U.S. Federal Sentencing Guidelines

Presentation to

Committee on Audit

Date

Background

Organizations, like individuals, can be found guilty of criminal conduct, and the measure of their punishment for felonies and Class A misdemeanors is governed by the U.S. Federal Sentencing Guidelines.

While organizations cannot be imprisoned, they can be fined, sentenced to probation for up to five years, ordered to make restitution and issue public notices of conviction and apology to their victim, and exposed to applicable forfeiture statutes.

Applicability

The organizational sentencing guideline, which apply to all organizations whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pension funds, trusts, non-profit entities, and governmental units, became effective November 1, 1991, after several years of public hearings and analysis.

Section 805 of the Sarbanes-Oxley Act of 2002 required the Federal Sentencing Commission to review and enhance the Organizational Sentencing Guidelines because of the corporate financial scandals of the last few years.

Common Offenses

The most commonly occurring offenses committed by organizations include the following:

- fraud,
- environmental pollution,
- money laundering,
- antitrust, and
- food and drug violations.

Two Key Purposes of the Organizational Sentencing Guidelines

These guidelines were designed to further two key purposes of sentencing: “just punishment” and “deterrence.” Under the “just punishment” model, the punishment corresponds to the degree of blameworthiness of the offender, while under the “deterrence” model, incentives are offered for organizations to detect and prevent criminal conduct within their ranks.

Organizational Culpability

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions.

An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions.

Culpability Factors

The culpability of an organization is generally determined by six factors that the sentencing court must consider: The four factors that increase the ultimate punishment of an organization are:

- the involvement in or tolerance of criminal activity;
- the prior history of the organization in terms of prior violations, including civil and administrative dispositions;
- the violation of an earlier court order during the occurrence of the offense which is being prosecuted; and
- the obstruction of justice.

The two factors that mitigate the punishment of an organization are:

- The existence of an effective compliance and ethics program; and
- The combination of the organization's efforts in self-reporting, cooperating with the authorities, or accepting responsibility.

Fine Mitigation

The potential fine range for a criminal conviction can be significantly reduced-in some cases up to 95 percent-if an organization can demonstrate that it had put in place an effective compliance and ethics program and that the criminal violation represented an aberration within an otherwise law-abiding community.

This mitigating credit under the guidelines is contingent upon prompt reporting to the authorities and the non-involvement of high level personnel in the actual offense conduct.

Absence of An Effective Compliance And Ethics Program

Conversely, the absence of an effective compliance and ethics program may be a reason for a court to place an organization on probation, and the implementation of such a program under court supervision may be a condition of a probationary term of up to five years under the organizational sentencing guideline.

New Guideline

In 2004, the Federal Sentencing Commission elevated the criteria for an effective compliance and ethics program into a separate new guideline in order to emphasize the importance of such programs. It also elaborated upon these criteria, introducing additional rigor generally and imposing significantly greater responsibilities upon an organization's governing authority (e.g. Board of Directors) and executive leadership.

Exercise Diligence

In order to have an effective program as defined by the guidelines, an organization must demonstrate that it exercised due diligence in fulfilling the requirements and also promoted in other ways, "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."

Requirements for an Effective Program

- Standards and procedures to prevent and detect criminal conduct.
- Responsibility at all levels and adequate resources, and authority for the program.
- Personnel screening related to program goals.
- Training at all levels.
- Auditing, monitoring, and evaluating program effectiveness.
- Non-retaliatory internal reporting systems.
- Incentives and discipline to promote compliance.
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation.

Due Diligence

An organization must exercise due diligence to prevent and detect criminal conduct, and promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Due diligence and the promotion of desired organizational culture are indicated by the fulfillment of seven minimum requirements, which are the hallmarks of an effective program that encourages compliance with the law and ethical conduct.

Standards and Procedures

Organizations must establish standards and procedures to prevent and detect criminal conduct. Standards and procedures encompass standards of conduct and internal control that are reasonably capable of reducing the likelihood of criminal conduct.

Responsibility at All Levels

The commission has determined that the organization's governing authority must "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.

The organization must assign someone in high-level personnel "overall responsibility" for the program. This prescription makes explicit that, while another individual or individuals may be assigned operational responsibility for the program, someone within high-level personnel must be assigned the ultimate responsibility for the program's effectiveness.

The individual assigned day-to-day operational responsibility for the program, whether it be a high-level person or an employee to whom this task is assigned, report to organizational leadership and the governing authority on the program. If authority is delegated, the governing authority must receive reports from such individuals at least annually. The new guideline mandates that such individual or individuals, no matter the level, must "be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

Personal Screening

The organization should 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.

The organization shall hire and promote individuals so as to ensure that all individuals within the organizational leadership will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance with ethics and the law.

Training

Compliance and ethics training are a requirement, and training requirement specifically extends to the upper levels of an organization, including the governing authority and high-level personnel, in addition to all of the organization's employees and agents, as appropriate.

Auditing and Monitoring

The Guidelines mandate that organizations use auditing and monitoring systems designed to detect criminal conduct. It also adds the specific requirement that the organization periodically evaluate the effectiveness of its compliance and ethics program.

Incentives and Discipline

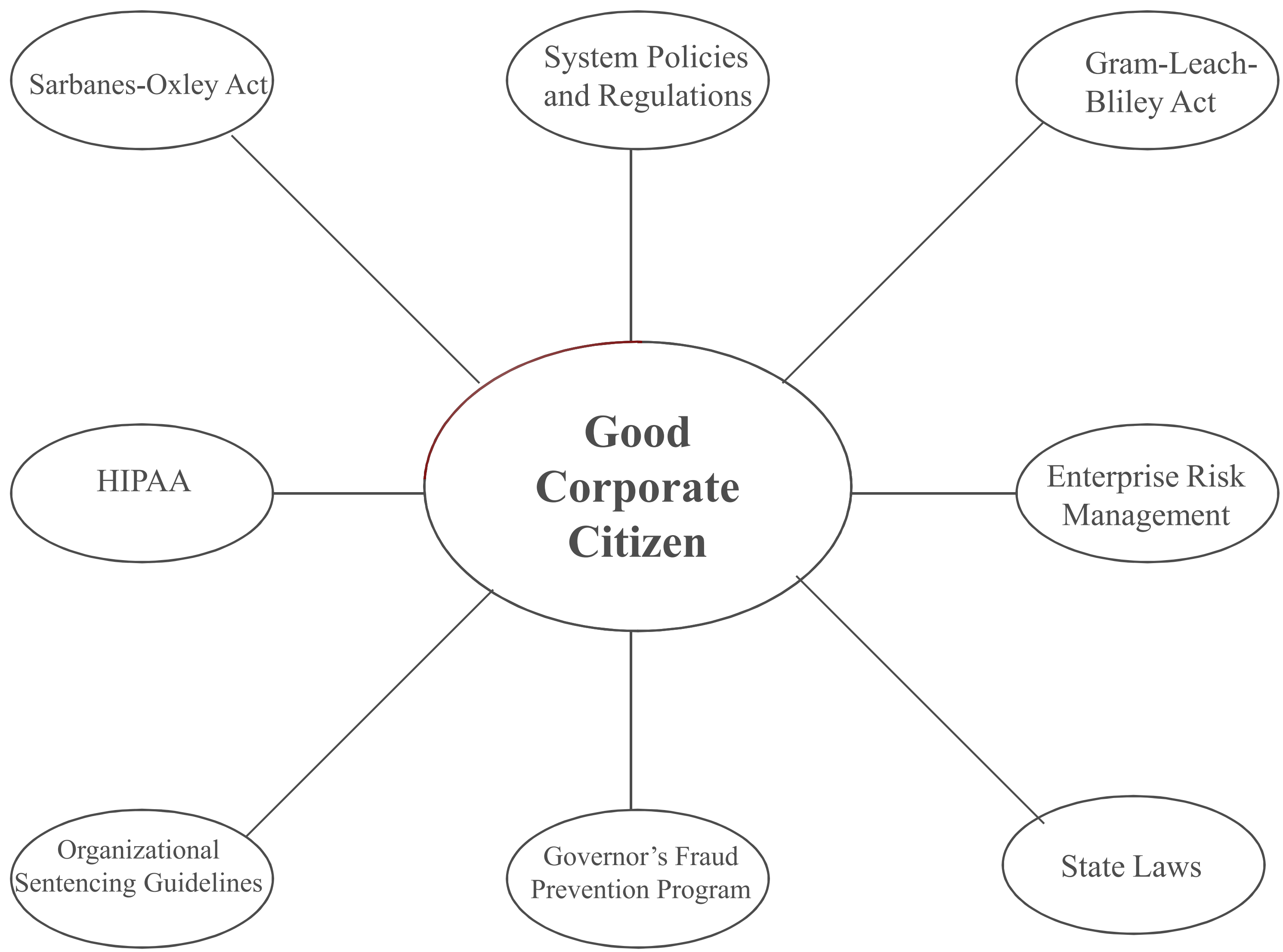
Compliance standards should be enforced through disciplinary measures and compliance should also be encouraged through appropriate incentives to perform in accordance with the compliance and ethics program. This articulates both a duty to promote proper conduct in whatever manner an organization deems appropriate, as well as a duty to sanction improper conduct.

Reasonable Steps

An organization should take reasonable steps to respond to and prevent further similar criminal conduct. This dual duty underscores the organization's obligation to address both specific instances of misconduct and systemic shortcomings that compromise the deterrent effect of its compliance and ethics program.

Risk Assessment

In addition to the seven requirements for a compliance and ethics program, the Guidelines expressly provide, as an essential component of the design, implementation, and modification of an effective program, that an organization must periodically assess the risk of the occurrence of criminal conduct.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System Policies and Regulations
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HIPAA
Good Corporate Citizen
Enterprise Risk Management
Organizational Sentencing Guidelines
Governor's Fraud Prevention Program
State Laws