Legal Backgrounder

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SENTENCING GUIDELINE AMENDMENTS: WHAT IMPACT ON REGULATED ENTERPRISES?

by
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On May 1, 2010, the United States Sentencing Commission ("Commission") announced its 2010 proposals to amend the Federal Sentencing Guidelines ("Guidelines"). This year's amendments are something of a mixed bag for the business community. On the one hand, the Commissioners have changed the formula for calculating corporate fines in a way that makes it possible for companies to receive credit for their compliance program, even if high-level personnel in the company were involved in the wrong-doing. On the other hand, additional amendments will potentially increase the burden for corporations that are sentenced to terms of probation. A third amendment clarifies what it means to have an effective compliance program. But none of the changes is a radical departure from the current law. This LEGAL BACKGROUNDER describes in detail what changes are proposed and how they will operate. It also offers some insight for how businesses should view these changes.

The Proposed Amendments

The Sentencing Guidelines provide a framework that guides much of what happens in the federal criminal justice system. They are used by prosecutors when making charging decisions, probation officers when making pre-sentence reports, and ultimately by federal district judges when imposing sentences.[1] By statute, the Commission was required to propose any amendments to the Guidelines by May 1, which then become effective, unless Congress intervenes, by November 1 of the same year.[2] Included among those the Commission voted to send Congress this year were three amendments affecting what the Guidelines refer to

[1]The United States Sentencing Commission is an independent government agency that provides recommendations about criminal sentencing policy to Congress, establishes sentencing guidelines for use by federal courts, and collects and publishes statistics about criminal sentencing in the United States. United States Sentencing Comm'n, *An Overview of the United States Sentencing Commission* at 1, available at http://www.ussc.gov/general/USSC_Overview_200906.pdf. The Commission's guidelines were mandatory on sentencing judges from the first Guidelines in 1987 until 2005, when the Supreme Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the guidelines cannot be mandatory, but courts must consider them when sentencing convicted defendants.

[2]28 U.S.C. § 994(p).

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as "organization defendants" such as corporations.[3] Chapter Eight of the Guidelines sets forth the procedures for sentencing organization defendants and includes detailed instructions for determining things such as: how an organization should structure its compliance program to receive credit at sentencing (section 8B2.1); how to determine the amount of an organization's criminal fine (section 8C); and the conditions under which it would be appropriate to sentence an organization to a term of probation (section 8D). The proposed amendments change aspects of each of these sections.

Calculating Fines Where Senior Executives Were Involved in the Crime. Section 8C of the Guidelines contains a somewhat complicated method for calculating the amount a convicted organization should be fined. Much of the complexity is found in Section 8C2.5, which assigns a "culpability score" to the organization based on things such as the size of the company, the management level within the company at which the crime took place, and the effectiveness of the organization's compliance program. The culpability score forms the basis for a multiplier that is applied to the organization's base fine level – the more culpable the organization, the higher the multiplier.

Under the Guidelines, an organization's culpability score is lowered if it has an "effective" compliance program, as defined in the Guidelines. Under the existing Guidelines, there is a rebuttable presumption that an organization's compliance program is not effective if senior executives within the company (termed "high-level personnel") participated in, condoned, or were willfully ignorant of the wrong-doing. The amended guidelines change this presumption in certain circumstances. The presumption would not apply where:

i. the individual(s) with operational responsibility for the compliance program has direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g. an audit committee of the board of directors);[4]

ii. the compliance program has detected the offense before discovery outside the organization or before such discovery was reasonably likely;

iii. the organization has promptly reported the offense to appropriate governmental authorities; and

iv. no individual with *operational responsibility* for the compliance program has participated in, condoned, or been willfully ignorant of the offense.[5]

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[3]Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Send Congress Guideline Amendments Providing More Alternatives to Incarceration, Increasing Consideration of Certain Specific Offender Characteristics During the Sentencing Process (Apr. 19, 2010). The amendments will take effect on November 1, 2010 barring any objection from Congress.

[4]The Commission has proposed a new Application Note to explain what it means by "direct reporting obligations" to a governing authority. The note explains that individual has direct reporting obligations if the individual has express authority to communicate personally to the governing authority promptly on any matter involving that may involve criminal conduct and if the individual reports at least annually on organizations compliance efforts. United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 20 (May 1, 2010).

