

Integrating an Ethical Decision-Making Model into a Comprehensive Compliance and Ethics Program

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Presentation Overview

- ▶ The Federal Sentencing Guidelines for Organizations (FSGO) provide a workable basic framework for a comprehensive compliance and ethics program.
- ▶ The Rutland Institute for Ethics at Clemson University offers individuals an “Ethical Toolkit” and decision-making model adaptable for diverse circumstances.
- ▶ Both a well-designed compliance program and a workable ethical choice process for individuals are needed for success.

FSGO Compliance Program Basics

- ▶ Derivation of 1991 Initial Guidelines
 - Key 2004 Amendments
 - Principal 2010 Amendments
- ▶ Major objectives of the guidelines
- ▶ Principal features of the policy scheme
- ▶ Reinforcement of the Sentencing Commission model over time
- ▶ Examination of important compliance program components

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Initial Development of the FSGO

- ▶ Authorization: **The Sentencing Reform Act of 1984**
 - Principal purposes to reduce sentencing disparity, prevent crime
 - US Sentencing Commission to develop sentencing guidelines for individuals and organizations
- ▶ Initial 1991 FSGO pioneered concept of punishment mitigation for organizations w/ effective compliance program and for cooperation

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Principles of an Effective Compliance Program—Seven Key Features

1. Establish Standards and Procedures to achieve and maintain Compliance with the law.
2. Ensure High Level Responsibility for implementation.
3. Avoid delegating responsibility to known problem persons.
4. Communicate/train effectively all personnel and agents.
5. Monitor/audit effectively; establish Internal Reporting System/Hotline.
6. Discipline violators appropriately but effectively.
7. Respond promptly to problems, Remedy appropriately, Strengthen program.

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Key Objectives of the FSGO Approach

- ▶ Immediate Goal: Reduce sentencing punishment.
- ▶ Intermediate societal objective—Incentivize businesses to develop Internal Control Systems to achieve and maintain Compliance.
- ▶ Long term societal objective—Reduce, prevent crime; promote Good Corporate Citizenship and more Ethical Business Cultures.

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Subsequent FSGO Amendments

2004 Updating and Strengthening Amendments

- ▶ Created more visible, stand alone **Guideline, Section 8B2.1**, describing more detailed elements of an Effective Compliance and Ethics Program.
- ▶ Expressly joined Ethics and Compliance functions, emphasizing importance of Organizational Culture.
- ▶ Emphasized importance of Risk Assessments.
- ▶ Established express Governing Authority Responsibilities.
- ▶ Strengthened all program elements.

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Subsequent FSGO Amendments

2010 Amendments

- ▶ Clarified expected responsive and remedial actions when violations occur:
 1. Restitution, remediation
 2. Voluntary disclosure
 3. Compliance program review, possible outside expertise
- ▶ Emphasized importance of CCO Direct Reporting , Independence
 1. Direct reporting to governing authority re: criminal conduct occurrences and at least yearly re: compliance program operation
 2. Policy expressed in context of judging program as effective even if high level person involved in wrongdoing.
- ▶ Fact of Whistleblower Report does not render program per se ineffective.

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External Forces Reinforce Importance of FSGO Compliance Programs

- ▶ The Courts
- ▶ The US Congress
- ▶ Federal Regulatory Agencies
- ▶ The Securities and Exchange Commission
- ▶ The US Department of Justice

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The Courts as an External Contributing Force

- ▶ ***In Re Caremark Int'l. Inc. Derivative Litig.***, 698 A.2d 959 (Del. Chancery, 1996)
 - Shareholders sued Board (unsuccessfully) for failure to prevent and confront unlawful conduct by health care company.
 - Chancellor Allen admonished governing authorities to heed FSGO compliance program features.
- ▶ ***Burlington Industries v. Ellerth***, 524 U. S. 742 (1998).
 - US Supreme Ct recognized value of effective compliance programs and prompt corrective action as part of affirmative company defense to sexual harassment suit under Title VII of Civil Rights Act of 1964.
- ▶ ***United States v. Booker***, 543 U. S. 220 (2005), and its progeny.
 - Changing sentencing guidelines from presumptively mandatory to Advisory has not diminished their importance as internal control system template.

