

amendment expressly provides at subsection (c) that ongoing risk assessment is an essential component of the design, implementation, and modification of an effective program. The proposed amendment includes at Application Note 5(A) certain requirements in conjunction with the performance of risk assessments, namely, that organizations assess the nature and seriousness of potential violations of law, the likelihood that certain violations of law may occur because of the nature of the organization's business, and the prior history of the organization. Corresponding commentary specifies that organizations must prioritize the actions taken to implement an effective compliance program and modify such actions in light of the risks identified in the risk assessment.

The proposed amendment also provides additional guidance with respect to the implementation of compliance programs by small organizations by making more frequent references to small organizations throughout the commentary and providing illustrations (e.g., § 8B2.1, Application Note 2(B)(ii)).

This proposed amendment also makes two changes to the factors that affect the culpability score of an organization under § 8C2.5 (Culpability Score). First, rather than precluding an organization from obtaining the compliance program credit if certain categories of high-level personnel are involved in the offense of conviction, the proposed subsection (f) establishes that "an offense by an individual within high-level personnel of the organization results in a rebuttable presumption" that effective prevention and detections program did not exist.

Under the existing guidelines, an organization cannot receive the three-point reduction in its culpability score under § 8C2.5(f) if any one of three categories of individuals participated in, condoned, or was willfully ignorant of the offense: (1) An individual within high-level personnel of the organization; (2) a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed; or (3) an individual responsible for the administration or enforcement of a compliance program. The existing guidelines also provide for a rebuttable presumption that an organization did not have an effective compliance program if an individual within substantial authority personnel participated in an offense. The proposed amendment provides for a rebuttable presumption that the organization did not have an effective compliance

program where high-level personnel of the organization participated in, condoned, or were wilfully ignorant of the offense. This modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under § 8C2.5(f).

Second, the proposed amendment addresses concerns about the relationship between obtaining credit under subsection (g) of § 8C2.5 and waiving the attorney-client privilege and the work product protection doctrine. Pursuant to § 8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it "fully cooperated in the investigation" of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and § 8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorney's Offices (all of which are described at Part V of the Advisory Group Report of October 17, 2003, located at www.ussc.gov). The commentary in the proposed amendment addresses some of these concerns by providing that waiver of the attorney-client privilege and of work product protections "is not a prerequisite to a reduction in culpability score under subsection (g)" but in some circumstances "may be required in order to satisfy the requirements of cooperation."

Proposed Amendment:

Chapter Eight is amended in the Introductory Commentary by striking "criminal conduct" each place it appears and inserting "violations of law".

Section 8A1.2(a) is amended by inserting ", Subpart 1" after "Part B".

Section 8A1.2(b)(2)(D) is amended by adding at the end the following: "To determine whether the organization had an effective program to prevent and detect violations of law for purposes of § 8C2.5(f), apply § 8B2.1 (Effective Program to Prevent and Detect Violations of Law)."

The Commentary to § 8A1.2 captioned "Application Notes" is amended in Note 3(c) in the second sentence by inserting "of the organization" after "high-level personnel".

The Commentary to § 8A1.2 captioned "Application Notes" is amended by striking Note 3(k) in its entirety.

Chapter Eight, Part B is amended by striking the heading and inserting the following:

"PART B—REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF LAW

1. REMEDYING HARM FROM CRIMINAL CONDUCT";

and by adding at the end the following new subpart:

"2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§ 8B2.1. Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—

(1) exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.

(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing