

Occupational Crime

Deterrence, Investigation, and
Reporting in Compliance with
Federal Guidelines

Ernest C. Blount



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Occupational Crime

**Deterrence, Investigation, and
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Praise for *Occupational Crime: Deterrence, Investigation, and Reporting in Compliance with Federal Guidelines*

“...captured my attention ...aided me with understanding the impact occupational crime has on my staff, myself and the organization I am employed to support and protect. [The book] does a succinct job of outlining the problems, the costs, and the solutions. ...provides well-researched and practical support materials to assist the proactive security conscious individual with development of a security awareness/loss contingency program.”

— Paul P. Donahue, CMA, CBM, ACFE

“A well-written eye opener, the subject of which is very timely and definitely needed in the current economic turmoil we are in. A ‘must read’ for all business management and auditors.”

— Richard J. Kamantz, CIA

“The compelling insight [the author has] provided regarding the development of a culture for ethical corporate behavior transcends various diverse industries. I found this book to be an excellent resource for anyone who cares about the conduct and survival of their business. [It] not only provided great insight as to ‘why’ anyone in today’s business environment would need to develop a meaningful corporate compliance program, but also a demystified and commonsense ‘how to’ approach.”

— Steven Mellion, MBA, MHA, CNHA

Introduction

The central focus of this book is occupational crime: its prevention, detection, reporting, and incident management. Its motivation originates not only with management concerns about internal loss prevention, but also the consequences in the event an employee is convicted of a federal crime and the organization is subsequently charged. More on how these interests correlate as you proceed.

Occupational crime is defined as those crimes committed by employees on behalf of or against an organization — public or private — with or without the express or implied consent, approval, or knowledge of management. The purpose herein is to provide organizational management, their internal staffs, and contract professionals who provide ancillary support services an informational resource that will aid in the prevention, detection, and reporting of illegal behaviors occurring within an organization.

When occupational crime is prevented, deterred, or detected post commission, with reported and effective remedial action initiated, many obvious benefits accrue to the organization. Those benefits are explored herein. And there is more. An additional incentive may not be so obvious and, under certain circumstances, hold critical significance to a particular organization. If you have not heard of the United States Sentencing Commission and, more specifically, *Chapter Eight, Sentencing of Organizations*, of the *United States Sentencing Guidelines*, perhaps it's now time to learn.

The United States Sentencing Commission is an independent agency of the federal judicial branch of government. The Commission was created by Congress through provisions of the Sentencing Reform Act of the Comprehensive Crime Control Act of 1984. Congress was not pleased with the perceived lack of certainty and disparity at the federal level in sentencing for criminal behavior. Crime control issues had also gained its attention. Congress wanted to rein in federal judicial sentencing discretion and add formal structure where none had previously existed. It also wanted heavier penalties imposed on white-collar criminals and on violent and repeat offenders in all categories.

The Commission was to create, among other tasks, a national set of sentencing guidelines to be used by federal criminal court trial judges in

making their sentencing decisions. The inaugural set of the *United States Sentencing Guidelines* took effect November 1, 1987. They have, of course, been amended over the years. The controversy generated by the Guidelines continues to this day. Many question their constitutionality, which has been tested for constitutionality in the U.S. Supreme Court. Challenges were initiated almost immediately and centered on the Sentencing Reform Act and allegations of improper legislative delegation and violation of the separation-of-powers doctrine. On January 18, 1989 the Court rejected the challenges, upholding the Commission as a judicial-branch agency (see *Mistretta v. United States*).

While the constitutional debate was ongoing, not much sympathy existed for convicted individuals. In the years since the U.S. Supreme Court's decision upholding the Commission, there has been a continuing debate as to whether the Guidelines unreasonably restrict judicial discretion and are, therefore, unfairly harsh to some defendants. This debate continues and, in all probability, will never be resolved to everyone's satisfaction.

In the period between November 1987 and the Court's ruling on the constitutionality of the Commission in January 1989, congressional interest in controlling organizational crime did not abate. Thus, on November 1, 1991, *Chapter Eight* of the Commission's Guidelines became effective, expanding the *Guidelines*. *Chapter Eight*, entitled *Sentencing of Organizations*, drew the attention of an entirely new set of the organization's interests. The provisions of *Chapter Eight* covered "corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities, and governmental units." Things had changed.

