

## | WHITE-COLLAR CRIME

## Sentencing Guidelines amendments affect corporate compliance

They focus on the role of the chief compliance officer and 'reasonable steps' an organization can take in response to criminal conduct.

BY MICHAEL W. PEREGRINE  
AND JOSHUA T. BUCHMAN

Lawyers advising organizational clients on compliance matters should be familiar with recent amendments to Chapter 8 of the federal Sentencing Guidelines, promulgated by the U.S. Sentencing Commission. This chapter of the Sentencing Guidelines has long served as the structural foundation for internal self-policing efforts through a corporate compliance program. The new amendments, submitted to Congress on May 1, focus on two areas: the value attributed to a direct reporting relationship from the chief compliance officer to the board of directors, and "reasonable steps" an organization may implement as a response to criminal conduct and to prevent further criminal conduct.

The Sentencing Commission is an independent agency in the judicial branch of the federal government, responsible for developing national sentencing policies for the federal courts. It was established in 1984 by the Sentencing Reform Act, with the goal of ensuring that similar offenders who commit similar offenses receive similar sentences. Chapter 8 of the guidelines, which governs the sentencing of organizational defendants, went into effect in 1991, and it provides incentives for organizations to create meaningful compliance and ethics programs.

The guidelines promote two core principles of an effective organizational compliance program: the exercise of due diligence to prevent and detect criminal conduct

and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law. An "effective" compliance program is defined by the guidelines as a program that is reasonably designed, implemented and enforced to prevent and detect criminal conduct. It is important to remember, however, that an organization's failure to prevent or detect a particular offense does not necessarily indicate that its compliance program is not generally effective.

Section 8B2.1 of the guidelines sets forth the following as the core elements of an "Effective Compliance and Ethics Program":

1. Establish standards and procedures to prevent and detect criminal conduct.
2. Assure that the organization's governing body and its executive leadership are knowledgeable about the content and operation of the compliance and ethics program and exercise reasonable oversight with respect to the implementation and effectiveness of the plan.
3. Apply reasonable efforts not to include within the management team any individual the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance plan.
4. Take reasonable steps to communicate periodically and in a practical manner the plan's compliance standards and procedures by conducting effective training programs involving

(and otherwise disseminating information to) board members, senior executives, management, employees and agents.

5. Take reasonable steps to monitor and audit the effectiveness of the compliance plan (including but not limited to implementing a confidential whistle-blower process).
6. Promote and enforce the compliance program throughout the organization, through the use of appropriate incentives and disciplinary measures.
7. Take reasonable steps, once criminal conduct has been detected, to respond appropriately to the conduct and to prevent further similar conduct, including making changes to the compliance program as appropriate.

### THE GUIDELINES' RELEVANCE

The guidelines are highly relevant to organizational compliance planning for several reasons. First, they provide a foundation from which to develop (and periodically assess) an organizational compliance program that is generally accepted in the industry and that will meet with the approval of government regulators. Although different industry regulations may require specific compliance plan variations, the seven elements in § 8B2.1 are intended to serve as a broad-based compliance plan framework. Second, in the event criminal conduct does occur within an organization, the existence of a guidelines-grounded compliance program may help convince federal law enforcement authorities to pursue civil rather than criminal

charges in connection with the unlawful conduct. Third, implementation and monitoring of a compliance plan based on the guidelines is consistent with the governing board's fiduciary compliance plan oversight obligations. Fourth, and perhaps most fundamental, is that, in the event an organization is criminally prosecuted and convicted, a documented guidelines-based program could serve as the basis for significantly reduced organizational penalties.

From a more practical perspective, it should be noted that any amendments to Chapter 8 of the guidelines are worthy of attention by counsel, simply because of the infrequency with which they are amended. The latest changes represent only the fifth amendment to Chapter 8 since its introduction in 1991.

