

## USSC Releases New Compliance Plan Effectiveness Guidelines

### Email Alert

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By Michael Peregrine and Joshua Buchman\*

In an important governance development for hospitals and other health industry companies, the standards for an "Effective Compliance and Ethics Program" contained in the Federal Sentencing Guidelines have been amended by recent 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: (1) board reporting relationships of the chief compliance officer; and (2) actions that the organization should take following detection of criminal conduct.

Given the board's compliance plan oversight obligations, health lawyers are well-advised to brief their clients' audit and compliance committees on the implications of these important new amendments.

In relevant part, the Guidelines provide that a corporation convicted of a criminal offense is eligible to receive a reduced sentence if it had in place at the time of the criminal offense a compliance plan that contained the seven specific criteria set forth in Chapter 8B2.1 (Effective Compliance and Ethics Program). For that reason, 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 Caremark-based compliance plan oversight obligations. As most healthcare lawyers recognize, it is for these and other reasons that the provisions of Chapter 8B2.1 are generally recognized as the "benchmark" of an "effective" corporate compliance plan.

The Sentencing Commission's April 29, 2010, action serves to:

- Clarify in two respects the requirement that the organization implement reasonable remediation efforts once criminal conduct has been detected: (1) taking steps to remedy the harm caused by the criminal conduct, including but not limited to restitution, self-reporting, and cooperation with authorities; and (2) 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 advisers to ensure the adequacy of the assessment efforts (*see, new Application Note to Section 8B2.1(b)(7)*).
- Add a new provision that clarifies the circumstances in which the court should subtract three points from the (convicted) corporation's "culpability score" under the Guidelines if the organization maintained an effective corporate compliance plan at the time the criminal conduct took place. The Guidelines generally prohibit the three-point reduction if members of senior management were found to be involved with, condoned, or were willfully ignorant of the criminal activity. The new provision creates an important exception to this prohibition if the following four conditions are satisfied:
  1. Significantly, the compliance officer has a "direct reporting obligation" to the board or subgroup thereof (e.g., the compliance or audit committee);
  2. The compliance program detected the criminal conduct before it was discovered or was reasonably likely to be discovered outside of the organization (i.e., by regulators);
  3. The organization promptly reported the offense to the federal government; and
  4. No corporate compliance officers were involved with, condoned or were willfully ignorant of the criminal offense (*see new Section 8C2.5*).

The Commentary to this amendment defines "direct reporting obligation" as one which provides the compliance officer with express authority to communicate personally with the governing authority: (1) promptly on any matter involving criminal or potential criminal conduct; and (2) no less than annually on the implementation and effectiveness of the organization's compliance plan.

These new amendments are noteworthy for health lawyers to the extent that they:

- Serve as a reminder that the Sentencing Commission Guidelines' "Effective Compliance and Ethics Program" criteria remain living, breathing, and subject to periodic modification;
- 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 (including those involving breach of fiduciary duty);
- Are consistent with other new compliance plan developments, including the board compliance oversight requirements mandated in recent U.S. Department of Health and Human Services, Office of the Inspector General Corporate Integrity Agreements; the increased willingness of the federal government to exercise its right to exclude individuals (including officers and directors) from federal healthcare programs; and recent health sector application by federal prosecutors of the strict liability "Responsible Corporate Officer Doctrine"; and
- Provide an opportunity to raise for internal discussion, where applicable, both: (1) board access and reporting relationships involving other key executives (e.g., the general counsel and the chief financial officer); and (2) the most appropriate degree of coordination between the general counsel and the compliance officer (without creating "conflict of interest" concerns by federal prosecutors/investigators).

The new Guidelines have been submitted to Congress and automatically become effective if not disapproved by Congress before November 1, 2010.

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