics management systems to ensure that at least one member of the governing authority possesses expertise on effective compliance/ethics management;
- 5) Encourage companies to increase compliance/ethics efforts at the local and regional level in order to better reflect the increased geographical dispersion of large corporations, especially multi-nationals;
- 6) Expand on current language by clarifying what it means to "take reasonable steps to respond appropriately" when criminal conduct has been detected by promoting the adoption of effective internal investigation protocols; and
- 7) Suggest some possible outcome metrics by which organizations can demonstrate the impact and effectiveness of their programs.

Recommendations to The U.S. Department of Justice

Noting the U.S. Department of Justice's (DOJ's) responsibility as the lead federal law enforcement agency, this Report directs five recommendations to the DOJ as the agency with the potentially decisive "vote" on whether the government will keep its oft stated promise to credit ECEPs.

Recommendation 2.1 - The DOJ should ensure that pre-existing compliance/ethics programs are a critical factor in the resolution of corporate misconduct cases.

Merely having a policy does not mean that it is communicated, understood, or followed. DOJ's senior officials must make sure stated policies are effectively implemented. The Attorney General should direct all federal prosecutors to take proper account of ECEPs.

Recommendation 2.2 - The DOJ should establish standards, based on the FSGO, to govern how ECEPs will be judged as well as standards to guide how ECEPs should affect case outcomes.

The DOJ Principles of Prosecution should be revised to make clear that prosecutors should look to the FSGO compliance/ethics program standards when making assessments about ECEPs. Using other standards – or a “we know a good program when we see it” approach – prompts companies to ask why they have obediently followed the Guidelines for two decades.

DOJ “boiler plate” requirements for a company’s compliance/ethics program, often mandated in DPAs, consent decrees, and other forms of settlement should start with the FSGO criteria. DOJ may want to add other requirements on top of the Guidelines’ framework, but ignoring the framework invites confusion and inconsistency.

Separately, the Department should provide substantially more guidance to prosecutors on how a pre-existing ECEP – as well as the lack of one – should affect settlement terms, including the monetary penalty, the length of the DPA term, reporting requirements, whether a monitor will be required, and the scope of the monitor’s activities.

Recommendation 2.3 - The DOJ should move to require greater internal consistency among its own divisions in the treatment of ECEPs.

DOJ’s Antitrust Division has consistently insisted it will not take ECEPs into account in enforcing anti-trust law. While there is logic in the context of multi-party conspiracies for the Division’s policy of placing great weight on a voluntary disclosure by the first disclosing party, DOJ handles other kinds of corporate cases that involve conspiracies without applying the blanket “no credit for compliance programs” policy adopted by the Antitrust Division.

Recommendation 2.4 - The DOJ should adopt a credible process for evaluating ECEPs.

Directing U.S. attorneys to give due consideration to compliance/ethics programs requires the Department to provide the tools necessary for proper evaluation, which is not typically part of legal education or practice. The Department should provide training to key DOJ personnel on compliance/ethics program best practices. This training process might include dialogue with the private sector about emerging best practices.

When cases arise, companies should have the burden of demonstrating not only that they have designed their compliance/ethics program well, but also that they have evaluated it to make sure this is so. Importantly, if a company otherwise makes a case that it has diligently sought to institute an effective program meeting the FSGO standards, evidence from its program evaluation that the program is not “perfect” should not be used against its bid for credit. Penalizing an organization based on the findings of its own internal review is a recipe for half-hearted inquiries and could seriously erode support for self-policing.

Recommendation 2.5 - The DOJ must communicate what it is doing with respect to the treatment of ECEPs in cases.

The dearth of information about the impact of ECEPs in DOJ decision-making undermines the FSGO policy of incentivizing the development of best practice compliance/ethics programs. DOJ should provide a public accounting of the impact of ECEPs in DPAs and require that press releases and other statements regarding cases of corporate or other organizational misconduct explicitly discuss the role played by compliance/ethics. It also should collect and publish aggregate data on the role of ECEPs in such cases. This Report cites some recent and commendable examples of cases in which the Fraud Section of the Criminal Division has begun to include more communication about its treatment of ECEPs in its cases, and we hope these cases can help inform future DOJ’s policies and practices in this area.

Recommendation to the President of the United States Regarding All Other Executive Branch Agencies

Recommendation 3.1 - The President should use available authorities to direct all executive branch agencies to adopt, publicize, and apply clear written policies with respect to how they promote and consider ECEPs in enforcement and other relevant settings.

While DOJ is responsible for enforcement of criminal law – the only area to which the Guidelines legally apply – other government agencies also have embraced the concept of recognizing compliance/ethics. But government enforcement agencies have been too close-mouthed about the way they assess and account for compliance/ethics programs. The President should address this shortcoming by directing agencies to promote effective

compliance and ethics programs and instructing them to establish and publish clear policies to that effect.

Recommendation 3.2 - Each agency of the federal government should develop and implement their own compliance and ethics programs, applying the FSGOs standards. The President should use available authorities to direct all executive branch agencies to do so as well.

The FSGO standards apply to all organizations, including governments. Requiring federal agencies to adopt strong compliance and ethics programs would further promote the underlying policy of the FSGOs while also helping to ensure that the human beings staffing federal agencies understand and follow the laws and standards that apply to them. In addition, for government agencies, having their own internal compliance programs would help them to better understand such programs in the regulated community.

