

**SCCE 6th ANNUAL EUROPEAN
COMPLIANCE & ETHICS INSTITUTE**

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***Corporate Responsibility & Liability:
A Global Perspective***

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**United States Sentencing Commission-
Federal Sentencing Guidelines**

- Effective November 1, 1991
- Control sentencing of organizations for most federal criminal violations
- Sentencing credit for "effective programs to prevent and detect violations of law"

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**Essential Elements of a
Compliance Plan***

- Standards and Procedures
- Oversight
- Education and Training
- Monitoring and Auditing
- Reporting
- Enforcement and Discipline
- Response and Prevention
- Risk Assessment
- Promotion of Organization Culture for Ethics and Compliance

* Federal Sentencing Guidelines, Chapter 8, 1991

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Amendments to FSG's, 2004

- ❑ Report published **October 7, 2003**
- ❑ <http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm>
- ❑ Effective **November 1, 2004**
- ❑ Key Recommendations:
 - ❖ "culture" of ethics and compliance
 - ❖ Defining ethics and compliance standards & procedures
 - ❖ Spelling out compliance obligations
 - ❖ Adequate resources
 - ❖ Clarifying employee screening practices
 - ❖ Training as an essential element
 - ❖ Means for anonymous reporting
 - ❖ Ongoing risk assessments.

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Amendments to FSG's, 2010

Expands an organization's eligibility for a reduced culpability if it has an effective program

- ❑ Effective in Detecting Criminal Conduct
 - ❖ The ethics and compliance program must detect the offense before its discovery outside the organization or before such discovery was reasonably likely
 - ❖ The organization must promptly report the offense to the proper governmental authorities
 - ❖ No person with operational responsibility in the program participated in, condoned, or was willfully ignorant of the offense.

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2010 Changes (Cont'd.)

- ❑ Enhanced Autonomy for Compliance Personnel
 - ❖ "direct reporting" channel between compliance personnel and the organization's governing authority
 - ❖ "express authority" for the "individual or individual with operational responsibility for the compliance and ethics program" to communicate "personally" with the governing authority
 - promptly on any matter involving criminal conduct or potential criminal conduct
 - no less than annually on the implementation and effectiveness of the compliance and ethics program
- ❑ If these requirements are met, corporations may receive credit for their ethics and compliance program.

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Individual Accountability for Organization Misconduct

- ❑ "One of the most effective ways to combat corporate misconduct is by **seeking accountability from the individuals who perpetrated the wrongdoing.**"
- ❑ "Such accountability is important for several reasons:
 - ❖ it deters future illegal activity,
 - ❖ it incentivizes changes in corporate behavior,
 - ❖ it ensures that the proper parties are held responsible for their actions, and
 - ❖ it promotes the public's confidence in our justice system."

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Oversight and Accountability

- ❑ Governing Authority – Knowledgeable about compliance program with reasonable oversight (*Board of Directors*)
- ❑ Ethics & Compliance Officer – high level individual
 - ❖ Reporting structure clearly defined
 - "direct to the top", no buffers
 - ❖ Strong leader – independent, empowered, effective
 - ❖ Shall have adequate resources and authority
 - ❖ Access to Board with periodic reporting responsibilities
- ❑ Compliance Committee, Regional liaisons, Program Staff, etc.

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The Principles of Federal Prosecution of Business Organizations in the United States Attorneys Manual

- ❑ Specific factors for Department of Justice prosecutors to consider in conducting an investigation of an organization;
- ❑ Determining whether to bring charges against the organization;
- ❑ Negotiating resolution of criminal and civil matters with organization;
- ❑ The factors include "the existence and effectiveness of the organization's pre-existing compliance program and efforts to implement an effective compliance program;
- ❑ Deferred Prosecution and/or Corporate Integrity Agreements.

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Department of Justice Evaluation of Corporate Compliance Programs

- Analysis and Remediation of Underlying Misconduct
- Senior and Middle Management
- Autonomy and Resources
- Policies and Procedures
- Risk Assessment
- Training and Communications
- Confidential Reporting and Investigation
- Incentives and Disciplinary Measures
- Continuous Improvement, Periodic Testing and Review
- Third Party Management
- Mergers and Acquisitions (M&A)

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International Standards for Compliance Programs

- United States Sentencing Guidelines ("USSG")
- United States Attorney's Manual ("USAM")
- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide")
- Good Practice Guidance on Internal Controls, Ethics and Compliance by the Organization for Economic Cooperation and Development ("OECD") Council
- Anti-Corruption Ethics and Compliance Handbook for Business (OECD Handbook) by OECD, United Nations Office on Drugs and Crime and the World Bank.

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Reference Material on Link to SCCE European Compliance and Ethics Institute 2018

- Department of Justice Criminal Division Evaluation of Corporate Compliance Programs
- White Paper – The Seven Elements of an Effective Compliance and Ethics Program
- Practical Guidance for Health Care Governing Boards on Compliance Oversight
- United States Securities and Exchange Commission Statement on Cooperation and Agency Enforcement Decisions
- Corporate Integrity Agreement between the Office of Inspector General of Health and Human Services and South Miami Hospital
- Non-Prosecution Agreement between the General Cable Corporation and United States Department of Justice
- Non-Prosecution Agreement between Tenet HealthSystem Medical, Inc. and United States Department of Justice
- Compliance and Governance for Health Care Organizations by Gabriel L. Imperato, Esq. and Anne N. Branan, Esq.
- Department of Justice Increases Focus on Organizational Compliance by Gabriel Imperato, Esq.

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Anti-Corruption, Bribery and Kickbacks: The U.S. Foreign Corrupt Practices Act, the U.K. and European Union Anti-Bribery Laws and the Brazilian Anti-Corruption Law

- Global Issue: United States Foreign Corrupt Practices Act ("FCPA"), United Kingdom Anti-Corruption Law ("U.K. Anti-Bribery Act"), European Union Anti-Bribery Laws, and the Brazilian Anti-Corruption Law ("Clean Company Act").
- FCPA Anti-Bribery Provisions: Anything of value to a foreign government official to promote action to obtain an improper advantage in retaining business
- U.K. Anti-Bribery Act: Organization strict liability for employee agents offering unjust advantage (i.e. bribery payments) to foreign or domestic government officials and any other parties if Act represents the "directing mind and will" of the company
- European Anti-Bribery Laws: Consistent with the U.S. Foreign Corrupt Practices Act, although more limited in scope and also focused only on bribery of public officials
- Brazilian Anti-Corruption Law: Organization strict liability for employee acts offering unjust advantage (i.e. bribery payments) to foreign or domestic government officials or related third-parties
- Compliance, Audits and Red Flags: Training, risk assessment, internal controls, audit and monitoring, third party screening and contractual protections

Please see the following link for the *Resource Guide to the U.S. Foreign Corrupt Practices Act*:

www.justice.gov/criminal-fraud/fcpa-guidance

THE END
