

New Federal Initiatives Project

**U.S. Sentencing Commission Holds
Public Hearing on Proposed Amendments
to the Organizational Guidelines**

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April 15, 2010



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U.S. Sentencing Commission Holds Public Hearing on Proposed Amendments to the Organizational Guidelines

On January 21, 2010, the U.S. Sentencing Commission proposed several amendments to the Sentencing Guidelines applicable to business organizations (“Organizational Guidelines”) and requested public comment on whether a future amendment should allow a business organization to receive full credit for having an effective compliance and ethics program, notwithstanding the involvement of high-level personnel in the criminal conduct, if the organization’s compliance personnel have direct reporting authority to the board or the audit committee.¹ On March 17, 2010, the Commission held a public hearing on the proposed amendments and the issue for public comment, and on April 7, 2010, the Commission voted to submit the proposed amendments to Congress.

The proposed amendments are as follows:

- Clarification that appropriate remedial steps under an effective compliance and ethics program should include remedying the harm caused to identifiable victims and the payment of restitution, and that other appropriate remedial steps may include self-reporting, cooperation with enforcement authorities, and the retention of an independent monitor;²
- Inclusion of an expectation that high-level personnel and substantial authority personnel should be familiar with the organization’s document retention policy and should modify the document retention policy, as necessary, to meet the goals of an effective compliance program;³
- Inclusion of an expectation that “[t]he nature and operations of the organization with regard to particular ethics and compliance functions” should be part of an organization’s periodic assessment of the risk for criminal conduct; for example, such an assessment should include whether employees are aware of, and conform to, the organization’s document retention policies;⁴ and
- Consolidation of the potential conditions of organizational probation and addition of the retention of an independent corporate monitor as a new potential condition.⁵

The Commission also requested public comment on the following issue:

- “Should the Commission . . . allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g., an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?”⁶

This issue for public comment is likely to generate the most public attention going forward. Tim C. Mazur, Chief Operating Officer of the Ethics and Compliance Officer Association (“ECO”), noted in his prepared remarks that the issue for comment “attracted the most attention from

EOCA members” and that “[r]espondents to our member survey overwhelmingly support this idea, with important qualifications” relating to (1) the potential ambiguity of “direct reporting authority,” (2) the potential ambiguity of whether “discovery outside the organization” includes employees’ friends or family, and (3) ECOA’s support for also requiring boards “to meet or exceed minimum standards for ethics and compliance literacy.”⁷ If the U.S. Sentencing Commission were to amend the Organizational Guidelines along the lines of the issue raised for public comment, business organizations in which compliance personnel currently lack direct reporting to the board or the audit committee would have a strong incentive to adopt such a reporting structure.

If Congress does not reject the proposed amendments, the amendments will become effective on November 1, 2010.⁸

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¹ See *Sentencing Guidelines for United States Courts*, 75 Fed. Reg. 3,525, 3,534 (Jan. 21, 2010) (to be codified at Chapter 8 of the U.S. Sentencing Guidelines Manual (“U.S.S.G.”)); see also http://www.uscc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf (reader-friendly, redlined version) (last visited Mar. 22, 2010).

² Proposed new Application Note 6 to U.S.S.G. § 8B2.1.

³ Proposed amendment to Application Note 3 to U.S.S.G. § 8B2.1.

⁴ Proposed amendment to current Application Note 6, to be recodified as Application Note 7, to U.S.S.G. § 8B2.1.

⁵ Proposed amendment to U.S.S.G. § 8D1.4.

⁶ Such an amendment would be to U.S.S.G. § 8C2.5(f)(3).

⁷ Statement of Tim C. Mazur, http://www.uscc.gov/AGENDAS/20100317/Mazur_testimony.pdf (last visited Mar. 22, 2010).

⁸ See Office of General Counsel, U.S. Sentencing Commission, *Guideline Amendments: the Amendment Process, Congressional Directives, Amendment Types and Retroactivity Issues*, at 2 (June 1, 2002), available at <http://www.uscc.gov/training/GLA.pdf> (last visited Mar. 22, 2010).

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