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# **New DOJ Charging and Sentencing Guidance and Amendments to the Sentencing Guidelines May Heighten the Value of an Effective Compliance Program**

**Tony Alexis**

*Partner*

202 263 3450

[aalexis@mayerbrown.com](mailto:aalexis@mayerbrown.com)

**Paula Tuffin**

*Partner*

212 506 2278

[ptuffin@mayerbrown.com](mailto:ptuffin@mayerbrown.com)

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# Introduction

- ◆ Recent amendments to Section 8C2.5(f)(3) of the United States Sentencing Guidelines, effective November 1, 2010, provide that a business organization with a compliance program that meets four specified criteria may be eligible to obtain sentencing mitigation benefit for an effective compliance program even in the face of wrong-doing by its high level-personnel.
- ◆ The Amendments also enhance the role played by the chief compliance officer in an effective compliance and ethics program.
- ◆ On May 19, 2010, US Attorney General Eric H. Holder, Jr., issued a new department wide policy on the charging and sentencing of federal crimes representing a shift in policy toward charging decision that gives prosecutors more discretion.

## Introduction (Cont.)

- ◆ Taken together, these recent developments suggest that companies with ‘effective’ compliance programs could stand to benefit at sentencing *and* in the charging decisions made by prosecutors.
- ◆ Today, we will discuss these changes, their impact on corporate charging and sentencing decisions and what the new landscape may mean to your company’s Compliance and Ethics Program.

# Agenda

- ◆ The mechanics of the corporate sentencing under the USSG
- ◆ Negotiation Leverage
- ◆ The ‘Outsourcing’ Problem
- ◆ Components of an effective compliance program
- ◆ Impact of amendments on the design and implementation of effective compliance and ethics programs
- ◆ Recent DOJ Charging Guidance
- ◆ Does Your Company Need to Modify its Compliance and Ethics Program?

# Mechanics of Corporate Sentencing

## ◆ Brief history of USSG

- Went into effect in 1987
  - Sought to take away certain discretion from the sentencing court to promote greater uniformity in sentencing
  - Until *United States v. Booker* , 543 U.S. 220 (2005), the USSG were binding on the court. Now, they are merely advisory.
- In 1991, USSG Chapter 8, Business Organizations, went into effect
  - Goal for corporations
    - Incentivize companies to reduce and eliminate criminal conduct by rewarding self-policing through effective compliance and ethics programs

# Mechanics of Corporate Sentencing (con't)

## — Carrot v. Stick

- Sentencing mechanism grants reductions in criminal punishment (fines) for self-policing activities such as instituting compliance programs, uncovering and addressing criminal conduct promptly, self-reporting and cooperating with government authorities.
- Imposes harsher punishment and denial of sentencing benefits and offsets for lack of a compliance program, position within the company of individual involved in the offense, failure to appropriately address the wrong-doing, obstruction of justice and failure to self-report

# Mechanics of Corporate Sentencing (con't)

- ◆ USSG application to corporations
  - ½ is fairly mechanical
  - ½ is interpretation of factors in making the calculations [subject to stipulations and negotiation]
- ◆ Basic principle is create incentives for corporations to:
  - Self-report discovered allegations of misconduct
  - Cooperate in investigation of misconduct
  - Resolve matter without resorting to trial

# Three Discrete Segments

- ◆ Remediating the harm cause by the alleged act
  - Restitution
  - Remedial orders
  - Community service
- ◆ Calculating the fine
- ◆ Probation and conditions of probation

# Calculating the Fine

## ◆ Four Steps

- Determine the base fine
- Determine the culpability score
  - Series of mitigating or aggravating factors which are ultimately added up to a total
- Determine the multiplier by application of the culpability score
- Mathematical computation of the multiplier and the base fine (a range of a minimum and maximum fine amount)

# Negotiation Leverage by Both Parties – Horse Trading

- ◆ Corporation: Has control over information and employees
  - Can “exchange” this information to government to aid its investigation to earn mitigation and other credit
  - Can gain favorable prosecution determination regarding charging decision
- ◆ Government: Has ultimate charging discretion
  - Can “exchange decision not to charge based on receipt of information
  - Can receive stipulations from corporation because a single point can be worth millions of dollars pursuant to the USSG

# Criticisms of the DOJ's “Outsourcing” of Policing to the Corporations

- ◆ Overly mechanical and too rigid especially in light of perceived ease with which a corporation can be criminally liable under the respondeat superior theory
- ◆ Creates employee moral problems (i.e. snitch atmosphere, second-guessing management)
- ◆ Corporations in certain industries cannot neatly integrate USSG compatible compliance programs
- ◆ Potential to uncover additional crimes – including very minor offenses which could reduce consumer confidence in some corporations