Federal sentencing guidelines were no longer limited to individual miscreants — they now covered organizations. Like individuals, organizations can be indicted, criminally charged, prosecuted, and found guilty of criminal conduct. *Chapter Eight* sets forth punishments for organizations convicted of federal crimes, including felonies and Class A misdemeanors. It also offers incentives that can mitigate sanctions. The enactment of *Chapter Eight* and its provisions got the attention of organizational managers, at least those who knew about it. The term, *Compliance Program*, took on a new meaning and level of importance.

Judicial discretion in the sentencing of convicted organizations is now statutorily defined and limited. Organizational entities cannot be sent to prison — but they can be and are heavily fined, ordered to make restitution, placed on probation, forced to forfeit property, suffer public and stakeholder recriminations, and can be forced out of business. The rules of the game changed with the post-November 1, 1991 implementation of *Chapter Eight* — and fundamentally so. It is prudent for organizational management to be familiar with and understand the implications of the new rules or suffer the

consequences if ever convicted of a federal crime. Statistically, organizations are most frequently convicted of violating criminal laws related to fraud, environmental waste discharge, taxes, antitrust, and food and drug offenses. There are many reasons why management should pay closer attention to organizational crime prevention, detection, and reporting — those that pre-date November 1, 1991 and those post November 1st.

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions.

Read that last paragraph again; you'll have to read it at least twice for the gravity of it to sink in.

Organizational sentencing guidelines offer convicted organizations an opportunity to mitigate potentially harsh sentencing impacts through incorporation of incentives that take the form of credits. These potential credits are set forth in *Chapter Eight*, § 8C2.5 — Culpability Score. Credits earned can substantially mitigate the size of a potential fine and other types of sanctions. The essential qualifier or credit trigger, if you will, is whether the miscreant organization had an effective compliance program in place. The operative term being *effective*. Eye wash compliance programs will not meet federal effectiveness criteria and should be avoided. Within the provisions of *Chapter Eight* is the architectural framework that sets forth the seven criteria for establishing an effective compliance program. Those seven criteria are:*

Compliance standards and procedures reasonably capable of reducing the prospect of criminal activity

Oversight by high-level management

Due care in delegating substantial discretionary authority

Effective communications to all levels of employees

Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal

* From: *An Overview of the Organizational Guidelines*, by Paula Desio, Deputy General Counsel, United States Sentencing Commission. (January 1999).

Consistent enforcement of compliance standards including disciplinary mechanisms

Reasonable steps to respond to and prevent further similar offenses upon detection of a violation

These seven criteria establish the necessary basis for the evaluation of and suitability for issuance of mitigation credits in federal criminal courts. They define the core components of an effective compliance program but do not provide precise details for their design and implementation. Each organization is, therefore, left with the flexibility and independence to design a program that is responsive to its specific requirements and circumstances.

What is a “compliance program?” In the absence of industry-specific regulatory requirements and definitions a compliance program may be viewed as the totality of those actions taken by an organization to set the legal and ethical tone of the organization and to prevent, detect, report, and legally manage internal criminal behavior. Such a program will encompass a broad spectrum of policies and procedures that includes ethics, integrity components, employee education, incident investigation, disciplinary issues, reporting requirements, and managerial and audit oversight. Program design should incorporate Guidelines criteria as an integral part of its architecture if mitigation credits are to be sought should the organization ever be convicted of a federal crime. In some industries like banking and securities, there are specific statutorily defined compliance programs and oversight mandates that must be met.

Congress has now emphasized the importance it places on organizational efforts for internal crime-control measures and the effectiveness thereof. Allocation of any mitigating credit, however, is contingent upon the miscreant meeting two basic requirements: (1) prompt reporting of a violation to proper authorities and (2) no involvement of high-level personnel in the commission of the violation. That’s right, management must not only report a crime, known or suspected, but also fully cooperate with authorities in the investigation of itself — and the results of the investigation better not show high-level involvement.

