

# **What Can We Learn From the U.S. Federal Sentencing Guidelines for Organizational Ethics?**

Professor Dove Izraeli (Tel Aviv University) and Mark S. Schwartz (York University)

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### **Abstract**

In November, 1991, the U.S. Congress enacted the U.S. Federal Sentencing Guidelines legislation which had a dramatic impact on corporate America. Can the Guidelines be used as a model or framework by other countries? Could other countries in the world benefit from adopting a similar piece of legislation? Are there any limitations to consider? In addressing these issues, the authors make the argument that the time has arrived for other countries to consider the development of legislation similar to the Guidelines in order to improve organizational ethics.

### **Part One - The U.S. Federal Sentencing Guidelines**

#### **Introduction**

In November, 1991, an innovative piece of legislation was enacted in the United States which had a profound effect on corporate America (Izraeli, 1997). The legislation, referred to as the U.S. Federal Sentencing Guidelines ("Guidelines"), used 'the stick and the carrot' approach to create an incentives for thousands of corporations to create or modify their compliance (ethics) programs.

The Guidelines were developed by the United States Sentencing Commission, a new governmental body which came into existence in 1984. The Commission was charged with the responsibility for creating uniformity in the sentencing of offenders of federal laws. Following the promulgation of Guidelines in 1987 for sentencing individuals convicted of federal offenses, the Commission proceeded to create Guidelines for organizations which were to become law in 1991 (Kaplan, 1993:136-137). The Guidelines (discussed in greater detail below) consisted essentially of a manual for judges to consider when determining the appropriate sentence for corporations convicted of a federal crime. Judges were being asked for the first time to consider whether the convicted corporation had established an "effective compliance program" prior to the violation taking place, in other words, whether the corporation had taken appropriate steps to prevent and detect violations of the law.

According to Win Swinsen, the former Deputy General Counsel of the Sentencing Commission, one of the primary reasons for the enactment of sentencing guidelines for organizations was that the U.S. government lacked a clear corporate crime sentencing and enforcement policy. As a result, judges were having great difficulty in finding meaningful ways to sentence corporations. Empirical research conducted by the Sentencing Commission on corporate sentencing practices demonstrated that "...corporate sentencing was in disarray...nearly identical cases were treated differently." In addition, average fines were found to be "...less than the cost corporations had to pay to obey the law" (Sentencing Commission, 1995:30).

To address these concerns, the Commission eventually came to accept the 'carrot and stick' approach to corporate sentencing. This approach was based on three principal and related objectives: (1) to define a model for good corporate citizenship; (2) to use the model to make corporate sentencing fair by providing objective, defined criteria; and (3) to use the model to create incentives for companies to take crime controlling actions. The final objective was designed to shift from the previous 'speed trap' enforcement policy of the past (i.e., merely lie and wait for corporate offenders and then fine them), to a more interactive approach. By providing financial incentives, the government was inviting companies to undertake effective, crime-controlling actions which in turn would put less pressure on already limited government enforcement resources (Sentencing Guidelines, 1995:34).

Since the enactment of the law, hundreds of corporations have been prosecuted under the Guidelines, some suffering fines and penalties in the tens and even hundreds of millions of dollars. Empirical evidence is now suggesting that the implementation of these programs is raising the level of legal and ethical behavior in corporations. Somewhat surprisingly, despite their impact and apparent success, the Guidelines appear to remain somewhat of a mystery to non-U.S. countries and corporations (Izraeli, 1995).

It may be the case that the time has arrived for countries other than the U.S. to consider the development of legislation similar to the Guidelines, using the Guidelines as a model or framework to follow. To make this argument, this paper will consist of two parts. Part one discusses the Guidelines in general, their purpose, impact, utilization by the U.S. courts, and effectiveness in achieving their objectives. Part two discusses why the time has arrived for other countries to consider the Guidelines due to foreign companies operating in the U.S., the development of a globalized business community, and a changing regulatory environment.

The paper will conclude by suggesting the potential benefits for other countries in adopting legislation similar to the Guidelines, the current limitations of the Guidelines and how they might be addressed, and finally an initial implementation strategy for countries to utilize in designing their own respective legislation.

