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PROPOSED AMENDMENTS TO FEDERAL SENTENCING GUIDELINES POTENTIALLY IMPACT ORGANIZATIONAL COMPLIANCE PROGRAMS

On January 21, 2010, the United States Sentencing Commission (the “Sentencing Commission” or the “Commission”) published for public comment proposed amendments to the Federal Sentencing Guidelines (the “Guidelines”).¹ Amendments to the Guidelines as they pertain to organizational compliance programs and the conditions of probation recommended for organizations were among the changes the Sentencing Commission proposed. This client alert discusses these proposed changes.

Introduction

Congress established the Sentencing Commission in the Sentencing Reform Act of 1984² to achieve uniform sentencing nationwide for federal defendants. Congress charged the Commission with the task of establishing the Guidelines and distributing them for use in the federal courts. The Commission promulgated the Guidelines for individual defendants in 1985 and added provisions pertaining to organizational defendants such as corporations, partnerships, associations, and trusts in 1991.

It was not until 2004, however, that the Sentencing Commission announced significant amendments to the portions of the Guidelines relating to organizations and established one of the sections at issue in this alert—the section related to an organization’s establishment of an effective compliance and ethics program. The 2004 amendments responded to a provision in the Sarbanes-Oxley Act of 2002³ that directed the Commission to review and, as appropriate, amend the Guidelines that apply to organizations to ensure that they “are sufficient to deter and punish organizational criminal misconduct.”⁴

For nearly 25 years, the Guidelines were mandatory—absent a few exceptions, courts were forced to sentence defendants within the Guidelines’ sentencing or sentencing fine range—but, in *United States v. Booker*,⁵ the Supreme Court made the Guidelines merely

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¹ See Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525 (Jan. 21, 2010).

² Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

³ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

⁴ See § 805(a)(2)(5), 116 Stat. at 802.

⁵ 543 U.S. 220 (2005).

advisory.⁶ Now, courts must consider the Guidelines' sentencing range but are permitted to tailor sentences in light of other statutory concerns too.⁷ A sentence within the Guidelines' range is, however, presumptively reasonable if challenged on appeal.⁸

The Sentencing Commission proposes to amend two sections of Chapter Eight of the Guidelines, which covers organizational defendants. Chapter Eight "is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."⁹ The possible sanctions of organizational defendants that courts have at their disposal under the Guidelines include fines, restitution, forfeiture, and probation.¹⁰

Generally, there are four factors that increase the ultimate punishment of an organization: (1) the involvement in or tolerance of criminal activity; (2) the organization's prior history; (3) the violation of an order; and (4) the obstruction of justice.¹¹ There are two factors that mitigate an organization's ultimate punishment: (1) the existence of an effective compliance and ethics program within it; and (2) self-reporting, cooperation, or acceptance of responsibility by the organization.¹²

The proposed amendments to the Guidelines alter one of the mitigation factors, an organization's maintenance of an effective compliance and ethics program, and also simplify the recommended conditions of probation for organizations. Additionally, the Sentencing Commission seeks public comment on whether to encourage direct reporting by compliance personnel to a company's board of directors.

Proposed Amendments to Section 8B2.1—Effective Compliance and Ethics Program

Section 8B2.1 of the Guidelines lists the required steps that an organization must take to have an "effective compliance and ethics program"—one entitling it to mitigation—under the Guidelines. The proposed amendments clarify subsection (b)(7), the step regarding remediation efforts after an organization has discovered criminal conduct. Subsection (b)(7) provides that "[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."¹³

The proposed amendments add to the Guidelines an Application Note for subsection (b)(7) to provide guidance on what actions constitute "reasonable steps" for the purposes of subsection (b)(7). First, the Note provides that if the criminal conduct has an identifiable victim or victims, "the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct."¹⁴ Other appropriate responses, it provides, include self-reporting and cooperation with authorities.¹⁵ Second, the Note states that the organization should assess and, if necessary, modify its compliance program to ensure that the program is more effective.¹⁶ Finally, the proposed Application Note states that if an organization chooses to modify its compliance program, the organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.¹⁷

⁶ See *id.* at 245–46.

⁷ *Id.*

⁸ *Rita v. United States*, 551 U.S. 338, 347 (2007).