If these two requirements are not met, mitigation of sanctions becomes highly problematic. A management dilemma is thus created. Here are some options: do nothing and take the risks, or put an eyewash program in place and hope its transparency is not discovered, and then hope your attorney effectively pleads ignorance or comes up with some creative defense upon conviction. With both options there is no possibility of mitigating federal sanctions, and the results could be disastrous. Conversely, management can design and implement an effective compliance program and if ever prosecuted

and convicted sanctions can be mitigated. What about self-incrimination; are you required to waive that protection? No, not if you do not intend to seek sanction-mitigation credits and are willing to take your chances in federal criminal court. But, if you intend to collect credits for sanction mitigation, then the answer is yes. In the latter instance, if you report internal criminal behavior, you may have voluntarily incriminated your organization.

Are the key criteria outlined in *Chapter Eight* mandated by law? The answer is no. Given, however, the pervasive all-encompassing number and complexity of federal criminal laws and the number of federal investigative agencies, the potential exposure to and risk of an employee committing violative behavior are substantially increased. Even in the absence of the aforementioned significant motivators exist for creation and implementation of internal crime and loss-prevention programs. When benefits are considered, it seems that good and sufficient cause exists to produce and implement such a worthwhile program. Even if an organization never has to deal with a federal crime conviction, the upside in internal loss prevention may just be sufficient justification for such a program.

Illegal, unethical, and irresponsible employee behavior is a multifaceted organizational problem. When this behavior is manifested, it is often described as fraud, theft, embezzlement, corruption, or white-collar crime. That is the legal context. Concurrently, unethical behavior can have moral and legal ramifications. Irresponsible behavior encompasses careless inattention to blatant illicit actions; it has become a national quagmire.

Preventing, deterring, and detecting such behavior and responding appropriately upon discovery have become significant concerns for the managers of America's commercial interests and for those individuals who run our societal and governmental institutions. In each venue abusive employee behavior and occupational crime are costly and intricate issues demanding vigilant management attention and diverse remedies.

A review of the elements necessary for the prevention, deterrence, detection, reporting, and management of wrongful employee behavior is included here. The means recommended to enhance existing management practices and controls is the employee security-awareness program. The employee security-awareness program is an expansive educational, motivational, and procedural approach custom-designed to accommodate the needs of a specific organization. Providing management with the essential "How tos" of such a program is the purpose of the present book.

If your intent is to design and implement a compliance program that incorporates the seven criteria of the Guidelines, then this material will assist you. You and your legal and other professional contributors, however, will have to ensure that the burdens of effectiveness are met and that each of the seven criteria is sufficiently incorporated into the compliance program to

meet the requirements of law. Given the uniqueness of each organization, no attempt is made herein to provide a model compliance program, and no attempt is made to produce a “one size fits all” approach. Each compliance program, therefore, must be custom designed to fit the individual requirements of the organization it is intended to serve.

The author has tried to create a resource in an easy-to-use and readable form: a book that connects the practical and the philosophical aspects of planning for producing and operating a successful employee security-awareness program — a resource that will assist the user from start to finish, from recognition of a problem to determination of need and program design and from program implementation through maintenance; a guide for those starting a program from scratch or for those who wish to enhance an existing one; and a source of information that will provide a framework for success if properly used and applied. Depending on the organization, the design, scope, audit, and other essential functions and components of a successful program will vary from the relatively simple to the highly complex. Each must be custom designed. The contents set forth herein cover the “big picture,” and each organization must provide the details that fit and fulfill their specific requirements.

Organizational crime and other abusive acts committed by employees are management problems. This book is intended for management use; any discussion of the referenced problems will require some analysis by management, which will include an examination of management’s ethics, business practices, and attitudes. We examine how those three areas influence the existence of abusive employee behavior or, conversely, how they work to eliminate it.

