

Change in the Wind for FCPA Ethics and Compliance Programs?

On January 21, 2010, the United States Sentencing Commission (USSC) proposed amendments to the Federal Sentencing Guidelines. These proposed changes included several which are used as the basis for the consideration of penalties for companies which violate the Foreign Corrupt Practices Act (FCPA). The proposed amendments can be found at

http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf

These changes could require serious re-evaluations by companies of their FCPA ethics and compliance policies, the proposed changes which would apply are as follows:

1. Effective Compliance and Ethics Program. The proposed amendment would change the Commentary to clarify the remediation efforts required to satisfy the requirement for an effective compliance and ethics program. These changes would add a new requirement which sets the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution to any harmed victims.

2. Recommended Conditions of Probation for Organizations. This proposed amendment changes the recommended conditions of probation for organizations. Under the proposal, the current distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason are consolidated into one subsection. This will allow a supervising Court, which makes a determination that there is a need for organizational probation, to have at its disposal, all conditional probation terms available for consideration.

3. Engagement of Independent Monitor. This proposed amendment inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects discussions and complaints regarding the use of monitors which have been ongoing over the past years, including incorporating changes from the House bill entitled, "*Accountability in Deferred Prosecution Act of 2009*", introduced in April, 2009 by House Democrats. The proposed changes clarify that the monitor shall make period reports to the supervising Court on the organization and the disposition of funds received. Finally, the proposed amendment inserts specific language requiring the company to submit to a reasonable number of regular or unannounced examinations of books and records by experts engaged by the Court or the monitor.

4. Board and High Level Management Involvement. This proposed amendment makes three requirements aimed at the highest levels within a company. First the Board "shall be knowledgeable...about the compliance and ethics program and shall exercise reasonable oversight"...Second, a "High-level" person within a company is required to ensure the organization has an effective ethics and compliance program. Third, specific individuals may have day-to-day responsibility for the ethics and compliance program

but they must have access to “high-level personnel...or the governing authority” AND must be given “adequate resources” and “appropriate authority” to complete their charge.

Interestingly the USSC requested comments from the public on whether an organization should receive certain credits towards a reduced sentence when high-level personnel (*think Jack Stanley?*) are involved in a violation of the FCPA or other offense covered by the Sentencing Guidelines. The Sentencing Commission posed three queries for comment as to this possible mitigation:

- (A) Did the persons with the “operational responsibility” for the company’s ethics and compliance program have direct reporting authority to the Board of Directors or a Board Committee?
- (B) Was the ethics and compliance program successful in “detecting the offense prior to discovery” or when it was reasonable likely to be discovered by a person outside the company?
- (C) Did the company promptly report the violation to the appropriate authority?

The public has 60 days, or until March 12, 2010, to submit written comments regarding the proposed amendments. The USSC will hold its public hearing to discuss the proposed amendments on Thursday, March 18, 2010, in Washington, DC.

These changes to the Sentencing Guidelines should be monitored closely by companies as they represent significant amendments to the Sentencing Guidelines. It appears that the Department of Justice is moving to force companies to place compliance and ethics in a higher profile within their organizations and not simply to pay lip service, along the lines of “we have a code of ethics and act responsibly”.

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