

*White Collar Defense and  
Investigations Practice Advisory*

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*Sentencing Commission Amends Organizational  
Sentencing Guidelines Related to Effective Compliance  
and Ethics Programs**by Andrew Weissmann, Katya Jestin and Paul M. Monteleoni*

The United States Sentencing Commission's recent amendments to Chapter Eight of its Guidelines Manual, which will take effect on November 1, 2010 unless Congress rejects them, will have significant implications for companies seeking to obtain leniency based on the maintenance of effective compliance and ethics programs. Most notably, the Commission adopted amendments:

*1. Encouraging a "Direct Reporting" Structure for Compliance Officers*

The amendments will extend more favorable treatment to compliance programs with direct reporting structures than to other types of programs. Under the current Guidelines Manual, a large corporation in which any high-level personnel had been involved in the criminal offense (including by condoning or being willfully ignorant of it) would be ineligible to receive a sentence reduction for having an effective compliance and ethics program, no matter how effective that program or how promptly the corporation self-reported the criminal activity at issue. An amendment permits an organization to benefit from an effective compliance program even if high-level personnel were involved in the offense so long as:

- the organization's compliance program gives the compliance officer with day-to-day operational responsibility express authority to communicate personally to the organization's Board of Directors or other governing body, or appropriate subgroup,

"(A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program";

- the compliance program successfully detected the offense "prior to discovery or reasonable likelihood of discovery outside of the organization";
- the organization promptly reported the violation to the appropriate authorities; and
- no individuals with day-to-day operational responsibility for the compliance program were involved in the offense.<sup>1</sup>

This proposal would thus extend more favorable treatment to companies that authorize their chief compliance officers to speak directly to the Board or Audit Committee. The new guidelines refer to the compliance officer having "direct reporting obligations" to the Board, and the accompanying commentary makes clear that "direct reporting" means only that the compliance officer must have "express authority to communicate personally" to the Board or pertinent committee.<sup>2</sup>

For those companies that already conduct periodic meetings of the Board or pertinent committee with the chief compliance officer (typically in conjunction with the General Counsel or other supervisor) this amendment would counsel documenting the

compliance officer's authority to bring matters to the attention of the Board or pertinent committee, which could be accomplished in the Audit Committee's charter and in the compliance officer's job description.

## 2. *Aiding Victims as a Remedial Step*

The proposed amendments would also require organizations to take steps to remedy the harm caused by violations including by making restitution to identified victims. Previously, in order to have an effective compliance and ethics program, an organization had to "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."<sup>3</sup> The Commission adopted language explaining that in order to respond appropriately, an organization has to take reasonable steps to remedy the harm resulting from the criminal conduct. While the Commission had proposed language requiring organizations to take steps toward paying restitution to identifiable victims, the Commission ultimately adopted slightly softer language, stating that the steps to remedy harm "may include, where appropriate, providing restitution to identifiable victims."

## 3. *Encouraging Use of Outside Advisors*

The Commission had initially proposed changes that would have increased the use of independent

monitors. In response to criticism of the potential overuse of monitors, the Commission adopted language stating that the steps an organization takes to prevent future similar criminal conduct "may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications [to the compliance and ethics program]."<sup>4</sup>

More significantly, the Commission had previously proposed including appointment of an independent monitor as a recommended condition of organizational probation. This proposed language was not adopted. Along similar lines, the Commission declined to include proposed language that would have recommended as a condition of probation "a reasonable number of regular or unannounced examinations of facilities subject to probation supervision."<sup>5</sup>

## 4. *Rejecting Special Emphasis on Document Retention Policies*

The Commission rejected its previously-proposed language that specifically singled out the organization's document retention policy as one that should be a focus of the periodic risk assessment process and that senior management must know. The Commission deleted the specific reference to document retention policies to avoid giving special emphasis to that one aspect of the compliance program.

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## Endnotes

[1] U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines at 17–18 (Apr. 30, 2010) [hereinafter Amendments], available at <http://www.usssc.gov/2010guid/finalamend10.pdf>.

[2] *Id.*

[3] U.S.S.G. § 8B2.1(b)(7).

[4] Amendments, *supra* note 1, at 17.

[5] U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines at 37 (Jan. 21, 2010), available at [http://www.usssc.gov/2010guid/20100121\\_Reader\\_Friendly\\_Proposed\\_Amendments.pdf](http://www.usssc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf).

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Jenner & Block LLP has substantial experience in assisting organizations implement and evaluate compliance programs, and worked on comments to the Sentencing Commission's amendments discussed herein. Jenner & Block LLP frequently aids organizations in responding to potential criminal conduct or government investigations. For more information about these amendments or Jenner & Block's White Collar Defense and Investigations Practice, please contact:

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