

White Collar Criminal and Civil Litigation and Compliance

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U.S. Sentencing Commission Sends Congress New Requirements for an Effective Compliance and Ethics Program

The U.S. Sentencing Commission recently promulgated amendments to the Federal Sentencing Guidelines that pertain to the sentencing of corporations and other organizations.¹ Companies will want to consider whether and how to modify their compliance and ethics programs in light of these amendments.

Under the Federal Sentencing Guidelines, a company convicted of a crime is eligible to have its sentence reduced by demonstrating that it had an effective compliance and ethics program in place at the time of the offense. Under the current Guidelines, companies are automatically disqualified from the benefit of this provision if “an individual within high-level personnel of the organization...participated in, condoned, or was willfully ignorant of the offense.”² The new amendments remove this automatic disqualification provision. Pursuant to the amendment, companies will now be eligible for reduction to their Guidelines sentences provided the following four criteria are met:

- the top personnel with operational responsibility for the compliance and ethics program “have direct reporting obligations to the governing authority or an appropriate subgroup thereof” (such as an audit committee);
- the compliance program uncovered the problem before it was discovered from outside the organization or “before such discovery was reasonably likely”;
- the company “promptly reported the offense to appropriate governmental authorities”; and
- “no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.”

Another important amendment elaborates on one of the general requirements of an effective compliance and ethics program. That requirement provides as follows: “[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.”³ The amendment incorporates two components as guidance. First, the company should take reasonable steps to remedy the harm, which may include self-reporting the problematic conduct, cooperating with authorities and, where appropriate,

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¹ The amendments will become effective November 1, 2010, unless Congress rejects them.

² § 8C2.5(f)(3).

³ § 8C2.1(b)(7).

providing restitution to identifiable victims. Second, the company should take steps to prevent further similar conduct and ensure its compliance program's effectiveness by assessing the existing program, making necessary changes, and possibly using an "outside professional advisor" to monitor such changes.⁴

The suggestion to employ an "outside professional advisor" parallels the demand frequently made by the Department of Justice, in negotiating deferred prosecution agreements with corporate defendants, that companies engage an independent monitor to ensure compliance with such agreements. This practice has generated great controversy over the past several years, largely because of the expense and intrusiveness of monitorships. Although the amended Guideline does not mandate the use of (or even define) an "outside professional advisor," the import of the amendment is clear: Companies that engage an outside consultant to verify compliance will be better positioned to receive favorable treatment at sentencing.

⁴ Amendment to Commentary to § 8B2.1 regarding Subsection (b)(7).

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