

BOARDMEMBER.com

New Federal Sentencing Guidelines - They Matter

by Joshua T. Buchman and Michael W. Peregrine

Governing board members—including, particularly, members of the compliance and audit committees—should consider revising the existing corporate compliance plan to reflect new amendments to the federal compliance plan guidelines, and to making related changes in other key officer-to-board reporting relationships.

In a recent development with important corporate governance implications, the standards for an “Effective Compliance and Ethics Program” contained in the Federal Sentencing Guidelines have been amended by action of the United States Sentencing Commission. These new amendments make several subtle but important changes to the construct of an “effective” plan, focusing in particular on (a) board reporting relationships of the chief compliance officer, and (b) actions the organization should take following detection of criminal conduct. The full text of the amendments is contained in regulations published on April 29. Given the board's compliance plan oversight obligations, the audit and compliance committees, if not the full board, should be briefed on the implications of these notable new amendments.

What? The Sentencing Guidelines?

As your general counsel will tell you, certain provisions of the Federal Sentencing Guidelines contain specific compliance plan guidelines that are generally regarded as the template from which effective corporate compliance programs are based.

Why is That My Problem?

Here's why. Federal law enforcement authorities will often refer to the Guidelines when determining whether to criminally prosecute an organization at the conclusion of a criminal investigation, or to pursue the organization on civil grounds. The Guidelines are also likely to be considered by corporate governance regulators and private plaintiffs in determining whether to pursue the members of a governing board for breach of its fiduciary duty to oversee the compliance plan. As your general counsel knows, it is for these and other reasons that the Guidelines are generally recognized as the “benchmark” of an “effective” organizational corporate compliance plan. Get it now?

OK. I'm Listening.

Here's what the new amendments do:

—Reflect what the Commission considers to be an appropriate organizational response once criminal conduct has been detected: first, taking steps to remedy the harm caused by the criminal conduct, including (but not limited to) restitution, self-reporting, and cooperation with authorities; and second, conducting an assessment of the organization's existing compliance program, including modifications

to the program as may be appropriate to prevent the occurrence of similar conduct. The amendment specifically refers to the use of outside professional advisors to ensure the adequacy of the assessment efforts.

—In an indirect yet important manner, provide that a direct and personal reporting relationship between the compliance officer and the governing board (or the compliance committee) should be considered a specific component of an effective corporate compliance program.

And What am I Supposed to Do?

1. Don't consider the compliance plan as set in stone, never in need of tweaking. These amendments are a reminder to the audit/compliance committee that the Guidelines remain living, breathing and subject to periodic modification.
2. Support senior management in its efforts to implement changes in the compliance plan in response to the new amendments.
3. Be prepared to force some changes in reporting relationships. The new Guidelines are a clear indication that prosecutors and other government regulators consider a “direct report” requirement an important element of a compliance program and will consider its existence when deciding whether to charge organizations in criminal cases or pursue them in civil cases.
4. Focus on the “big picture”: the new Guidelines are consistent with other new compliance plan developments, including new board compliance oversight requirements mandated in recent DHHS OIG Corporate Integrity Agreements, the increased willingness of the federal government to exercise its right to exclude individuals (including officers and directors) from federal health care programs, and recent health sector application by federal prosecutors of the strict liability “Responsible Corporate Officer Doctrine.”
5. Use this development as an opportunity to raise for internal discussion, where applicable, both (a) board access and reporting relationships involving other key executives (e.g., the general counsel and the chief financial officer); and (b) the most appropriate degree of coordination between the general counsel and the compliance officer (without creating “conflict of interest” concerns by federal prosecutors/investigators).
6. Be prepared for the time when tough board decisions will need to be made regarding self-reporting and other forms of cooperation with the government.
7. Remind the full board of its basic compliance plan oversight obligations, and its need to work with the general counsel to monitor the corporation's legal liability profile.

Michael W. Peregrine and Joshua T. Buchman are partners in the Chicago office of McDermott Will & Emery LLP practicing in corporate governance and trial, respectively. The views expressed herein are those of the authors and do not necessarily reflect the views of McDermott Will & Emery LLP nor any client of the Firm.