[5]United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 18 (May 1, 2010). The person with "operational responsibility" is the person with day-to-day responsibility over the compliance program. United States Sentencing Comm'n, Federal Sentencing Guidelines § 8B2.1 (2009).

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Interestingly, the Commission's initial proposed 2010 amendments, released in January, did not include this proposed amendment. The amendment set forth above was a response to public comments received by the Commission on its January amendments proposal.[6] Organizations like the Washington Legal Foundation and the Association of Corporate Counsel expressed concern that the presumption of ineffective compliance in the current Guidelines is too broad and hinders the Commission's goal of encouraging internal and external reporting of criminal conduct.[7]

Deciding When a Compliance Program is Effective. The seven criteria by which the effectiveness of an organization's compliance program should be judged are set forth in Section 8B2.1 of the Guidelines. The Commission is not proposing to change any of these criteria but rather, hopes to clarify them by adding a new Application Note – the Commission's formal commentary to the Guidelines.

One criterion of an effective compliance program set forth in section 8B2.1 relates to the "reasonable steps" an organization must take if criminal conduct is detected through the compliance program. The Commission proposes to amend this section by clarifying what constitutes "reasonable steps." The proposed Application Note explains that reasonable steps in responding to detected criminal conduct may include "providing restitution to identifiable victims as well as other forms of remediation…self-reporting and cooperation with authorities."[8] Reasonable steps to prevent further criminal conduct include "assessing the compliance and ethics program and making modification as necessary to ensure the program is effective."[9] In response to public comment, the Commission revised language in the Application Note that proposed use of an independent monitor as an "additional step" over and above other compliance program assessments.[10] Under the final proposed Application Note the use of professional advisors is mentioned as just one of the "reasonable steps" that "may be" taken when criminal conduct is detected.

Recommending Conditions of Probation. The Guidelines deal with probation for organization defendants in sections 8D1.1-4. Section 8D1.1 describes the circumstances in which a court should order probation for an organization, and Section 8D1.4 contains recommended probation terms. Currently, Section 8D1.4 contains certain terms that are recommended only when an organization has been put on probation to ensure payment of a monetary penalty (such as restitution or a criminal fine), and other terms that are recommended when the organization is put on probation for any other reason. The proposed amendment removes this distinction and now recommends the same terms be imposed whenever a company is sentenced to probation. Although the proposed amendment simplifies the recommended conditions of probation for an organization, it may also result in more onerous conditions of probations than would have been ordered previously.

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[6]United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 20 (May 1, 2010).

[7]*See, e.g.*, Comments of the Assoc. of Corp. Counsel at 8 (Mar. 17, 2010), available at http://www.ussc.gov/pubcom_201003/ACC_Hackett_comments.pdf; Comments of the Washington Legal Foundation at 7 (Mar. 22, 2010), available at http://www.ussc.gov/pubcom_201003/WLF_Comments.pdf.

[8]United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 17 (May 1, 2010).

[9]*Id.*

[10]United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 17 (the steps taken to prevent further criminal conduct "may include" the use of an outside advisor). This was a small wording change from the original language proposed in the January 2010 version of the amendments, which proposed the use of an independent monitor as an "additional step" over and above other compliance program assessment measures. United States Sentencing Comm'n, Amendments to the Sentencing Guidelines at 35 (Jan. 21, 2010). Some commenters, including the Washington Legal Foundation, expressed concern that the original language concerning independent monitors, without further context, would obligate companies to include such a provision in their compliance programs. Comments of the Washington Legal Foundation at 3-4 (Mar. 22, 2010), available at http://www.ussc.gov/pubcom_201003/WLF_Comments.pdf.

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What the Proposed Amendments Mean for Regulated Enterprises

We suggest that, on the whole, the proposed amendments should be viewed positively by the business community. If the proposed amendments are adopted, businesses can still get credit for having an effective compliance program, even if their senior executives have been involved in wrong-doing. Moreover, the proposed amendments provide more clarity regarding what steps should be taken if a company uncovers criminal conduct within the organization. In order to benefit from these changes, however, businesses must be vigilant about implementing compliance programs and ensuring that existing programs are consistent with the amendments. For example, businesses should ensure that the individual with operational responsibility over the program has direct and prompt access to the corporate governing body. In the words of the Guidelines, effective compliance programs should "exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[11]

[11]United States Sentencing Comm'n, Federal Sentencing Guidelines § 8B2.1(a) (2009).