⁹ U.S. SENTENCING GUIDELINES MANUAL ch. 8, pt. A, introductory cmt. (2009).

¹⁰ See, e.g., *id.* § 8C3.1.

¹¹ *Id.* ch. 8, pt. A, introductory cmt.

¹² *Id.*

¹³ *Id.* § 8B2.1(b)(7).

¹⁴ Sentencing Guidelines for United States Courts, 75 Fed. Reg. at 3535. Similarly, restitution is a step considered under the Department of Justice Guidelines in determining whether to prosecute business organizations. See U.S. ATTORNEY'S MANUAL, 9-28.300(A)(6), 9-28.900(A) & (B).

¹⁵ Sentencing Guidelines for United States Courts, 75 Fed. Reg. at 3535.

¹⁶ *Id.*

¹⁷ *Id.*

The proposed amendments also add two Application Notes that provide further guidance on the necessary actions that an organization must take to have an effective compliance and ethics program. The first deals with the obligations of high level and substantial authority personnel; it states that they “should be aware of the organization’s document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law.”¹⁸

The second Application Note echoes this sentiment. It clarifies subsection (c), which requires an organization to “periodically assess the risk of criminal conduct [within it] and . . . take reasonable steps to design, implement, or modify” its compliance and ethics program.¹⁹ The Application Note requires an organization, as part of this assessment, to monitor “the nature and operations of the organization with regard to particular ethics and compliance functions” and states, as an example, that “all employees”—not simply high level or substantial authority personnel—“should be aware of the organization’s document retention policies”²⁰

Proposed Amendments to Section 8D1.4—Recommended Conditions of Probation

Section 8D1.4 contains provisions regarding recommended conditions of probation for organizations. The proposed amendments to Section 8D1.4 simplify these recommended conditions and give courts greater discretion in their choice of probation conditions. Currently, the Guidelines distinguish between conditions of probation that are appropriate to ensure that an organization is able to pay an order of restitution, fine, or assessment and conditions of probation that are appropriate for any other reason.²¹ The proposed amendments eliminate this distinction and thus give courts the flexibility to impose any of the available conditions of probation on an organization.²²

The proposed amendments also augment two of the current possible conditions of probation. First, they allow for a court to require an organization to submit to examinations of its books and records by an independent corporate monitor, instead of simply a probation officer.²³ Second, they allow for a court to require an organization to submit to a reasonable number of unannounced examinations of facilities subject to probation supervision.²⁴ Currently, courts can only require organizations to submit to examinations of their books and records as a condition of probation.²⁵

Issue for Comment—Reduced Penalties for Direct Reporting to Board of Directors

Along with seeking comment on the proposed amendments discussed above, the Sentencing Commission also seeks comment “on whether to encourage direct reporting to the board by responsible compliance personnel by allowing an organization with such a structure” to receive mitigation of its ultimate punishment even if high-level personnel are involved in the criminal conduct.²⁶

Conclusion

Even the most vigilant and law-abiding of companies must be aware of the requirements of an effective compliance and ethics program. The proposed amendments and issue for comment discussed above provide helpful insight into how an organization should structure its compliance program so that if it does face the prospect of having to pay criminal fines, it can qualify for leniency.

¹⁸ *Id.*

¹⁹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c).

²⁰ Sentencing Guidelines for United States Courts, 75 Fed. Reg. at 3535.

²¹ *See* U.S. SENTENCING GUIDELINES MANUAL § 8D1.4.

²² *See* Sentencing Guidelines for United States Courts, 75 Fed. Reg. at 3535.

²³ *Id.*

²⁴ *Id.*

²⁵ *See* U.S. SENTENCING GUIDELINES MANUAL § 8D1.4(b)(2).

²⁶ Sentencing Guidelines for United States Courts, 75 Fed. Reg. at 3535.

Whether these proposed amendments become part of the Guidelines in their current form or a similar one, they nevertheless indicate what the Sentencing Commission considers to be among the best practices related to compliance and ethics programs. Consequently, organizations should be mindful of them as they continuously assess and modify their own compliance and ethics programs.

The 60 day public comment period for the proposed amendments and issue for comment ends on March 22, 2010.

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