## Criticisms of the DOJ's "Outsourcing" of Policing to the Corporations (con't)

- ◆ Potential to create or stir-up civil litigation (SEC and FCA)
- ◆ Potential to create corporate bureaucracy (Form over substance and potential for financial peril of the corporation)
- ◆ Slow down reasonable business decisions

# Effective Compliance and Ethics Programs

- ◆ Codified in USSG Sec. 8B2.1
- ◆ Two objectives must be met for a compliance and ethics program to warrant credit towards a lower culpability score pursuant to subsection (f) of §8C2.5 and subsection (c)(1) of §8D1.4
  - Incorporate diligent efforts to prevent and timely detect criminal conduct
  - Promote a corporate culture that encourages compliance and ethical conduct

# Criteria for an Effective Compliance and Ethics Program-Pre Amendments

- ◆ Established Standards and Procedures for Preventing and Detecting Criminal Conduct
- ◆ Oversight by High-Level Personnel
- ◆ Due Care in Selecting Substantial Authority Personnel
- ◆ Effective Communication of Standards and Procedures to All Levels of Employees
- ◆ Reasonable Steps to Ensure Adherence to Compliance and Ethics Program; Monitoring, Periodic Evaluations, System for Allowing Anonymous and Reprisal Free Reporting of Suspected Wrong-Doing
- ◆ Consistent Enforcement of Compliance Standards Including Disciplinary Mechanisms
- ◆ Reasonable Steps to Respond to and Prevent Further Similar Offenses Upon Detection of a Violation

## Amended USSG 8C2.5

- ◆ Amended USSG permits eligibility for effective compliance and ethics program credit at sentencing even if members of “high level personnel” has some role in the offense.
  - Must have in place a direct reporting relationship between the individual with operational responsibility for the compliance program and the corporation’s governing body

## USSG 8C2.5 (con't)

◆ Text of amended 8C2.5(f) (3) (C):

(C) “Subparagraphs (A) and (B) shall not apply if

(i) the individual or individuals with operational responsibility for the compliance and ethics program (see Sec. 8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);

## USSG 8C2.5 (con't)

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.”

## Application Note 11

◆ Application Note 11:

*“For purposes of subsection (f)(3)(C)(i), an individual has ‘direct reporting obligations’ to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.”*

# Interplay Between Amendments and Recent DOJ Charging Guidance

## ◆ Holder Memorandum

- Text
  - Meaning of phrase “individualized assessment”
  - “Circumstances relating to the commission of the offense”
  - US Attorneys Manual guidance
- Prior Policy Pursuant to Attorney General John Ashcroft
- Appears to be a shift towards greater prosecutorial discretion in charging decisions and sentence requests
- Individual circumstances, like exceptional compliance programs, could carry more weight than they currently do when negotiating case resolution with the government

# What Does This Mean for My Compliance Program?

## ◆ What we know

- The amended guidelines put a premium on programs where the CCO reports directly (and often) to the Board of Directors or Audit Committee
- Potential for sentence reduction
- The USAM directs AUSAs to considers the same factors as those in the USSG when making charging decisions
  - Potential for obtaining a lesser charge
- The Holder Memorandum instructs prosecutors to make individualized assessments of the extent to which charges fit the specific circumstances of a case, opening the door a bit wider for consideration of a company's compliance program in charging decisions and sentencing requests.

## What to Do With This Information

- ◆ Do a thorough risk analysis of your company's exposure to federal investigation/prosecution
  - Regulations that govern your industry
  - FCPA
  - Employee knowledge of your company's ethical standards
  - Previous compliance issues

# What to Do With This Information (con't)

- Examine existing compliance and ethics program
  - Does it accomplish the USSG objectives?
  - Does it uncover potential wrong-doing quickly?
  - Once uncovered, does the program offer ways to address the wrong?
  - Are all employees and (in some cases) agents and affiliates well-versed in the program?
  - Does your CCO report to the Board of Directors or the Audit Committee?
  - Are the objectives of your program clear?
  - Is the information transmitted to your board free from influence?
- Examine the costs of bringing your program in line with the USSG

# Factors to Consider

- ◆ Effect Modifications in Reporting Lines May Have on Workplace
  - Disgruntled staff
  - Additional resources required to achieve a USSG consistent policy
    - Are specifically designated personnel required to carry out compliance function?
    - Does compliance need to be a stand alone unit?
    - Is the skill-level of compliance personnel matched to the expectations for the role?

# Questions & Answers



# Mayer Brown Speakers

Anthony M. Alexis  
Partner  
Washington, DC  
(202) 263-3450  
aalexis@mayerbrown.com

Paula A. Tuffin  
Partner  
New York  
(212) 506-2275  
ptuffin@mayerbrown.com