



WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE

ALERT

PROPOSED AMENDMENTS TO SENTENCING GUIDELINES ISSUED

By Patrick J. Egan and Christine Soares

On January 21, 2010, the U.S. Sentencing Commission (the “Commission”) issued a notice of proposed amendments to the Sentencing Guidelines, which included amendments to the guidelines regarding the sentencing of organizations accused and convicted of criminal wrongdoing. Generally, when organizations are charged and convicted of a federal offense, the court uses Chapter 8 of the Sentencing Guidelines as a guideline in imposing penalties. Historically, the Sentencing Guidelines have formed the underpinning of corporate compliance. If enacted, the proposed amendments will have a significant effect on corporate structure and decision-making.

The first proposed amendment is to Section 8B2.1, titled Effective Compliance and Ethics Program (the “Compliance Guidelines”), which serves as a guide for effective corporate compliance programs. The proposed amendment focuses on document retention policies and provides that executive management and members of the board of directors must be aware of the organization’s document retention policies and conform those policies to meet the goals of an effective compliance plan. In addition, as part of its periodic compliance plan assessment activity, the organization should verify that all employees are aware of the document retention policies and that those policies conform to the goals of an effective compliance plan.

The second amendment is also to the Compliance Guidelines and sets forth the steps the organization should take after detecting criminal conduct. The steps include self-reporting, cooperating with authorities and providing restitution and remediation to identifiable victims. In addition, the amendment recommends that an organization periodically assess the corporate compliance program, make necessary modifications and, as such, retain an independent monitor to ensure adequate assessment and implementation of the necessary modifications.

In addition, the Commission has proposed an amendment to Section 8D1.4 governing conditions of probation for organizations. The amendment provides, as a condition of probation, that an organization shall be required to retain an independent corporate monitor agreed upon by the parties or appointed by the court. The scope of the independent monitor’s role shall be approved by the court, and the organization shall pay for the monitor’s compensation and costs. Although similar provisions have become a staple of sentence requirements in the recent years, the amendment codifies the practice and provides specific guidance on the role of the corporate monitor.

The Commission also requested comments to a proposed amendment to Section 8C2.5(f)(3), which at present provides a reduction in sentencing for an effective

compliance program. The proposed amendment would entitle an organization to a reduction even where executive management or members of the board of directors are involved if:

- (a) the person with operational responsibility for corporate compliance reports directly to the board level;
- (b) the compliance program is the first to uncover the offense; and
- (c) the organization reports the criminal conduct to the appropriate authorities.

If the proposed amendments are enacted, organizations should consider including their document retention policies in both the corporate compliance plan materials and their employee handbook. Clearly, the

Commission continues to focus and heighten the awareness obligations of an organization's executive management and board of directors, emphasizing the importance of internal reporting relationships to effective corporate compliance.

Comments regarding the proposed amendments are due to the Commission by March 22, 2010. The Commission will then hold a public hearing on these comments.

For more information, please contact Patrick J. Egan at 215.299.2825 or pegan@foxrothschild.com, or Christine Soares at 215.299.2864 or csoares@foxrothschild.com or any member of Fox Rothschild's White-Collar Compliance and Defense Practice.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.