The book is organized as follows:

- Chapter 1: The Problem — Reviews and places organizational crime and the abusive-employee behavior problem into perspective; discusses management’s contribution to the problem and suggests remedial action.
- Chapter 2: The Cost — Examines the price business, institutions, individuals, and the nation pay for organizational crime and abusive employee behavior, and how to calculate those costs.
- Chapter 3: The Solution — Provides specifics for the development, implementation, and maintenance of an employee security-awareness program. The intent is to prevent, deter, and detect organizational crime and other abusive employee conduct. Input is interfaced with criteria proscribed by the federal sentencing guidelines for organizational crimes.
- Chapter 4: Support Materials — Provides supplemental materials used for program planning, records, and communications media.

Two points must be made prior to review and use of this book. First, any discussion of abusive employee behavior has negative overtones and implications that are inherent and unavoidable. Second, when management is taken to task about an issue, the author is not indicting every current or former business or institutional manager. The emphasis is on those issues, attitudes, and practices that apply to or come under the auspices of management. Keeping these two points in mind will assist you in keeping the purpose of the book balanced and in proper perspective.

Furthermore, I would be negligent in my treatment of management if I did not acknowledge the leaders — those ethical, highly competent, entrepreneurial, imaginative, empathic, and concerned business and institutional managers — who set the standard for managerial excellence in America and throughout the world. It is those individuals who by their actions contribute immeasurably to the richness of our daily lives and the American experience. It is their commitment to excellence, entrepreneurial spirit, and determination that moves America. It is their character, integrity, and vision of the future that will take us into many tomorrows.

The use of the pronouns “he” and “him” throughout this text are used generically and not intended to singularly imply the male gender. Thus, “he” and “him” are simply used in place of “he or she” and “him or her.” This convention has been adopted to convey the point with an economy of words.

In closing, a word of caution about the use of the book. The author provides some basic discussion and input on a few legal, accounting, and personnel matters and references federal sentencing guidelines for organizations. However, such information is not a substitute for professional advice in those areas. The author is neither a lawyer nor a certified public accountant; therefore, you are encouraged to seek and use the services of professional advisors in all matters where such input is dictated.

Ernest C. Blount, CFE

About the Author

Ernest C. Blount is a seasoned business executive with extensive management, corporate security, and law enforcement experience that encompasses a broad range of investigative and executive posts. In business he has served as a vice president with a major multinational security firm, heading up their public services division. Mr. Blount has been the director of internal affairs and director of corporate security for two large Florida corporations over a period of 25 years. In government he has served as a chief of police, the organizer and first administrator of the Office of Safety and Security for the Palm Beach County Public School System, and as a part-time instructor in the Criminal Justice Degree Program at Palm Beach Community College. He is a graduate of Florida Atlantic University.

Mr. Blount's experience in the investigation and prevention of fraud and white-collar crime began as criminal investigator for the Palm Beach County Sheriff's Department. He is a Certified Fraud Examiner and has served as a business consultant and expert witness in federal court. This is Mr. Blount's second book. His first book is entitled *Model Guidelines for Effective Police-Public School Relationships*.

Mr. Blount is a member of the Association of Certified Fraud Examiners. He has been a member of the International Association of Chiefs of Police and The Florida Association of Chiefs of Police.

Acknowledgments

Anyone who has ever undertaken a research and writing project of the nature contained herein soon finds many of his or her weaknesses exposed. During the time it took to complete the project the support, encouragement, suggestions, criticism, factual analysis, and other inputs from those persons who took an interest in the project were very important to its completion. For that help, I shall always be appreciative.

In saying thank you I acknowledge the many industrial security professionals who pioneered and contributed so much to the body of knowledge now identified with professional security management, loss-prevention, and employee security-awareness programs. Through the years I have drawn on and grown with that knowledge. So much of what this manual contains reflects what I have learned from others. I give credit, then, to those professionals who through their written or personal input have influenced my professional life.

There are a few friends and professional colleagues who I wish to acknowledge and thank as well: Jim Manor, Paul Duffy, Margaret Devine, Mario Martinez, Paul Johnson, Jim Kirkland, and Ken McNabb. There were others who added their two cents' worth. Several senior executives took a look at the manuscript and, while they squirmed at the criticism of management, acknowledged the truth it contained. All recognized the problems illustrated and the need for solutions.

Ernest C. Blount

“Where the law ends, tyranny begins.....”

William Pitt, 1770

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