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United States Congress as a Contributing Force—Laws Furthering Compliance

- ▶ **Foreign Corrupt Practices Act of 1977.**
 - Led to Corporate Codes of Conduct prohibiting overseas bribery.
 - Enforcement priority today for SEC, DOJ.
- ▶ **Sarbanes Oxley Act of 2002.**
 - Public companies must report re: ethics codes for financial, accounting officers.
 - U. S. Sentencing Commission directed to review, strengthen FSGO.
- ▶ **Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.**
 - 2000+ pages of law; approx. 50% implementing regulations issued to date.
 - No direct mention of compliance programs.
 - Strengthened hand of **Whistleblowers**, providing indirect impetus to bolster compliance program internal reporting and investigation systems.

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Program and Regulatory Agencies as Contributing Forces

- ▶ **Environmental Protection Agency**
 - recognizes value of effective compliance programs and cooperation as bases to refrain from DOJ Criminal or Civil Enforcement.
- ▶ **Equal Employment Opportunity Commission**
 - Similar
- ▶ **Dept. of Health and Human Services**
- ▶ **Dept. of Education (Office of Civil Rights—Title IX)**

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U S Department of Justice Enforcement as Contributing Force

- ▶ **Principles of Federal Prosecution of Business Organizations** (Thompson/McNulty, etc. Memoranda).
 - Prosecution decisions based significantly on compliance program effectiveness , cooperation (including voluntary disclosure).
 - DOJ evaluation of Compliance Programs.

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U S DOJ Compliance Program Evaluation Considerations (Cont.)

Considerations include:

1. Program designed for maximum effectiveness, most likely risks?
2. Applied earnestly and in good faith? Does it work?
3. Supported with adequate staff and resources?
4. Employee awareness of program; effectiveness of training.
5. Effective internal reporting system for employees and to governing authority.
6. Sufficient internal audits; accurate results.
7. Violators effectively disciplined.
8. Violations promptly investigated, disclosed.
9. Program deficiencies promptly remedied.
10. Compliance program functions sufficiently independent.

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Key FSGO Components—

1. Ethics and Culture

- ▶ Since 2004, FSGO state two Overarching Requirements for an Effective C&E Program:
 1. Due Diligence to Prevent and Detect Violations.
 2. Promotion of an Organizational Culture that encourages Ethical Conduct and Commitment to Compliance with the law. **Section 8B2.1 (a).**
- ▶ Practice Points: Ethical conduct derives from organization's Core Values
 - Nominally expressed in Code of Conduct, Mission Statement, Board and Management statements.
 - Practically embodied in how the organization operates daily.
 - "Tone" -What matters most are not words but actions so that Tone becomes Ethical Culture and Standard Operating Procedure.

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Key FSGO Components—

2. Risk Assessments

- ▶ Since 2004 FSGO require **Periodic Risk Assessments** with findings used to design, implement, or modify each C&E program element. **Section 8B2.1 (c), App. n.7.**
- ▶ Practice Points: Periodic risk assessments should cover:
 - Nature and seriousness of likely misconduct.
 - Particular risks associated w/ nature of activities.
 - Particular risks associated w/ prior org. history.
 - Risks should be prioritized.
 - Ongoing, effective risk assessments are of heightened importance in heavily regulated components to protect public health and safety.

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Key FSGO Components—

3. Training

- ▶ Since 1991, FSGO require ongoing, effective training to communicate org. standards and procedures to all personnel and agents. **8B2.1(b)(4)(A).**
- ▶ Training, appropriate for org. roles, responsibilities must include Boards, senior management. **8B2.1(b)(4)(B).** 2004 amend.
- ▶ Practice Points: Org. should document education (whether conducted on-line or in person), employee completion, test for understanding, audit for performance, remedy deficiencies. Maintain records.

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Key FSGO Components—

4. Remedial Actions

- ▶ FSGO require reasonably prompt steps to investigate detected misconduct, respond appropriately, prevent reoccurrence (including necessary modifications to strengthen C&E Program). **Section 8B2.1(b)(70, App.n. 6.**
- ▶ Remedial actions generally will include restitution or appropriate harm remediation.
- ▶ Practice Points: Self reporting and cooperation are organization's call but get heavy emphasis from regulatory agencies, DOJ.
- ▶ Preventive actions generally include assessing, modifying C&E Program, discipline of individual violators, outside professional assistance (often necessary to satisfy regulators, DOJ).