Recommendation to the President and Congress to Designate a Cross-Government Working Group

Recommendation 4.1 - Using available authorities, the President and Congress should establish a cross-government working group to create a Core Federal Model for corporate compliance/ethics programs.

Federal agencies deserve applause for supporting ECEPs, but the lack of cross-government coordination has resulted in a patchwork of inconsistent and duplicative demands. The President and Congress should direct federal agencies to work toward a more consistent government-wide approach that enables organizations to more effectively meet (or exceed) expectations for compliance/ethics and, in turn, reduce the frequency of misconduct by organizations and their employees. While some customization is appropriate to reflect the intricacies of specific risk areas, organizations deserve a single government-wide model, based on Sentencing Guidelines' criteria for compliance/ethics programs.

Recommendations to Congress

Recommendation 5.1 - Congress should use its oversight authority to insist that federal regulatory and enforcement agencies establish, and demonstrate that they are

implementing policies for the promotion, evaluation, and consideration of compliance/ethics programs.

Congress can play an important role in encouraging organizational compliance/ethics efforts by insisting on transparent and consistent policy implementation by federal regulatory and enforcement agencies. Ideally, Congress and the Administration will agree on mutually-supporting actions to guide federal agencies and assure their full commitment to effective compliance/ethics programs, but Congress should exercise its oversight powers to enforce this commitment.

Recommendation 5.2 - Congress should consider the impact on organizational compliance/ethics programs when it develops legislation related to law enforcement and regulatory oversight of organizations by the federal government.

Congress should avoid legislation that unintentionally undermines the FSGO principles or organizational compliance efforts. It should consider the views of compliance and ethics experts when addressing issues of corporate crime and misconduct. For example, some believe that poorly drafted whistleblower provisions or other reward programs designed to encourage reporting of misconduct can erode compliance/ethics programs by encouraging reporting outside the company as a first resort.

To ensure that its actions are consistent with the FSGO's approach to compliance and to organizational compliance/ethics efforts, Congress should consider the potential impact of legislation on the compliance/ethics function.

Recommendation 5.3 - Congress should exercise its authority to ensure that at least one member of the U.S. Sentencing Commission has experience with the FSGO.

Current law requires that at least three of the USSC's voting members must be federal judges and also that no more than four members may belong to the same political party. To emphasize the importance of the FSGO, Congress should amend the law to require that at least one member of the Commission has substantial knowledge of and experience with the FSGO.

Recommendation to the Courts

Recommendation 6.1 - Judges should exercise judicial oversight of DPAs and other settlement agreements filed with the Courts to ensure that such agreements indicate on their face the consideration of the FSGO criteria for “an effective compliance and ethics program” and other FSGO factors in the development of the settlement’s terms.

Judges should assert their inherent authority to review settlement agreements that are filed with the court to confirm consideration of FSGO principles, especially the compliance/ethics program criteria, so that companies that have worked hard to ensure ethical performance and compliance receive proper credit. Judges would not supplant the prosecutor’s judgment with their own approach, but rather would verify the consideration of FSGO factors.

Judges will, of course, need to accept that additional requirements that supplement FSGO may be appropriate in individual cases, while ensuring that the FSGO should remain the foundation for evaluating ECEPs in enforcement and dispute resolution involving U.S. law.

Recommendations to the Private Sector

Recommendation 7.1 - While we have made recommendations to U.S. Sentencing Commission on how the FSGO criteria might be improved, we encourage the private sector to act now. Private sector organizations need to embrace the intent of the Guidelines’ diligence standards and implement compliance/ethics programs that are part and parcel of the business fabric and not the result of mere box-checking. This begins by defining the mission of a company as comprising both strong financial performance and a strong commitment to integrity. Proper positioning, empowerment, and autonomy of the chief ethics and compliance officer must also be a priority.

Boards of directors and senior executives should demand compliance/ethics programs that are effective in preventing and detecting misconduct and help build ethical and law-abiding cultures. Corporate leaders should require regular assessment of company compliance and ethics efforts including measures of the corporate culture and incorporate commitment to compliance and ethics as a key factor in all performance reviews and compensation systems, including those of senior officers. The board should ensure that the chief ethics and compliance officer is a senior corporate officer with sufficient empowerment, autonomy, resources, and access to senior

management and the board of directors to be effective. The compliance and ethics program should reach all parts of the business. Boards also should include at least one director with expertise on effective compliance/ethics management and familiarity with FSGO standards.

Recommendation 7.2 - Invest in initiatives that raise the bar for “best practice.”

Businesses should consider the full range of management tools in their compliance and ethics programs and never treat the FSGO as if they are a simple checklist. They should continue to search for the most effective ways to reach their employees and others who act for the company to ensure compliance with all applicable laws and ethical conduct. The FSGO are an excellent framework, but managers should apply their experience and imaginations to ensuring their employees always do the right things.

The full report can be found at fsgo.ethics.org/fsgo.

**The full version of this report can be obtained at:
fsgo.ethics.org/fsgo.**



2345 Crystal Drive ■ Suite 201 ■ Arlington, VA 22202

Telephone: 703.647.2185 ■ FAX: 703.647.2180 ■ Email: ethics@ethics.org

www.ethics.org