### THE FOCUS OF THE AMENDMENTS

The recent amendments offer important guidance to counsel on the structure and elements of an effective compliance program. Particularly noteworthy are two principal changes, one that addresses the organization's internal reporting structure and another that addresses remedial efforts required once criminal conduct has been detected.

The first principal amendment promotes (by extension of mitigation credit) the establishment of a direct reporting relationship between the chief compliance officer and the organization's governing body. The commentary to this amendment defines "direct reporting relationship" as an arrangement providing the compliance officer with "express authority to communicate personally with the governing authority or appropriate subgroup thereof (e.g., the audit/compliance committee) (A) promptly on any matter involving criminal or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the organization's compliance plan." This amendment describes a direct reporting relationship that likely exceeds that currently in place at many compliance-sensitive organizations. This amendment illustrates the commission's intent to promote a "bypass" mechanism to foster direct and transparent communication between the compliance officer and the governing board of the organization and is an apparent response to government regulators' concerns about senior management "filtering" compliance information before it reaches the board.

The second principal amendment clarifies the types of "reasonable steps" an organization should take (consistent with its compliance plan) to respond appropriately once criminal conduct is detected and to prevent similar conduct. According to the amendments, these "reasonable efforts" include a variety of steps to remedy the harm caused by the criminal conduct, including but not limited to restitution, self-reporting and cooperation with authorities. Such efforts include an assessment of the organization's existing compliance program, including modifications to the program as may be appropriate to prevent the recurrence of similar conduct. The amendment suggests that it may be appropriate for an organization to engage outside professional advisers to help ensure the adequacy of the assessment efforts. See new Application Note to § 8B2.1(b)(7).

### WHY CLIENTS SHOULD TAKE NOTICE

A key communication/transparency-based theme emerges from these amendments, which counsel may wish to underscore with their internal and external clients. By the amendments, the commission seeks to promote clear compliance-related communications, whether through the internal reporting structure or through the external reporting obligation. The amendment relating to an internal compliance officer reporting relationship is intended to promote objectivity throughout the organization with a system of checks and balances. The amendment relating to reporting and responding to a criminal offense is intended to promote compliance-based transparency and efficiencies.

From a broader perspective, the amendments should be viewed within the context of the substantially enhanced federal law enforcement environment, particularly with respect to financial crimes and the health care industry. As several recent speeches by senior Department of Justice officials have indicated, substantial resources have been committed to an "aggressive, coordinated and proactive" effort to investigate and prosecute crimes in these and other areas. These officials have stressed the value DOJ attributes to organizational maintenance of a "robust" and documented compliance plan. In a May 25 presentation, Acting Deputy Attorney General Gary G. Grindler specifically highlighted the two new amend-

ments to the guidelines as important elements of an effective compliance plan.

Counsel should consider with their clients the following actions relating to the new amendments:

- As a basic step, compare the existing provisions of the organization's compliance plan against the guidelines' seven core elements of an "effective" plan.
- As another basic step, compare the provisions of the organization's plan with the relevant compliance plan provisions of the U.S. Department of Justice's "Principles of Federal Prosecution of Business Organizations." Although not entirely parallel to the Sentencing Commission's guidelines, the Department of Justice's principles contain many useful criteria consistent with the guidelines.
- Examine the existing reporting relationship of the compliance officer to determine whether it allows for direct communication to the board or a board committee with delegated power over compliance matters (e.g., the audit or compliance committee).
- Assure reasonable frequency of compliance officer reporting to the board or compliance committee.
- Review the organization's process for assessing, reporting and remediating incidents of criminal conduct to ensure compliance with the amendments.
- Confirm that the compliance officer's board-reporting relationship is unrestricted by the chief executive officer, the general counsel or any other senior executive.
- Take this opportunity to review with the board and with the responsible board committee their basic fiduciary obligations with respect to oversight of the compliance plan.

*Michael W. Peregrine and Joshua T. Buchman are partners in the Chicago office of McDermott Will & Emery.*