### **(1) What are the Guidelines?**

According to the Guidelines, any organization is liable to sentencing, fines, and to periods of probation for federal offenses connected with antitrust, securities, bribery, fraud, money laundering, criminal business activities, extortion and embezzlement, conspiracy, and others. The preamble to the Guidelines states that the organization operates only through its agents, usually its managers, and is, therefore, liable for the offenses committed by them. Naturally, the managers are personally responsible and liable for their own behavior. The innovation of the Guidelines lies in the fact that the sentences imposed on the organization and its agents are designed to achieve the following objectives: (a) just punishment; (b) sufficient deterrence; and (c) encourage the development of internal mechanisms to prevent, identify and report on criminal behavior in organizations (i.e., through a 'carrot and stick' approach).

To assist corporations in knowing exactly what constitutes an appropriate internal mechanism, the Guidelines list seven elements indicating what is considered an 'effective compliance program.' These elements include but are not limited to the following: (1) compliance standards and procedures (e.g., a code of conduct or ethics); (2) oversight by high-level personnel (e.g., a compliance or ethics officer); (3) due care when delegating authority; (4) effective communication of standards and procedures (e.g., training); (5) auditing/monitoring systems and reporting mechanisms (e.g., a 'hotline'); (6) enforcement of disciplinary mechanisms; and (7) appropriate response after detection (Kaplan, 1993:138-142).

To achieve the objectives, the Guidelines provide the following measures: (1) the organization is required to remedy all damage that it has caused and to pay a fine based on the severity of the offence and the degree of guilt of the offender. Moreover, probation periods are set to ensure that the punishment is indeed implemented and that the organization has taken steps to reduce the probability that the offence will be repeated; (2) the Guidelines include a schedule of prison sentences for the agents of the organization and fines on the organization and its agents. The base level of prison sentences is up to three years and the fines are up to \$72.5 million. All sentences are also liable to a probation period to ensure that remedial action has been taken or to continue investigations. The level of the sentence is liable to be increased substantially, depending upon the past behavior of the offender, so that the maximum fine may reach up to \$290 million, or even higher in some instances (the 'stick' approach); (3) an organization that proves it has developed an effective program for preventing offenses and has begun implementing the program prior to the offence is eligible to have its fines and punishments reduced by over 95% (the 'carrot' approach).

### **(2) Impact of Guidelines**

Although the Guidelines have been in existence for only half a decade, they have already had a significant impact on corporate America. As determined by a number of surveys, the primary

impact has been the creation or enhancement of compliance or ethics programs by thousands of companies across the United States, and even outside of the U.S.

In some cases, the Guidelines have provided a model for the entire compliance or ethics program. For example, The Bank of Tokyo has made the Guidelines "the focal point of its overall compliance effort" (U.S. Sentencing Commission, 1995:63). According to the bank, the Guidelines gave them "...a clear picture of what a compliance program should look like and a set of instructions on how to construct a program." The bank also found that "...virtually every compliance directive we received, regardless of the source, fit comfortably within the structure that is suggested by the [seven elements for compliance]" (U.S. Sentencing Commission, 1995:65). In addition to The Tokyo Bank, other New York-area banks as well as a Canadian bank, the CIBC, "...have begun to use the guidelines as a foundation for their overall compliance efforts" (U.S. Sentencing Commission, 1995:67).

Other companies, even if they already had some sort of compliance or ethics program in place before 1991, have indicated that the Guidelines were one of the factors which influenced the enhancement of already existing ethics programs. According to "A National Study of Compliance Practices" which involved 333 corporations representing various sizes and industries, 44 percent of the respondents stated that the Guidelines caused them to add vigor to their compliance programs, while 20 percent added compliance programs because of their awareness of the Guidelines (U.S. Sentencing Commission, 1995:134). According to Andrew Apel, the author of the study, "...certainly, the guidelines are having a significant impact on what organizations are doing to prevent and detect violations of law" (U.S. Sentencing Commission, 1995:129). Another study by the Council of Ethical Organizations of approximately 750,000 employees from 203 large U.S. companies also found that the Guidelines have had an influence on corporate ethics programs. The survey found that 38 percent of the companies significantly improved their ethics compliance environments following the enactment of the Guidelines (U.S. Sentencing Commission, 1995:178).

