

# KIRKLAND ALERT

February 2010

## U.S. Sentencing Commission Proposes Changes Regarding Sentencing of Corporations

On January 21, 2010, the United States Sentencing Commission issued a notice of proposed amendments to the [United States Sentencing Guidelines](#) (“Guidelines” or “USSG”)<sup>1</sup> and to its commentary regarding the sentencing of organizations. In large part, the proposed amendments would add requirements for an effective compliance and ethics program a corporation must meet in order to receive a reduction in its fine under the Guidelines. The proposals would require, among other things, that:

- Compliance officers have direct reporting authority to the board level (e.g., an audit committee of the board);
- In response to the discovery of criminal conduct, the organization provides restitution to victims of the criminal conduct and otherwise remedies the resulting harm;
- The organization assesses its compliance program in response to the discovery of criminal conduct and makes modifications to ensure the program is more effective; and
- The organization promptly reports the violation to the appropriate authorities.

As discussed below, these proposed requirements could significantly impact corporate decision-making in response to a criminal investigation.

The proposed amendments also include new terms of probation for a corporate defendant, including the explicit authorization for appointment of an independent monitor.

The Sentencing Commission is accepting written public comments on the proposed amendments through March 22, 2010, and will hold a public hearing on the proposed amendments in the future. Historically, most proposed amendments have been implemented.

### **1. New Commentary on Effective Compliance and Ethics Programs**

Since their inception, the Guidelines have provided corporations with a significant incentive to have an Effective Compliance and Ethics Program, as defined by USSG §8B2.1. The Guidelines provide a substantial reduction in an organization’s criminal fine if it had an Effective Compliance and Ethics Program in place at the time the putative criminal conduct occurred.<sup>2</sup> Companies eligible for this reduction may reduce the criminal fine by up to 60 percent. Moreover, as a practical matter, corporations have relied on comprehensive compliance and ethics programs to try to convince the Department of Justice to not bring criminal charges in the first place. The proposed amendments raise the bar for what corporations need to implement as part of such a comprehensive program.

The proposed amendments make important additions to the commentary on the text of USSG § 8B2.1—the Guideline defining Effective Compliance and Ethics Program. The most significant change is a new section on the application notes to § 8B2.1(b)(7), which addresses steps a corporation should take in response to detecting

criminal conduct. The new commentary states that organizations should: (1) “take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct” and (2) “assess the compliance and ethics program and make modifications necessary to ensure the program is more effective.”

A requirement to provide restitution to victims in response to discovering criminal conduct would present difficult challenges for a corporation. It presumes that a company will immediately know that it has committed a crime. White-collar criminal questions, however, often turn on the issue of intent, which is typically far more difficult to discern than the underlying conduct. In our experience, federal criminal investigations often last years from the date of the first grand jury subpoena to eventual resolution. The issue of whether a crime has been committed often is hotly disputed. Under the proposed language, a corporation could arguably jeopardize its eligibility for fine reduction if it contests civil litigation by purported victims during a criminal investigation.

If adopted, this requirement will force corporations to make immediate (and perhaps premature) decisions about restitution and remediation. For example, upon learning of potential FCPA violations, should it return the money earned under a suspect contract? If so, to whom? In a securities fraud investigation, must it pay members of a civil class action? Presumably not.

The requirement to assess the existing compliance and ethics program following the initiation of a criminal investigation can be done without conceding that, in fact, a crime has been committed by the corporation. Regarding this requirement, the proposed commentary further notes that “[t]he organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.” No such requirement has previously been part of Guidelines sentencing considerations. Thus, a corporation will need to evaluate whether to appoint an outside monitor even before the completion of the federal criminal investigation.

The proposed amendments also add requirements related to the implementation of document retention

policies as part of an effective compliance program. The new commentary would require that:

“[b]oth high-level personnel and substantial authority personnel . . . 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.”

