

CLIENT ALERT

New Amendments to Corporate Sentencing Guidelines: Important Changes in Requirements for Effective Compliance and Ethics Programs

May 3, 2010

Last Friday, April 30, 2010, the United States Sentencing Commission finalized significant revisions to the Federal Sentencing Guidelines. These changes directly implicate the relationship between a corporation's chief compliance officer and the board of directors and the manner in which a corporation should respond to the discovery of criminal conduct.

For the first time, the Sentencing Guidelines now allow a corporation to receive a three level downward departure in sentencing for maintaining an effective compliance and ethics program, even where high level or substantial authority personnel are involved in the offense. However, the following conditions must be met:

- i. the individual(s) with "operational responsibility for the compliance and ethics program" (usually the chief compliance officer) must have had "direct reporting obligations" to the governing authority (usually the board of directors) or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);
- ii. the compliance and ethics program must have detected the offense before discovery outside of the corporation or before such discovery was reasonably likely;
- iii. the corporation must have promptly reported the offense to appropriate governmental authorities; and
- iv. no individual with "operational responsibility for the compliance and ethics program" must have participated in, condoned, or have been willfully ignorant of the offense.

A compliance officer has "direct reporting obligations" if the officer has "express authority to communicate personally" and promptly to the board "on any matter involving criminal conduct or potential criminal conduct." Additionally, the compliance officer must communicate to the board of directors at least once a year regarding "the implementation and effectiveness of the compliance and ethics program."

The Sentencing Guidelines were additionally amended to define a corporation's responsibilities after it has discovered criminal conduct. After the discovery of an offense, an effective compliance and ethics program requires that the corporation take reasonable steps to "remedy the harm resulting from the criminal conduct." These steps may include: i) providing restitution to identifiable victims; ii) self-reporting criminal conduct to relevant governmental authorities; and iii) cooperating with those governmental authorities. The list is not exhaustive.

After the discovery of criminal conduct, a corporation must also assess its current compliance and ethics program and make appropriate modifications as required. Notably, the Sentencing Guidelines now encourage the engagement and retention of an outside professional advisor by the corporation to ensure adequate assessment and implementation of any modifications to the

corporation's compliance and ethics program. This change is significant because the retention of an outside monitor usually occurs as a condition to settling the matter with the government.

The amendments will become effective November 1, 2010, unless Congress takes affirmative action to block the amendments.

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