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Key FSGO Components— 5.Compliance Program Independence

- ▶ As amended in 2004 and 2010, FSGO emphasize strength and independence of C&E function. **Section 8B2.1(b)(2), App. n.3.**
 - High level responsibility for C&E Program.
 - Periodic (at least yearly) reporting to management and Board.
 - Adequate resources, authority, access to governing authority.
- ▶ FSGO strongly suggest direct reporting for CCO to governing authority or subgroup charged w/ compliance oversight. **Section 8B2.5(f)(C)(i), App. n. 11.**
 - Prompt reporting to Board re: criminal conduct.
 - At least yearly reporting on implementation, effectiveness of C&E Program.
- ▶ Practice Point: Compliance independence increasingly important to DOJ, others.

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Summary – FSGO

- ▶ FSGO have evolved over 2+ decades from punishment mitigation at sentencing to a template for all forms of compliance programs (criminal, civil, ethical misconduct).
- ▶ Elements of an effective C&E Program are applicable to all risk areas and types of violations.
- ▶ The FSGO continue to represent the best fundamental model to achieve Compliance and Ethical behavior—one that is institution/industry flexible and internationally recognized.

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Integrating an Ethical Decision-Making Process into a Comprehensive Compliance Program

- ▶ Compliance Program provides the Policies, Structure, and Methodology.
- ▶ Ethical Choice Process helps individual actors make sound decisions within the compliance framework.
- ▶ What do we mean by an Ethical Choice Process and how might it work?

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An Ethical Toolkit/ Decision-Making Model

- ▶ One such model has been developed by the Rutland Institute for Ethics at Clemson University.
- ▶ <http://www.clemson.edu/ethics/RIE/programs.html>
- ▶ Basic point: No single approach works for all ethical problems.
- ▶ Hence, consider 3 different ways of viewing ethical dilemmas:
 1. Utilitarianism.
 2. The Rights-based approach.
 3. Virtue ethics.

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Utilitarianism

- ▶ Focuses on the Consequences or outcomes of an action.
- ▶ Goal: achieve greatest good for greatest number w/o causing significant harm.
- ▶ Right actions yield happiness; Wrong choices yield unhappiness.
- ▶ Procedural steps/ analysis:
 - Identify the foreseeable consequences of a possible action.
 - Evaluate those consequences in terms of happiness yield vs. costs.
 - Choose the action yielding greatest overall happiness.

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Weaknesses of the Utilitarian Approach

- ▶ Achieving the greatest happiness may violate important individual rights and/or institution policies.
- ▶ Consequences alone can't always determine what's right.
- ▶ An ethical choice in some situations demands a different analysis.

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The Rights-Based Approach

- ▶ Also known as the “Golden Rule” approach.
- ▶ Focus: Every person deserves respectful treatment.
- ▶ Hence, must consider the rights and duties owed others.
- ▶ A right action applies the policy equally to all regardless of identity or position.

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Weaknesses of Rights-Based Approach

- ▶ Fails to consider consequences.
- ▶ Lack of pragmatism, flexibility sometimes can yield undesirable outcomes.

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The Virtue Ethics Approach

- ▶ Relies on a generalized goal or aspiration rather than a set of rules.
- ▶ Focus on both the decision and the character of the decision-maker.
- ▶ Goal: Strive to become a person of admirable character; i.e., a more ethical person.
- ▶ Asks character-based questions such as:
 - What would a person of admirable character do?
 - If someone (e.g., the boss) was watching, what would they want me to do?
 - What would my mentor do?
 - What action will make me a better person?

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Weaknesses of Virtue Ethics Approach

- ▶ Lacks a precise formula for answering ethical questions.
- ▶ Depends on internal prompts to ask the analysis questions; hence, may assume person already has strong moral compass.

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Which Approach to Use?

- ▶ Best to apply all **3** tools when considering an ethical dilemma.
- ▶ If a solution can meet all **3** criteria; i.e.,
 1. bring about good consequences,
 2. respect rights (and institution policies), &
 3. help decision-maker become a more ethical person,
- ▶ Then, **convergence** indicates a good, ethical decision.
- ▶ If imperfect convergence, the following **4-step process/model** can help decide:
 1. Identify.
 2. Analyze.
 3. Justify.
 4. Decide.

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Step One: Identify

- ▶ Identify the problem and stakeholders. Ask:
 - What constitutes the problem?
 - What are the issues at stake?
 - What are the significant factors?
 - Who has a stake in the outcome?
 - What is at stake for each?
 - What are the available options?