Senior executives not directly involved in compliance will need to be familiar with document retention policies. Thus, a compliance officer or in-house counsel will want to document that senior executives were informed of the company’s document retention policies.

## 2. Conditions of Probation

Some notable changes are also proposed to § 8D1.4 (“Recommended Conditions of Probation - Organizations (Policy Statement)”) that would add new conditions of probation for an organization. These conditions include: (1) enhanced reporting requirements to the court regarding compliance and the organization’s financial status; (2) appointment of an independent corporate monitor; and (3) submission to “a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.”

While these changes reflect terms of probation commonly sought by the Department of Justice at sentencing or during plea negotiations, the potential incorporation of these terms into the conditions recommended by the Guidelines is significant. Currently, the only reference to monitors in the Guidelines is an application note to the probation violations guideline suggesting a “master or trustee” could be appointed “in the event of repeated violations of the conditions of probation.”<sup>3</sup> The proposed amendment would authorize the appointment of a monitor as an initial term of probation. The “enhanced reporting” and “unannounced examinations” conditions would make corporate probation potentially more onerous.

The inclusion of these specific terms of probation in

the Guidelines could make it more difficult for a corporate defendant to argue against a sentence that includes a monitor or to resist potentially onerous inspection and reporting conditions.

### 3. Extra Credit for Compliance Programs?

Currently, the reduction in a corporation's fine for having an Effective Compliance and Ethics Program is not available if "high-level personnel" "participated in, condoned, or w[ere] willfully ignorant of the offense."<sup>4</sup> The Sentencing Commission has requested comment on the following question:

Should the Commission amend §8C2.5(f)(3) (Culpability Score) to 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?

This request for comment indicates that the Sentencing Commission is considering ways to encourage self-reporting. Such an amendment would create a strong incentive for a corporation to self-report criminal conduct of high-level executives to be eligible for a reduction in its potential fine for having an effective compliance program. Further, a corporation will need to consider ensuring that its reporting structure provides for direct reporting authority for its compliance officer to the board.

This new mix of rewards and burdens following self-reporting makes the voluntary disclosure decision even more difficult.

<sup>1</sup> Though no longer mandatory after *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines remain a critical component of federal sentencing.

<sup>2</sup> USSG §8C2.5(f)(1).

<sup>3</sup> USSG §8F1.1, application note 1.

<sup>4</sup> USSG §8C2.5(f)(1)(3)(A).

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Mark C. Holscher  
Kirkland & Ellis LLP  
333 South Hope Street  
Los Angeles, CA 900171  
[www.kirkland.com/mholscher](http://www.kirkland.com/mholscher)  
+1 (213) 680-8190

Mark R. Filip  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/mfilip](http://www.kirkland.com/mfilip)  
+1 (312) 862-2192

Laurence A. Urgenson  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
[www.kirkland.com/lurgenson](http://www.kirkland.com/lurgenson)  
+1 (202) 879-5145

Michael J. Garcia  
Kirkland & Ellis LLP  
601 Lexington Avenue  
New York, NY 10022  
[www.kirkland.com/mgarcia](http://www.kirkland.com/mgarcia)  
+1 (212) 446-4810

Jeffrey S. Sinek  
Kirkland & Ellis LLP  
333 South Hope Street  
Los Angeles, CA 900171  
[www.kirkland.com/jsinek](http://www.kirkland.com/jsinek)  
+1 (213) 680-8139

Chris Colbridge  
Kirkland & Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
[www.kirkland.com/ccolbridge](http://www.kirkland.com/ccolbridge)  
+44 20 7469 2010

Henry J. DePippo  
Kirkland & Ellis LLP  
601 Lexington Avenue  
New York, NY 10022  
[www.kirkland.com/hdepippo](http://www.kirkland.com/hdepippo)  
+1 (212) 446-4780

John A. Eisenberg  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
[www.kirkland.com/jeisenberg](http://www.kirkland.com/jeisenberg)  
+1 (202) 879-5902

*This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.*