LEGAL UPDATES

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Sentencing Commission Signals Change in Effective Compliance Program Requirements

Service

White Collar, Internal Investigations, & Compliance

The United States Sentencing Commission (USSC) has proposed amendments to the United States Sentencing Guideline's (USSG) definition of an "effective" compliance program. This definition is often used by federal prosecutors when deciding whether to indict a corporation or to only pursue individual executives for misconduct they are investigating. The better the compliance program, the more likely the Department of Justice will focus on individual wrongdoers rather than pursuing the corporation as a whole.

The proposed amendment will avoid the current inference that when an act is committed by "high-level" personnel of an organization, there will be no credit for the organization's compliance efforts. Adopting the threshold requirements gives organizations a very important tool in mitigating risk associated with allegations of inappropriate conduct by its managers or employees.

Unfettered Access to the Board of Directors

The greatest practical effect of the new standard, if adopted, is that a compliance program will no longer be deemed "effective" unless it grants compliance personnel unfettered access to the Board of Directors. It appears that the Commission wants compliance personnel to serve as a check on top management. To induce corporations to follow this model, the revision would permit a three-point reduction in the offense-level calculation if 1) the compliance personnel have direct access to the board or a committee of the board, 2) the program detected the illegal conduct before it was discovered by the government, and 3) the organization reported the wrongdoing promptly to the authorities.

Remedying the Harm

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The proposed amendment also adds an application note that expands to the description of a reasonable response by an effective compliance program to include an effort to promptly remedy the harm caused to identifiable victims and the payment of restitution. This is in addition to the already controversial “prompt reporting rule,” which appears to require reporting of wrongdoing even before the corporation has a full understanding of the purported misconduct. The proposed change seems designed to impose restitution payments even before a corporation can determine if additional civil liability will be pursued

What This Means to You

The Commission’s proposed changes to the definition of an effective compliance program will affect any organization that is governed in any fashion by federal law. Corporations and executives can comment on the proposed changes before they are made, but the comments must be received before March 22, 2010. The Commission will also hold a public hearing on the proposed amendments.

Contact Info

Husch Blackwell Sanders can help your organization develop the type of robust compliance program that meets the expectations of the Commission and the federal law enforcement community. If you have any questions, please contact your Husch Blackwell Sanders attorney.

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