

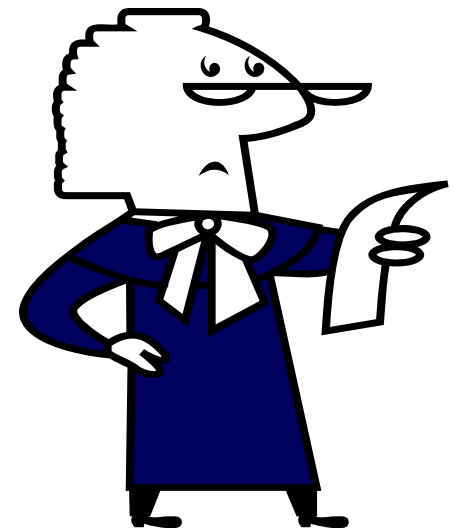


# Revisions to the Federal Sentencing Guidelines

## *What Are They and What Do They Mean?*

**Presentation to GHB  
March 1, 2005**

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*It is not an adequate ethical standard  
to aspire to get through the day  
without being indicted.*

Richard Breeden  
Former Chairman, S.E.C.





# Why ethics is on the agenda

- ◆ Sarbanes-Oxley
- ◆ NYSE Listing Requirements
- ◆ Sentencing Guidelines for Organizations





# Revised Sentencing Guidelines

- ◆ Effective November 1, 2004
- ◆ Apply to all organizations, private and public, profit and non-profit
- ◆ Still matter despite Supreme Court decision



# As a result of the Supreme Court decision

- ♦ Guidelines were made *advisory* - court can give less credit - *OR MORE* - for the compliance part
- ♦ Unlike other portions of the Guidelines, the compliance parts aren't controversial, so no one expects courts to give less credit
- ♦ DoJ will still use – charging decisions and appeals
- ♦ Already part of many agency guidance documents
- ♦ Represent best practices





# Ethics, compliance and culture

To have an effective compliance *and ethics* program, an organization shall—

- (1) exercise due diligence to prevent and detect criminal conduct; and
- (2) otherwise *promote an organizational culture that encourages ethical conduct* and a commitment to compliance with the law.

- ◆ *What is your organization doing to promote an organizational culture that encourages ethical conduct?*

# Risk-based approach

*In implementing subsection (b) [“Seven Steps”], the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.*

- ♦ *What are companies doing in risk assessment?*

# 1. Standards

The organization shall establish standards and procedures to prevent and detect criminal conduct

- ◆ *Most organizations have these elements in place*
- ◆ *Ongoing challenge: how to get right information to all employees, have them to understand it; build credibility*

## 2. Structure

*The organization's governing authority shall 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.*

- ♦ *What is the level of Board involvement in the compliance and ethics program at your company?*

## 2. Structure (cont'd)

High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

- ◆ *Who is your high level person?*
- ◆ *What is the role of senior leadership in your program?*
- ◆ *On-going challenges—penetrating the organization and globalization*

## 2. Structure (cont'd)

Specific individual(s) within the organization shall be delegated *day-to-day operational responsibility* for the compliance and ethics program. Individual(s) with operational responsibility *shall report periodically to high-level personnel and, as appropriate, to the governing authority*, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given *adequate resources, appropriate authority, and direct access to the governing authority* or an appropriate subgroup of the governing authority.

- ◆ *Adequate resources; appropriate authority; direct access to the governing authority*

## 3. Managerial conduct

The organization shall 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.*

- ♦ *Hire and promote...*
- ♦ *How do you define conduct inconsistent with the Ethics and Compliance program?*

## 4. Communications and training

The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program *by conducting effective training programs* and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(Including to) *the members of the governing authority, high-level personnel, substantial authority personnel*, the organization's employees, and, as appropriate, the organization's agents.

- ◆ *“Effective” training*
- ◆ *Risk/role based training a challenge*

## 5. Monitoring

The organization shall take reasonable steps—(A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) *to evaluate periodically the effectiveness of the organization’s compliance and ethics program;* and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees *and agents* may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

- ◆ *Monitoring and auditing*
- ◆ *Measuring effectiveness*

## 6. HR processes

The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) *appropriate incentives to perform in accordance with the compliance and ethics program*; and (B) appropriate disciplinary measures for engaging in criminal conduct *and for failing to take reasonable steps to prevent or detect criminal conduct*.

- ♦ *Including in HR/performance appraisal processes the easy part*
- ♦ *Achieving managerial consistency more difficult*

# Performance appraisals and compensation



## 7. Remediation

After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

- ◆ *Management 101*

# Large organizations

- ♦ *A large organization generally shall devote more formal operations and greater resources in meeting the requirements...than shall a small organization.*
- ♦ *As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.*

# Role of governing authority and company leadership

- ◆ Sentencing Guidelines:  
“Understanding and oversight”
- ◆ Long-term orientation —  
Reputational emphasis
- ◆ Outside the box thinking —  
“WWES?” (What Would Eliot  
Say?)
- ◆ Model and insist on  
candor/honesty



*“Rules cannot substitute for  
character.”*

-Alan Greenspan,  
Chairman of the U.S. Federal Reserve Board