



PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES WILL IMPACT CORPORATE COMPLIANCE PROGRAMS

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The proposed amendments are effective November 1, 2010, unless blocked by Congress.

On April 30, 2010, the U.S. Sentencing Commission ("the Commission") sent Congress proposed amendments to the U.S. Sentencing Guidelines ("the Guidelines"). The amendments include important changes to the requirements that an organization must meet in order to have an "effective compliance and ethics program" and, thereby, to potentially mitigate any sentence imposed in the event of a criminal prosecution. The most significant changes clarify how an organization's senior compliance personnel should interact with the Board of Directors and address how an organization must respond when it discovers criminal conduct.

Sentencing Guidelines for Organizations

The Guidelines for the Sentencing of Organizations were adopted in 1991 and are found in Chapter Eight of the Guidelines Manual. The Commission's goal in promulgating the Guidelines was to provide federal judges with a framework to use in imposing sentences on corporate defendants. In 2004, the Commission substantially revised Chapter Eight by making the existence of an "Effective Compliance and Ethics Program" a factor the court could consider in deciding the appropriate sentence for a corporation.

The Chapter Eight Guidelines are also important because the Justice Department's charging policies, as outlined in the U.S. Attorney's Manual, instruct prosecutors to consider Chapter Eight when deciding whether to charge a corporation and which charges to select. Specifically, U.S. Attorney's Manual Section 9-28.800 instructs prosecutors to ask the following questions before making charging decisions with respect to a corporation: (1) whether the corporation's compliance program is well designed; (2) whether the program is being applied in good faith; and (3) whether the compliance program is effective. In order to answer these questions (and, in turn, make the appropriate corporate charging decision), prosecutors are directed to the definition of an effective compliance and ethics program in Chapter Eight of the Guidelines.

Sentencing Reductions for an Effective Compliance Program

The recently proposed amendments effect companies because they significantly revise the definition of an effective compliance program and because they clarify, for the first time, that a company that maintains an effective compliance program is still eligible to receive a three-level sentencing reduction even if high-level employees were involved in the company's wrong-doing. However, in order to receive this benefit the company must include the following in their compliance and ethics program:

- The person with responsibility for the compliance program reports directly to the board of directors or an appropriate sub-group of the board;
- The compliance program must have detected the offense before discovery outside of the corporation or before such discovery was reasonably likely;
- The company promptly reported the offense to appropriate government authorities; and
- No person with operational responsibility for the compliance program participated in, condoned, or was willfully ignorant of the offense.

Responding to Criminal Conduct

Chapter Eight was also amended to detail what actions a company must take after detecting criminal conduct. After discovering an offense, an effective compliance program requires that the company "take reasonable steps" to "remedy the harm caused from the criminal conduct." These steps may include "providing restitution to identifiable victims" and "self-reporting and cooperation with authorities."

After discovering criminal conduct, a company must also assess its current compliance and ethics program and make appropriate "modifications to ensure the program is effective." Significantly, the Guidelines now explicitly encourage the retention of "an outside professional advisor" to assist in updating a company's compliance program and "ensure adequate assessment and implementation of any modifications."

Reviewing Existing Compliance and Ethics Programs

These revisions to the Guidelines highlight the importance of maintaining an effective and up-to-date compliance and ethics program. The amendments also provide a useful reminder that a company's compliance program is not static; rather, it requires regular review and revision. When reviewing existing programs in light of the new amendments, compliance personnel should focus on these new requirements and should also review the company's plan for promptly identifying and responding to any potential criminal conduct.

For more information or for assistance in evaluating your Compliance Program in light of the proposed amendments to the Sentencing Guidelines please contact [Chelsea S. Rice](mailto:csrice@ober.com), at 202.326.5020 or csrice@ober.com or [Richard W. Westling](mailto:rwestling@ober.com) at 202.326.5012 or rwestling@ober.com. Ms. Rice and Mr. Westling are attorneys in Ober|Kaler's Government Investigations and White Collar Defense Group and are based in the firm's Washington, D.C. Office.

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