

## Bring your firm in line with federal compliance standards

**F**or more than 20 years, Chapter 8 of the Federal Sentencing Guidelines has served as the template for formal compliance and ethics programs in U.S. corporations. Yet a large segment of the business community remains unaware of the existence of these guidelines, let alone their implications and how to respond to them effectively. If you are one of the many who find themselves in this group, read on, because in 1,000 words or less I will give you the basics of what you need to know about the federal government's definition of an effective compliance and ethics program and why it should matter to you.

Let's begin with a quick review of the rather harsh laws regarding corporate criminal liability. Early in the last century, in a series of landmark decisions, the U.S. Supreme Court ruled that a corporation, no matter how large or small, is criminally liable if one of its employees commits a crime within that person's scope of employment and at least partly with the intent to benefit the company. This means that even if you specifically tell an employee not to do something and the employee does it anyway, your organization can be indicted, convicted and subjected to fines and other penalties. As unfair as this may seem, thousands of companies suffer this fate every year.

Fast-forward to 1991, when the U.S. Sentencing Commission, a body created by Congress to draft sentencing guidelines for federal criminal cases, provided some relief to corporations from this harsh rule by publishing Chapter 8 of the U.S. sentencing guidelines for organizations. Tucked within the many pages of technical instructions for federal judges was a section outlining "the Seven Elements of an effective compliance program." Ten years later, this section was substantially amended and relabeled as the seven elements of an effective compliance and ethics program.

Before I outline the Seven Elements for you, let me take a moment to explain several reasons why this judicial guidance had a profound effect on corporate America and why every business owner subject to



### BUSINESS ETHICS

Jim Nortz

U.S. law should care about them. First, the sentencing guidelines state that if an organization can demonstrate it had an effective compliance and ethics program, it could receive up to a 95 percent reduction in any fine levied for the criminal activity of employees. The idea behind giving organizations such a significant break was to provide an incentive for enacting programs to detect and prevent criminal activity.

The Justice Department has taken additional steps to give organizations an incentive for creating and sustaining effective compliance and ethics programs. In a series of memoranda providing guidance to its prosecutors, the department has stated that if an organization can show it had an effective compliance program and meets other criteria—like cooperating with investigators, for example—the government might entirely forgo charging the corporation for criminal activity of an employee. In other words, if your organization has a good compliance and ethics program, prosecutors might just go after the employee and not indict the company at all.

As a consequence, since publication of the Seven Elements in 1991, corporations across the U.S. and around the globe have invested billions of dollars in developing programs that conform to them—and the compliance and ethics profession was born. But there is one more important reason why thousands of corporations invested in formal compliance and ethics programs: The Seven Elements are common-sense steps, and implementing them substantially reduces the chance of getting into trouble in the first place.

The following summary of the Seven Elements, which detail the minimum government requirements to prevent and detect

criminal conduct and promote an ethical culture, illustrates this point.

### Seven Elements summarized

**1.** The organization must establish standards and procedures to prevent and detect criminal conduct.

**2.** The organization's board of directors and top leaders must provide program oversight and appoint high-level personnel to have overall responsibility for the program.

**3.** The organization must use reasonable efforts to make sure those considered for top management positions have not engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

**4.** The organization must inform employees about applicable standards, procedures and other aspects of the compliance and ethics program.

**5.** The organization must take reasonable steps to ensure that its compliance and ethics program is followed and must publicize a system for employees to report misconduct without fear of retaliation.

**6.** The organization's compliance and ethics program must be promoted and enforced.

**7.** After criminal conduct has been detected, the organization must take reasonable steps to respond appropriately to criminal or unethical conduct and to prevent similar conduct from occurring in the future.

You can get the full text of the Seven Elements and associated guidance documents at [www.usc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/8b2\\_1.htm](http://www.usc.gov/Guidelines/2012_Guidelines/Manual_HTML/8b2_1.htm).

Given the significant benefits that accrue from implementing an effective compliance and ethics program as outlined in the Seven Elements, if you have not already done so, you should consider taking the following steps to bring your organization in line with these federal standards:

■ Evaluate your organization's management structure to determine whether it satisfies the requirements associated with the role of the governing authority and high-level personnel with overall responsibility

for the compliance and ethics program.

■ Assemble a small team of high-level people in your firm, and assign them to document policies, procedures or systems you now have that might satisfy one or more of the Seven Elements.

■ Identify any gaps that may exist between the Seven Elements and your existing policies, procedures and systems.

■ Formulate and execute action plans to fill the gaps.

■ Monitor and periodically evaluate the effectiveness of your compliance and ethics program according to the Seven Ele-

ments.

It is vital to recognize that this work should not be merely a paper exercise. A paper program is very unlikely to materially affect employee behavior, and the government knows it. Both the Justice Department and the courts have been very critical of “paper” programs and are likely to give you little credit if this is all you do. Instead, what is required is strong leadership from the top to bring your program to life and make it real for all employees. If you take these steps and take the work seriously, with a modest investment of your time, you

are likely to learn a lot about your organization, materially lower your enterprise risks and put yourself in the best position to thrive over the long term.

*Jim Nortz is executive vice president of compliance and ethics solutions at the Institute for Priority Thinking and is a member of the Rochester Area Business Ethics Foundation. The opinions expressed in this article are his alone and may not reflect those of the institute or the RABEF. For more information about the RABEF, go to [www.rochesterbusinessethics.com](http://www.rochesterbusinessethics.com). Nortz can be reached at [jimnortz@gmail.com](mailto:jimnortz@gmail.com).*