

mitigating factor that reduces an organization's culpability score and ultimately its fine range. Also, the implementation of a compliance program may be a condition of probation for organizations under § 8D1.4(c) (Recommended Conditions of Probation—Organizations).

The proposed amendment incorporates the seven minimum steps for a compliance program, currently located in the commentary to § 8A1.2 (Application Instructions—Organizations) at Application Note 3(k), into a new guideline at § 8B2.1 in order to emphasize the importance of compliance programs and provide more prominent guidance on the attributes of such programs. The proposed amendment defines the obligations and purposes of such programs, adds more detail to the seven minimum requirements, and provides definitions throughout the associated commentary.

The proposed amendment expands the scope of the objective of a compliance program by defining the term "violation of law" more broadly than in the current guidelines, which refer only to violations of criminal law and prevention of criminal conduct. The proposed amendment expands the objective of a compliance program more broadly to include prevention and detection of "violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable." This language also replaces the prior reference to "employees and agents", relying instead on the legal standard of vicarious liability.

The proposed amendment retains the requirement that an organization exercise due diligence to prevent and detect violations of law, and adds at subsection (a) the requirement that an organization shall also "otherwise promote an organizational culture that encourages a commitment to compliance with the law." This proposed addition is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations.

The proposed amendment retains the existing seven minimum steps of an effective compliance program but provides greater guidance regarding some of the requirements by adding definitions and clarifying terms at subsection (b). First, for the requirement of the "establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct",

Application Note 1 defines "compliance standards and procedures" as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law."

Second, for the requirement that "specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance", subsection (b)(2) defines the specific roles and reporting relationships of particular categories of high-level personnel with respect to compliance programs. In particular, the proposed amendment provides that the "organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law." The accompanying commentary at Application Note 1 defines "organizational leadership" as "(A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel" and retains existing definitions for the terms "high-level personnel of the organization" and "substantial authority personnel".

The proposed amendment also provides at subsection (b)(2) that the "organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law." Application Note 1 defines "governing authority" as "(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization." Subsection (b)(2) retains the existing requirement that "specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility for the program," and specifies that their responsibility is to "ensure the implementation and effectiveness of the program." The proposed amendment also requires that the individual responsible for compliance be given adequate resources and authority to carry out such responsibility, and provides that such individual shall report directly to the governing authority.

Third, the proposed amendment at subsection (b)(3) replaces the current requirement that substantial authority personnel be screened for their "propensity to engage in violations of law" with a requirement that the organization "use reasonable efforts and due diligence not to include within the substantial authority personnel any

individual whom the organization knew, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective program". For purposes of this subsection only, the proposed amendment defines the term "violations of law" as "any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation)." This is meant to ensure that an individual is screened on the basis of his or her culpability and not on the basis of an organization's vicarious liability. The corresponding commentary enumerates factors to be considered in this determination, among them, the recency of the individual's violations of law and other misconduct, the relatedness of the individual's violations of law and other misconduct to his or her responsibilities, and whether the individual has engaged in a pattern of such violations of law and other misconduct.

Fourth, the proposed amendment at subsection (b)(4) makes compliance training a requirement, and specifically extends the training requirement to the upper levels of an organization as well as to the organization's employees and agents, as appropriate.

Fifth, the proposed amendment at subsection (b)(5) expands the existing criterion for using auditing and monitoring systems by expressly providing that such systems are to be designed to detect violations of law. The proposed amendment adds the specific requirement that there be periodic evaluation of the effectiveness of its compliance program. The proposed amendment replaces the existing reference to "reporting systems without fear of retribution" with the more specific requirement for the implementation of "mechanisms to allow for anonymous reporting." The proposed amendment expands the stated focus of internal reporting from "the criminal conduct * * * of others" to using internal systems for both "seeking guidance and reporting potential or actual violations of law."

Sixth, the proposed amendment at subsection (b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through "appropriate incentives to perform in accordance with a [compliance] program." Finally, at subsection (b)(7) the amendment retains the existing requirement that an organization take reasonable steps to respond to and prevent further similar violations of law.

In addition to the seven criteria for a compliance program, the proposed