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Proposed Changes to Organizational Sentencing Guidelines

U.S. Sentencing Commission Proposes New Requirements for Effective Compliance Programs and Seeks Comment on Reducing Penalties for Criminal Conduct Involving High-Level Personnel

SUMMARY

On January 21, 2010, the U.S. Sentencing Commission proposed important amendments to the Sentencing Guidelines applicable to organizations, including the definition of what constitutes an effective corporate compliance program. Because the Sentencing Guidelines serve as a principal reference point under federal law for minimum standards in the design and structure of compliance programs, corporations should examine their programs to determine whether they comply with these proposed standards.

As described in more detail below, the proposed amendments address four important areas: (1) the steps a corporation should take when responding to the discovery of criminal conduct; (2) document retention policies; (3) the use of independent corporate monitors; and (4) the governance of corporate compliance functions.

DISCUSSION

Corporate Responses to the Discovery of Criminal Conduct

The Sentencing Guidelines provide that a corporation that maintains an effective compliance and ethics program should receive reduced penalties for criminal conduct that occurred at the time such a program was in place. Corporate legal and compliance professionals rely on the Guidelines to establish a framework of minimum standards for corporate compliance programs.

The Guidelines articulate seven requirements of an effective compliance and ethics program, including the requirement that an organization take reasonable steps to respond to the detection of criminal

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conduct and prevent its recurrence. The Sentencing Commission has proposed new commentary to provide the following additional guidance on the specific steps an organization should take after detecting criminal conduct:¹

- The organization should take “reasonable steps” to remedy the harm resulting from the conduct, which may include, where “appropriate,” paying restitution, self-reporting the conduct to the authorities, and cooperating with authorities in any ensuing investigations.²
- The organization should assess its compliance and ethics program and make modifications necessary to prevent similar criminal conduct, which may include retaining an “independent monitor” to oversee any modifications.³

These proposed amendments suggest for the first time that corporate policies of making voluntary restitution, self-reporting, and cooperation — steps often considered matters of legal strategy — should be components of an effective compliance program. The proposed amendments also contemplate that upon discovering misconduct, corporations should consider voluntarily retaining an independent monitor to oversee enhancements to its compliance program. While such monitors have frequently been imposed by the Department of Justice as part of corporate criminal resolutions, the proposed amendments contemplate for the first time the voluntary retention of third-party monitors as part of pre-resolution remedial efforts.

Document Retention Policies

The proposed amendments would add new commentary regarding the creation and implementation of document retention policies. First, the proposed amendments would require high-level personnel to “be aware” of the organization’s document retention policies and ensure that such policies satisfy the requirements for an effective compliance program and reduce the risk of liability for the corporation.⁴ Second, the proposed amendments would provide that, in connection with its obligation to periodically assess the risk of criminal conduct, a corporation should ensure that “all employees” are aware of the organization’s document retention policies.⁵

Recommended Conditions of Probation

The proposed amendments would expand the recommended conditions of probation that a court may impose on a corporation, including requiring the corporation to submit to “regular or unannounced examinations” of its records and facilities by an “independent corporate monitor,” who may also be

¹ “Proposed Amendments to the Sentencing Guidelines,” at p. 35 (Jan. 21, 2010), *available at* http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf (“Proposed Amendments”). Comments on the proposed amendments are due by March 22, 2010, with a public hearing to be scheduled later this year.

² Proposed Amendments, at p. 35.

³ Proposed Amendments, at p. 35.

⁴ Proposed Amendment, at p. 35.

⁵ Proposed Amendments, at p. 35.

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charged with assessing the efficacy of a corporation's compliance program.⁶ These proposed changes would make clear that a court may impose a requirement — the appointment of independent corporate monitors — already frequently included in deferred-prosecution and non-prosecution agreements.

Reduced Criminal Penalties for Misconduct Involving High-Level Personnel

The Sentencing Commission also requested comment on whether corporations should receive reduced penalties for having an effective compliance program even where high-level personnel were involved in criminal conduct. This change would create an important exception to the current Guidelines provision barring a corporation from receiving any credit for maintaining an effective compliance program if high-level personnel were involved in the underlying criminal conduct.

Importantly, the Sentencing Commission articulated three conditions a corporation must satisfy in order to qualify for this proposed exception:⁷

- The individual responsible for compliance in the organization must have had direct reporting authority to the board.
- The compliance program must have detected the offense before it was discovered or was reasonably likely to be discovered by someone outside the organization.
- The organization must have promptly reported the violation to the appropriate authorities.

If enacted, this provision would suggest a significant governance change for some corporations — namely, that the most senior compliance official have a direct reporting line to the corporation's board of directors.

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⁶ Proposed Amendments, at p. 37. The proposed amendments also provide that compensation and related costs for the independent corporate monitor would be paid for by the organization.

⁷ Proposed Amendments, at p. 39.

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