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Step Two: Analyze

- ▶ Analyze and compare options using the 3 analytical tools to get different perspectives.
- ▶ Utilitarian/consequences tool asks:
 - What are the foreseeable and likely consequences for each option?
 - Which option generates the greatest good for the greatest number?

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Step 2: Analyze(cont.)

- ▶ The Rights-based tool asks:
 - Which option is most just?
 - What are the goals/intentions behind each option?
 - Would you be willing to be on the receiving end?
 - Does the preferred option respect the rights of all?

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Step 2: Analyze (cont.)

- ▶ The Virtue Ethics / Aspiration tool asks:
 - Which option best promotes integrity and good character?
 - Which option best contributes to the person you wish to become (personally and professionally)?
 - Which option would your boss and your mentor choose?

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Step Three: Justify

- ▶ Explain and Justify the choice of options.
- ▶ Questions to consider in this process:
 - What are the benefits of the preferred choice?
 - What are the risks and costs?
 - What happens if the contemplated choice is not made?
 - Have all realistic alternatives been considered?
 - Can the action be explained and defended?

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Step Four: Decide

- ▶ Follow through with action.
- ▶ Relevant questions in this process:
 - What is the best way to implement the decision?
 - How can I maximize the good and minimize any harms?
 - How can I make the decision “count”?
- ▶ Courage and commitment to act are essential.
- ▶ The Action may be hardest part of using the **IAJD** model.

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Ethical Decision-Making as a Process

- ▶ Careful and Deliberative
- ▶ A Skill to learn and practice
- ▶ No easy answers or “pat” approach
- ▶ Using the **3-step Toolkit** and the **4-step IAJD model** can develop confidence in ethical decision-making.
- ▶ Other approaches to ethical decision-making have also been developed.

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Ethical Decision Model of Markkula Center for Applied Ethics, Santa Clara University

- ▶ <http://www.scu.edu/ethics/ethical-decision>
- ▶ Identify the relevant facts and the stakeholders.
- ▶ Evaluate contemplated best decision option from 5 ethical perspectives:
 1. Utility
 2. Rights
 3. Justice
 4. Common Good
 5. Virtue
- ▶ Weigh the 5 perspectives, assigning points to each totaling 100.

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What a Comprehensive Compliance and Ethics Program Offers

- ▶ (Based on the FSGO Model)
- ▶ A means of assessing risks and designing strategic responses.
- ▶ A means of communicating institution policies and receiving regular feedback.
- ▶ An effective problem redress process.

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What an Integrated Ethical Decision-Making Process Offers

- ▶ Helps individuals sensitize their own moral compass.
- ▶ Ensures they think seriously about decisions, ask questions, and hopefully make sound decisions.
- ▶ Helps individuals better achieve aspirations.
- ▶ Promotes an institution culture that encourages ethical conduct and compliance.

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Integrate A Workable Ethical Decision-Making Model into your Compliance Program

- ▶ Both lend themselves well to the higher education institutional framework.
- ▶ Both work together to achieve desired results.
- ▶ Externally, the combination works to ensure a compliant , ethical institution.
- ▶ Internally and individually, they help individuals carry out their daily work w/ greater confidence they are making sound choices.

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Practice Scenario 1

You have a new employee in one of the units you manage. Near the end of the 90-day probationary period the employee's supervisor comes to you with an unfavorable rating of the employee. He outlines a list of substandard performances and says the employee lacks the experience the employee says he had. He recommends cutting him loose. You have just learned, however, that the new employee is marrying the Department Head's daughter in a few months.

What will you do?

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Practice Scenario 2

Your position in the department results in a number of students coming to you for help with both academic and personal problems. Near the end of one day an attractive female student comes to you in tears and wants to talk. She says she was at a party, had a lot to drink, and ended up having sex with two guys who were on the football team. She says they forced themselves on her, but she has been too embarrassed to report it to the police. She did not know the identity of one of the guys but the other happens to be the star running back on the team. You are a rabid sports fan yourself and know the team is playing in the Championship game next weekend.

What do you do?

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Practice Scenario 3

You have just been promoted to manage an institutional unit the University President recently recognized as being one of the University's best. But, as you settle into the job and start crunching the numbers, you realize things are way off. Your predecessor as manager is a good friend. When you confront him with the discrepancy, he admits he had been fudging the numbers, as he really needed the big promotion he just got to pay family medical bills. On top of this, you have just learned the Administration is assessing which under-performing units it can downsize because of a funding shortfall.

What do you do?

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Questions?

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