Unfortunately, the studies did not break down the impact of the Guidelines on individual components of ethics programs. Despite this gap, one can assume that the Guidelines have had the greatest impact on four components: (1) ethics training; (2) ethics officers; (3) ethics offices; and (4) ethics hotlines. Each of these components can be related to one of the seven elements of an effective compliance program as stipulated by the Guidelines. It should be noted, however, that one component in particular, a code of ethics, has not come into existence merely as a result of the Guidelines. As several studies have indicated, the vast majority of large companies (93 percent) already had a code of ethics in place by 1990 (Center For Business Ethics, 1992).

### **(3) Utilization by Courts**

The Guidelines have clearly had an impact on the establishment or enhancement of corporate ethics programs. One of the reasons for this achievement is that in case of an offense the size of the fine is conditional on the existence of a compliance or ethics program.

According to the U.S. Sentencing Commission Annual Report, in 1995, 111 organizational defendants were sentenced according to the Guidelines, with 83 cases subject to the Guidelines'

fine provisions. This was an increase from 1994 which saw only 86 corporate Guidelines' sentencings. In 1994 the average fine was \$420,000, with the average fraud fine about \$1 million and the highest single fine \$15.5 million (which involved an environmental fraud offense) (Kaplan, 1995:1).

The Guidelines have had an even more significant impact on probation. Fifty-eight percent of companies sentenced during 1994 were placed on probation, with 20 percent of these being ordered to implement compliance programs. The Guidelines were to have less of an impact on compliance programs and corporate fines. Only four of the prosecutions during 1994 involved a direct consideration of the defendant's compliance program by the court. In one case, the fine was reduced on the basis of the company being held to have an effective compliance program (Kaplan, 1995:1). This situation was to change dramatically in February, 1996. In what was the largest criminal fine in U.S. history, a Manhattan federal court sentenced Daiwa Bank to pay a fine of \$340 million under the Guidelines. The case involved a bank employee who lost \$1.1 billion in unauthorized trades. The two main reasons for the fine were the bank's "lack of a meaningful compliance program" and its "consequent failure to report the employee's wrongdoing" (Kaplan, 1996: 1).

Another development which has been noted due to the Guidelines is being referred to as 'the shadow effect.' Essentially, the Guidelines are also being considered by courts and government agencies in criminal cases other than those brought under the Guidelines. Companies such as National Medical Enterprises (involving kickbacks) (now Tenet Healthcare), Lucas Aerospace (involving falsifying test data), and C.R. Bard (involving fraud) were all ordered to adopt extensive compliance programs in addition to paying fines. Even civil cases such as Prudential Securities (involving fraud) or Grumman Corporation (involving kickbacks) were ordered to implement compliance programs, which were much more onerous than if conducted voluntarily (Kaplan, 1995:2-3).

#### **(4) Effectiveness of Guidelines**

It can be seen from the above discussion that the Guidelines have had an impact on the creation and implementation of ethics programs, and have actually been utilized by the courts in assessing fines and placing companies on probation. Despite this impact, one could ask a more fundamental question: "Have the Guidelines helped to achieve their ultimate purpose, the reduction of corporate crime and an improvement in ethical behavior?"

Although it may be some time before we can know the answer to this question with any degree of certainty, a study released by the Ethics Resource Center entitled, "Ethics in American Business: Policies, Programs and Perceptions" provides an initial indication that ethics programs are beneficial in improving organizational ethics. The survey examined employee attitudes and behavior in relation to the existence of three components of an ethics program: (1) codes of conduct, (2) the introduction of ethics into employee and management training, and (3) the establishment of ethics and compliance offices. Over 4,000 U.S. workers were surveyed representing different levels of responsibility, job functions, company size, and industries (Ethics Resource Center, 1994).

The survey indicates that ethics programs appear to improve ethical behavior. The results are summarized as follows:

- Corporate ethics programs appear to have a distinctly positive impact on employee behavior and their opinions about the ethics of fellow employees, management, their companies and even themselves. The most positive effects were reported in companies which had all three program components - codes of conduct, ethics training and ethics offices. Striking differences could be seen in the responses of employees in companies with comprehensive ethics programs and the responses of those in companies with no program elements or with only a code of conduct. Indeed, a code of conduct as the sole element of an ethics effort often seemed to have a negative effect on employee perceptions. Ethics initiatives appeared to increase employee awareness of misconduct, employee willingness to report misconduct, and the level of satisfaction with the outcome of their reporting (Ethics Resource Center, 1994:6).

Another study by the Council of Ethical Organizations of 750,000 employees from large U.S. corporations found that, "Employees of companies that had implemented or fortified comprehensive ethics compliance programs in response to the guidelines...reported that they were less likely to violate laws and policies" (Sentencing Commission, 1995:178).

There are a few cautionary notes to consider, however, regarding the above noted studies. Although studies have shown that corporations have enhanced their ethics programs because of the Guidelines, and that companies with a comprehensive ethics program appear to have a higher level of ethical behavior, one cannot necessarily make the conclusion that the Guidelines are responsible for improved ethical behavior. One of the weaknesses with the Ethics Resource Center and Council of Ethical Organization's studies as with most business ethics studies is that they only measure self-reported data, as well as perceptions of behavior, as opposed to actual behavior. It should not be forgotten that many companies created compliance or ethics programs irrespective of the Guidelines. In any event, the evidence to date indicates that the Guidelines have had an influence on ethics programs which appear to lead to improved ethical behavior in organizations.

## **Part Two - Could Other Countries Benefit From Adopting Legislation Similar to the Guidelines?**

There are numerous reasons to suggest why the time has arrived for countries around the world to consider adopting legislation similar to the Guidelines. These reasons include foreign companies operating in the U.S., the development of a globalized business environment, and a changing regulatory environment around the world.

### **(5) Foreign Companies Currently Operating in the U.S.**

Most large corporations in the world currently conduct business in the U.S. Many of these companies will establish U.S. subsidiaries with branch offices or factories located in the U.S. or obtain U.S. supplied financing and list their shares on American stock exchanges. For these companies, there is a direct and immediate reason to create compliance or ethics programs,

regardless whether their home country has created any legislative incentives to do so. Failure to create programs for the U.S. based operation can result in financial penalties which could otherwise be avoided. Daiwa Bank, as discussed above, is an excellent example of a company which suffered by not having implemented an appropriate compliance or ethics program.

According to Jeff Kaplan, the Daiwa Bank lesson is especially important for foreign companies doing business in the U.S., "...[T]he entire disaster occurred not because the bank was greedy or malevolent, but simply because it failed to accord due weight to U.S. regulatory mandates" (Kaplan, 1996:11). According to Lori Tansey, president of the International Business Ethics Institute, "Without question many foreign companies doing business in the United States fail to understand the requirements of United States law. Most are not aware of the sentencing guidelines or their implications" (Kaplan, 1996:11). If this is the case, non-U.S. companies will continue to suffer by not taking into consideration the potential impact of the Guidelines.

For those countries with companies operating in the U.S., there is then a direct benefit to adopting legislation similar to the Guidelines. Non-U.S. corporations would have an automatic incentive to create compliance or ethics programs in their home country, and if the programs are applicable to operations in the U.S., these corporations would gain automatic protection from non-compliance when doing business in the U.S. Unfortunately for some non-U.S. companies, such as Daiwa Bank, they had to learn their lesson the hard way.

## **(6) Changing Business Environment: Globalization**

One can point to the changing business environment around the world as a major motivator for countries to consider implementing legislation similar to the Guidelines. Clearly, the business world is becoming a smaller place. According to Lori Tansey, "the most significant development in today's business world is globalization" (Tansey, 1995:1). Several world trading blocks have been established, such as NAFTA (North American Free Trade Agreement) and the EU (European Union). International sales by U.S. multinationals were over \$1 trillion in 1991 (Tansey, 1995:1). Other evidence of globalization includes the growth of multinational corporations and international joint ventures. Changing technologies such as the internet, e-mail, fax, and video conferencing continue to make the world a smaller place where communication anywhere around the world is almost instantaneous. As the international corporate world becomes more closely inter-connected, the obligations of multinational corporations to take measures to comply with worldwide legislation increases.

Another development over the years has been the increasing internationalization of ethical standards. According to DeGeorge, "the growth of multinationals and the closer integration of U.S. and non-U.S. firms makes all the more necessary the development of business ethics on an international scale" (DeGeorge, 1987:209). Several initiatives have demonstrated the need to generate consensus around the world on the issue of ethical standards. For example, Getz (1990) has pointed to four international codes which multinational corporations are required to follow: (1) the International Chamber of Commerce (ICC); (2) the Organization for Economic Cooperation and Development (OECD); (3) the International Labour Organization (ILO); and (4) the United Nations Commission on Transnational Corporations (UN/CTC).

The Caux Principles, created by leaders from the Japanese, European, and U.S. business communities, emphasize the growing importance of international ethical standards:

- The Caux Round Table believes that the world business community should play an important role in improving economic and social conditions. As a statement of aspirations, this document aims to express a world standard against which business behavior can be measured. We seek to begin a process that identifies shared values, reconciles differing values, and thereby develops a shared perspective on business behavior acceptable to and honored by all (Caux Round Table, 1994:2).

In addition to international codes, organizations devoted to encouraging international standards of ethical conduct have emerged. Transparency International, based in Berlin, Germany, is an organization which was established to focus on grand corruption in international business transactions. One of the goals is "...practical change, in laws, institutions and policies, that will drastically reduce the incidence of corruption in the future" (Transparency International, 1996:7). By the end of 1995, the organization had over fifty national chapters established or in progress around the world (Transparency International, 1996:7).

These developments of globalized business and acceptable international business conduct serve to reinforce the impetus for countries around the world to both individually and collectively to work together in creating incentives for the corporations to establish compliance or ethics programs designed to reduce corporate crime and unethical activity. Developing legislation similar to the Guidelines would provide that incentive to the international corporate world.

### **(7) Changing Regulatory Environment: Other Countries**

Is the United States the only country in the world to have developed legislation which creates incentives for corporations to adopt compliance or ethics programs? A survey of three political entities, Europe, Australia, and Canada, indicates that these areas of the world have already developed or are in the process of developing measures which in some respects even go beyond those of the U.S. Sentencing Guidelines.

Europe has already taken steps to create incentives for companies to establish compliance programs. The Commission of the European Union has mitigated the penalties for firms for a number of years when they have been found to have compliance programs with respect to competition law (Tansey, 1995:1).

Australia may be the world leader, at least on paper, in terms of corporate compliance initiatives. Two pieces of legislation are particularly significant. The first is the Australian Trade Practices Act, enacted in 1986, which regulates such activities as anti-trust or misleading advertising. According to the Act, "an effective compliance program can constitute a corporate defense" and is also a key factor in the assessment of the penalty. Not only sound policies and procedures must be adopted, but the corporation must also actively supervise and enforce these policies (Tansey, 1995:2). Australia also took a major step in 1994 by amending its Criminal Code (assented to on March 15, 1995). One of the key provisions of the Code now states that a corporation can be criminally responsible if it is established that "a corporate culture existed



within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision" or by showing that "the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision." [Criminal Code Bill 1994, Part 2.5, Division 12, Section 12.3(2) (c and d)]. What is substantially different about this legislation is that it relates directly to liability, and not merely the sentencing of corporations as does the U.S. Sentencing Guidelines.

Canada is somewhat behind the U.S., Europe, and Australia, but is catching up quickly. The Canadian government is now beginning to recognize the importance and value of encouraging companies to develop compliance systems. A recent Consultation Draft Bulletin from the Canadian Competition Bureau, which regulates the Canadian Competition Act (e.g., bid-rigging, price discrimination, misleading advertising), looks remarkably similar to the U.S. Federal Sentencing Guidelines in recommending that companies establish an 'effective compliance program' with respect to the Act. By doing so, the draft Bulletin suggests that companies may benefit in terms of alternative case resolutions, immunity and sentencing recommendations, and due diligence defences. The fact that the program relates not only to sentencing but to actual defences is an aspect which goes beyond the U.S. Guidelines. An 'effective compliance program' is defined as including five components: (1) the involvement and support of senior management; (2) development of relevant policies and procedures; (3) on-going education of management and employees; (4) monitoring and audit mechanisms; and (5) disciplinary mechanisms (Schwartz, 1996:7).

One of the most potentially significant developments in the Canadian legal context for corporate compliance and ethics to date are the recent proposals to amend the Canadian Criminal Code. A consultation paper has been issued which asks for comments on the following question: "Should corporate criminal liability be...based on 'corporate culture'?" (Schwartz, 1996:7). The new Criminal Code section would read as follows: "A corporations commits an offense when there exists within the corporation an attitude, policy, or practice that directed, encouraged, tolerated or led to the offense, or that failed to require its representatives to comply with the law." (Department of Justice Canada, 1994:27). Similar to the Australian Criminal Code, if the Canadian Criminal Code is amended to include such a provision, compliance programs would relate directly to liability, and not merely sentencing or potential defences to liability.

All of these countries have moved to some degree, and in some respects even beyond the U.S. Sentencing Guidelines. This worldwide trend combined with the increasing globalization of business serve as an impetus for other countries to consider the development of legislation similar to the Guidelines.

## **(8) Benefits of Adopting Guidelines**

Would the Guidelines serve a purpose in the rest of the world? One does not have to look too far to find evidence of the extent and cost of corporate fraud and corruption around the world. A survey by KPMG found that "fraud is a significant problem for companies around the world" (KPMG, 1996:4). The survey included a total of 18 countries representing North America, Asia, Europe, Australia, Africa, and the Middle East. The survey found that 52% of respondents stated that they had experienced fraud in the past year, with 48% believing that fraud is a major

problem for their business today and over 50% believing that fraud will continue to increase (KPMG, 1996:4). An Ethics Resource Center study found that 31% of the U.S. employees surveyed had observed misconduct at work in the last year which violated the law or company policy. Of those employees who did observe misconduct, fewer than half actually reported such misconduct to an appropriate person in the company (Ethics Resource Center, 1994:23). One might speculate whether the same situation exists in other countries of the world, suggesting that worldwide corporate misconduct is even more pervasive than current surveys suggest.

There have been several estimates of the total cost of fraud. One commentator suggests that "while-collar crime is conservatively estimated to cost businesses well in excess of \$100 billion per year" (Driscoll et al., 1995:233). The KPMG survey suggests that "...fraud costs corporations worldwide billions of dollars each year" (KPMG, 1996:10). A similar international study by Ernst & Young found that over one quarter of businesses surveyed had lost over \$1 million (U.S.) in total due to fraud (Ernst & Young, 1996:1).

Assuming that the Sentencing Guidelines create economic incentives for corporations to adopt measures to reduce corporate crime, fraud, corruption, and improve ethical behavior, then almost all stakeholders may benefit. Corporations benefit by reducing the extent of corporate crime and unethical activity, meaning the preservation of corporate assets, and to have illegal or unethical activity reported internally before reaching the court system or the media. Consumers benefit by not being forced to bear the costs of unethical activity by employees. Employees benefit by having the corporation provide the means through compliance and ethics programs by which employees are able to do what they know is right and legal, and not to feel pressured to act otherwise. Governments benefit by creating an economic incentive for corporations to self-regulate themselves, relieving much of the burden from enforcement agencies. Society is the net beneficiary of less corporate crime and unethical activity, as potentially hundreds of billions in economic benefits are generated as a result, leading to an overall increase in both the global standard of living and quality of life.

One of the advantages of the Guideline's approach is that motivation for adopting compliance or ethics programs is not necessarily an issue. Although U.S. courts may consider whether the company has adopted the program as mere window dressing, and is not really enforcing its standards, it really does not matter whether the company is complying only because of the Guidelines, or because it is the right thing to do. It may even be the case that even if companies adopt programs as a type of insurance policy, they may eventually come to see that there is an ethical justification for adopting such programs. What is evident is that it is easier to convince senior management to spend money to create a compliance or ethics program when there is an external economic incentive for doing so. Later, after seeing the program in effect, senior management would be in a position to see the intangible and the economic benefits of having such a program in place.

Another advantage of the Guidelines is that they only suggest a minimum framework for setting up an 'effective compliance program.' Companies can and probably should go beyond the seven elements listed. This approach would be easily transferable to other countries in the world. The flexibility of the approach would enable countries to develop their own recommended elements. For example, the Canadian government only lists five elements in their list of components of an

'effective compliance program.' What companies have found most helpful about the Guidelines, however, is that at least, they provide a definition of what constitutes an acceptable compliance program.

### **(9) Limitations of Guidelines**

Despite the potential benefits for other countries of adopting something similar to the Guidelines, there are still a number of potential limitations to the Guidelines which must be recognized and addressed. One possible criticism of the Guidelines is that they really only create an incentive for companies to create legal compliance programs. In other words, although the Guidelines are often mentioned in conjunction with ethics programs, companies are really only being required to adopt measures which require employees to follow the law, and not necessarily engage in activity which goes 'beyond the law.' A secondary problem is that companies may end up creating codes of ethics which are essentially legal documents, which are more difficult to understand and less accepted by employees (Sentencing Commission, 1995:177).

It is somewhat understandable that the Guidelines take this approach. To make a pronouncement that companies must create a program which leads to employees acting 'beyond the law' or 'ethically' and will be rewarded for doing so would not necessarily serve a purpose, and may no longer be functional. In addition, several companies are finding that although they might begin with a legal compliance approach, over time they shift the emphasis of their programs to an ethics, values, or integrity approach. For example, Levi Strauss and Co., which began with a lengthy code of ethics, has shifted to a one page statement of their values and principles (Raiborn and Payne, 1990:883). Other companies are finding that a combined legal compliance and ethics approach is the best route to go. In any event, one can argue that a company with a legal or compliance program is better than one without any program.

Another potential limitation or weakness of the Guidelines is that they only relate to compliance with U.S. federal law, of a criminal nature. The Guidelines do not relate to state law or civil litigation. The Guidelines also only relate to sentencing (e.g., fines or probation), as opposed to possible defences to liability or actual liability itself. As observed above, other countries such as Australia and Canada may relate compliance or ethics initiatives directly to liability and to possible defences which can be raised. It has also been the case that U.S. state courts and courts considering civil litigation matters are also beginning to take direction from the Guidelines. All of this activity provides a certain degree of assurance that other countries, in adopting legislation similar to the Guidelines, have the ability to determine the range of activity which their legislation would cover.

Another potential problem is that the creation of one of the seven elements of an effective compliance program, the setting up of hotlines to report non-compliance, has a danger of being abused. Employees may want to get revenge on a fellow employee, or merely be expressing discontent with one's employment, and take advantage of an anonymous phone line to report illegitimate problems (Trevino and Nelson, 1995:257). These bogus phone calls can cost the corporation resources, and problems for innocent employees who must proceed to defend themselves against an alleged complaint.

Despite the danger of abuse, one might assume that only a small proportion of phone calls through their hotlines are not legitimate. It can also be argued that the overall benefits of having a hotline, such as keeping problems internal as opposed to reaching external sources, outweigh the potential problems. Corporate experience with hotlines is still relatively recent, and over time and with more experience, problems such as abuse can be dealt with in an appropriate fashion.

An argument may be raised that suggesting that other countries consider the development of legislation similar to the U.S. Guidelines is just a further continuation of the imposition of U.S. legal/ethical norms or standards upon other jurisdictions, or at least the emulation of such norms or standards. This may be one reason why it has been difficult for other countries in the world to adopt legislation similar to the U.S. Foreign Corrupt Practices Act. For many countries, there may be an automatic resistance to following any legislative model being used by the U.S.

What these countries must realize is that in some respects the model was already in existence prior to the Guidelines coming into effect in 1991. For example, the Australian Trade Practices Act and the European Commission have been in existence prior to 1991. It must also be recognized that the development by other countries of legislation similar to the Guidelines would not require non-U.S. corporations to abide by U.S. law (unless they are doing business in the U.S. of course), but merely require these corporations to abide by the laws of their respective home country. It is hard to imagine that a country's government would not have an interest in having their corporations create programs which lead to less corporate crime or unethical activity.

A further limitation to the Guidelines being adopted by other countries is that multinational corporations are going to be faced with a situation involving an even more pronounced conflict of laws or ethical norms. For example, if one of the requirements is to create a code of ethics, how would a company deal with the wide range of laws and ethical norms which exist throughout the world?

This limitation may be less problematic than it appears on its surface. Multinationals are already addressing such concerns by modifying their corporate codes of ethics to adjust to situational concerns. Although many like to argue that ethics vary across the world, others point out that there may be greater consensus on what activity is considered ethical or unethical than is currently accepted. For example, although certain countries of the world are known to be prone to extensive bribery, "...there is no country in the world where bribery is either legally or morally acceptable" (Heimann,1994:7).

## **(10) Implementation Strategy**

The discussion above is designed to provide readers with a basic understanding of the Sentencing Guidelines, their purpose, impact, effectiveness, and arguments to support their adoption by other countries around the world. Clearly, the actual implementation strategy will depend on a number of factors to be considered by the respective governments. The following is a possible checklist of initial considerations in developing an implementation strategy:

- What is the current extent of corporate crime and unethical activity? Are we concerned about these levels and their impact on society?
- What type of political system is in effect? Is there sufficient political support and will for the adoption of this type of legislation? Which government department or departments are best suited to administer this type of legislation?
- How developed is our legal framework (e.g., legislation, court system)? If the legislation is adopted, will it be enforced (i.e., considered by the courts or administrative tribunals)?
- What are the current cultural and religious norms in effect? Should these norms be considered when making recommendations as to what constitutes an 'effective compliance program'?

## **Conclusion**

All of society stands to benefit from a reeducation in corporate crime and unethical activity. The U.S. Federal Sentencing Guidelines provide a model which to date appears to be successful in achieving this goal. Other countries around the world, including Australia, Europe, and Canada, have already adopted or are in the process of adopting similar legislation.

Hopefully the success of the Guidelines, will encourage other countries to consider developing their own legislative incentives for corporations to abide by the law and engage in activities to promote the level of ethics in all organizations.

## **References**

- Center for Business Ethics. (1992). "Instilling Ethical Values in Large Corporations," *The Journal of Business Ethics*, 11, 863-867.
- DeGeorge, R. T. (1987). "The Status of Business Ethics: Past and Future," *Journal of Business Ethics*, 6, 201-211.
- Department of Justice Canada and O'Reilly, J.W.. (1994). "Toward A New General Part of the Criminal Code of Canada: Details on Reform Options,"
- Dricsoll, D.M., Hoffman, W.M., and Petry, E.S. (1995). *Ethical Edge*. (New York: MasterMedia Limited).
- Ernst & Young. (1996, May). "Fraud: The Managed Risk."
- Heimann, F.F. (1994, November 8). "Should Foreign Bribery be a Crime?" presented at the Conference on Bribery in International Trade, Milan, Italy.
- Getz, K.A. (1990). "International Codes of Conduct: An Analysis of Ethical Reasoning," *Journal of Business Ethics*, 9(7), 567-577.
- Izraeli, D. (1995). "Impact of the U.S. Sentencing Guidelines on Organizations", 3rd International Jerusalem Conference on Ethics in the Public Service, June 25-29, 1995.

Izraeli, D. (1997). "Promoting Business Ethics Through Legislation", in Dove Izraeli and Noam Zohar (eds), *Ethics and Social Responsibility - Israeli Studies*, (Hebrew), Tel-Aviv, Tscherikover Publishers - Gomeh Scintific Publications, 1997.

Kaplan, J.M., Dakin, L.S., and Smolin, M.R. (1993). "Living With the Organizational Sentencing Guidelines," *California Management Review*, Vol. 36, No. 1, 136-146.

Kaplan, J. M. (1995, July/August). "The Sentencing Guidelines: A 'Still Developing' Picture," *Ethikos*, Vol. 9, No. 1.

Kaplan, J. M. (1996, May/June). "Why Daiwa Bank Will Pay \$340 million under the Sentencing Guidelines," *Ethikos*, Vol. 9, No. 6.

KPMG (1996, April). "International Fraud Report."

Raiborn, C.A. and Payne, D. (1990). "Corporate Codes of Conduct: A Collective Conscience and Continuum," *Journal of Business Ethics*, 9, 879-889.

Schwartz, M. (1996). "Corporate Compliance and Ethical Decision Making in Canada," *Corporate Conduct Quarterly*, Vol. 5, No. 6, 1996, pp. 6-7, 17.

Tansey, L. (1995). "Corporate Compliance Programs: International Implications," *Corporate Conduct Quarterly*, Vol. 4, No. 2.

Transparency International. (1996). Annual Report.

Trevino, L.K. and Nelson, K.A. (1995). *Managing Business Ethics*, New York:John Wiley and Sons.

U.S. Sentencing Commission. (1995, September 7-8). "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation," *Proceedings of the Second Symposium on Crime and Punishment in the United States*, Washington, D.C..

Prof. Dove Izraeli  
Tel-Aviv University  
Faculty of Management  
69978 Tel-Aviv, Israel  
Tel: (972-3) 640-9176  
Fax: (972-3) 641-4215  
+Fax: (972-3) 640-9560  
E-mail: dovi94@post.tau.ac.il

Mark S. Schwartz (Ph.D. Candidate)  
Schulich School of Business  
York University  
4700 Keele Street  
North York, Ontario  
M3J 1P3 CANADA  
Tel: (905)-881-0069  
Fax: (416)-787-3664  
E-mail: schwartz@yorku.ca