

be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report to the governing authority, or to an appropriate subgroup of the governing authority, the effectiveness and operation of the program to detect and prevent violations of law.

In addition to receiving reports from the foregoing individual(s), individual(s) with day-to-day operational responsibility for the program should periodically provide to the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the program to detect and prevent violations of law.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2); to perform their assigned duties consistent with the exercise of due diligence; and to promote an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. Application of Subsection (b)(3).—

(A) Violations of Law.—

Notwithstanding Application Note 1, “violations of law,” for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—

Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—

In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3, subdivision (C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual’s

violations of law and other misconduct (*i.e.*, other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual’s violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization’s business. If, because of the nature of an organization’s business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Periodically, prioritizing as most likely to occur and most serious, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A).

(C) Modifying, as appropriate, the actions taken under any step set forth in

subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter ‘are sufficient to deter and punish organizational criminal misconduct.’

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.”

The Commentary to § 8C2.4 captioned “Application Notes” is amended in Note 2 by striking “(Larceny, Embezzlement, and Other Forms of Theft)” and inserting “(Theft, Property Destruction, and Fraud)”.

The Commentary to § 8C2.4 captioned “Background” is amended in the fourth sentence by striking “criminal conduct” each place it appears and inserting “violations of law”.

Section 8C2.5 is amended by striking subsection (f) in its entirety and inserting the following:

“(f) Effective Program to Prevent and Detect Violations of Law

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in § 8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points.

(2) This section does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) Participation in, condoning of, or willful ignorance of, an offense by an individual within high-level personnel of the organization results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.”

The Commentary to § 8C2.5 captioned “Application Notes” is amended by striking Note 1 in its entirety and inserting the following: