

Revisiting Multinational Corp. Compliance Programs

Law360, New York (April 12, 2010) -- The United States Sentencing Commission recently issued proposed amendments to the Sentencing Guidelines relating to the sentencing of organizations. These amendments are designed to encourage organizations to create and enhance compliance programs.

These amendments, which are likely to become a part of the Sentencing Guidelines, provide important guidance to multinational corporations that are seeking to manage the risks posed by the various legal regimes under which they operate, such as the Foreign Corrupt Practices Act, export controls, sanctions and anti-money laundering laws.

The compliance program contemplated by the Sentencing Guidelines is one where the organization “exercise[s] due diligence to prevent and detect criminal conduct” and “otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”[1]

To reach this point, the Sentencing Guidelines require that organizations take four basic steps to establish an “effective” compliance program.

First, organizations should use a risk-based approach in which they “periodically assess the risk that criminal conduct will occur,” including the “nature and seriousness of such criminal conduct,” the “likelihood that certain criminal conduct may occur because of the nature of the organization’s business,” and the “prior history of the organization.”[2]

Second, they are to designate “high-level personnel” who are to be “given adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority” to whom they can report problems as they arise.[3]

Third, organizations are required to “periodically assess the risk of criminal conduct” and to take “appropriate steps” to modify their compliance programs in light of the revised risk profile of the organization.[4]

Finally, the organization is required to “take reasonable steps to respond appropriately” to any detected criminal conduct, “including making any necessary modifications to the organization’s compliance and ethics program.”[5]

The proposed amendments to the Commentary to the Guidelines strengthen the second and the fourth of these four requirements in the following ways:

Document Retention Responsibilities

The Sentencing Guidelines already provide that an effective compliance program requires the involvement of “high-level personnel” who should “ensure that the organization has an effective compliance and ethics program,”[6] including a requirement that high-level personnel and substantial authority personnel “perform their assigned duties consistent with the exercise of due diligence” and “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”[7]

The proposed commentary “clarifies what is expected of high-level personnel and substantial authority personnel” with regard to document retention.[8] The proposed commentary states that “[b]oth high-level personnel and substantial authority personnel should 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.”[9]

The proposed commentary underscores the importance of document retention by also stating that even employees who are not in a position to oversee compliance responsibilities should similarly be aware of and take steps to ensure that the organization’s document retention policy is conducted in accordance with these goals.[10]

Steps After Detection of Criminal Conduct

The proposed amendment includes a new application note that describes what steps would be considered to be “reasonable” for an organization to take after it has detected criminal conduct. As the proposed commentary notes, if “the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct.”[11]

With regard to situations where the victim is not known, the proposed commentary notes that “[o]ther appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation.”[12]

Direct Reporting

The proposed amendments include an “issue for comment,” which is whether there should be a three-level mitigation of the culpability score where an organization has a compliance program that requires “direct reporting to the board by responsible compliance personnel,” even in situations where “high-level personnel are involved in the criminal conduct.”[13]

Several recent FCPA settlements seem to indicate that the U.S. government considers it very important that there be a direct and fairly significant board involvement in compliance issues, and the Sentencing Commission appears to be moving in the same direction as well.

The Sentencing Commission states that it included this issue for comment to solicit input regarding whether this type of credit would encourage organizations to set up structures where there is direct reporting to the board by compliance personnel.

The Significance of the Changes for Multinational Corporations

The proposed changes emphasize the importance of senior management and board of directors being involved in, and responding appropriately to, violations as they arise. This increasing focus on senior officers and directors is important because it is occurring against a backdrop of increasing U.S. attention to laws and regulations that govern the conduct of multinational corporations.

All this has increased both the risk of violations and the consequences for both multinational corporations and individuals. In this environment, a well-run compliance program, and the establishment of an ethical culture, are the best bulwarks against conduct that can increase the risk of violations.

A good compliance program does more than just deter violations — it also helps to detect violations once they have occurred, provides an internal mechanism to report them, prevents the violations from growing into a pattern, allows the company to conduct an internal review to determine what happened, and gives the company the opportunity to put in place appropriate remedial measures. It serves education, deterrent and discovery functions.

A compliance program is a key investment in risk mitigation, thereby helping the firm carry out its corporate objectives in a prudent and managed fashion. And if worse comes to worst, a well-run compliance program serves the final function of decreasing the potential penalties to be applied, because under the Sentencing Guidelines the existence of a well run compliance program has “a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.”[14]

The complete process a typical multinational corporation would need to follow when putting together the type of compliance program contemplated by the Sentencing Guidelines is beyond the scope of this article.[15] Nonetheless, the following general considerations form the core of the design of most compliance programs:

Risk Identification

The risk-based approach contemplated by the Sentencing Guidelines is a good way to allocate scarce corporate resources. This means that the typical first step is to consider the risks posed by the corporation’s business activities, including an evaluation of the corporation’s business units and their location, its product line or lines, and the corporation’s history of compliance issues.

Control Identification

The corporation typically will determine what controls already have been established and evaluate their adequacy and defects.

Resource Identification

The controls the corporation implements should be commensurate with the resources available. A company should not, for example, put in place a program that demands a substantial investment in due diligence if it has not made the decision to fund such activities. Otherwise, it risks setting itself up to look like it has failed to meet its own compliance standards.

Scope and Objectives Identification

The typical next step is to evaluate the scope and objective of the program: who needs to be covered, what level of training is required, what monitoring needs to occur, and so forth. As noted in the Sentencing Guidelines, it is a good idea to consider the level of oversight and what liaisons the corporation wants at the director and senior management levels.

Compliance Procedures

Compliance procedures need to be developed based upon the particular risk profile of the corporation. It is advantageous to have procedures in place for dealing with red flags and problematic situations as they arise, so that potential violations are both unearthed and investigated promptly.

Training

Training is one of the most important compliance steps, and it should be taken into account from the start of the compliance process. A good balance should be struck between providing a complete program and one that is understandable even to people who do not regularly deal with legal issues and compliance procedures.

Testing Procedures

It is difficult to have a strong compliance program unless it is regularly tested, probed, and analyzed, as contemplated by the Sentencing Guidelines. An evolving best practice is to use periodic assessments and audits to ensure that well meaning compliance procedures are in fact being followed.

Reporting Procedures

Reporting procedures are a key element of any compliance program. Companies should have clear procedures in place from the start regarding when the compliance officer will address complaints and reports, when the general counsel's office will get involved, and when senior management and directors will be informed and need to take action.

Updating Policies and Procedures

Finally, the days of putting a compliance program in place and then leaving it unattended are long gone. As contemplated by the Sentencing Guidelines, multinational corporations should regularly monitor their compliance policies and procedures and update them to reflect both changes in the risk profile of the corporation and to reflect developments in compliance best practices so that they can be incorporated into an updated program.

The new amendments to the Sentencing Guidelines highlight the evolving regulatory risks for corporations that operate in high-risk areas, such as corporations that operate in multiple (especially high-risk) countries.

For multinational corporations dealing with the regulatory risks posed by such laws as the FCPA, the anti-money laundering laws, and the anti-boycott, export control, and sanction regulations, the proposed Sentencing Guidelines amendment provide a good reason for them to re-evaluate their compliance regimes in light of the kinds of evolving best practices symbolized by these proposed amendments.

--By David W. Simon (pictured) and Gregory Husisian, Foley & Lardner LLP

David Simon (dsimon@foley.com) is a partner in the Milwaukee office of Foley & Lardner. Gregory Husisian (ghusisian@foley.com) is of counsel in the firm's Washington, D.C., office.

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[1] Sentencing Guidelines § 8B2.1(a).

[2] Sentencing Guidelines § 8B2.1(a) (Application Note 7).

[3] Sentencing Guidelines § 8B2.1(b).

[4] Sentencing Guidelines § 8B2.1(c).

[5] Sentencing Guidelines § 8B2.1(b)(7). Other points singled out by the Sentencing Guidelines include a requirement for “effective training,” regular communication of its compliance program to employees, and establishing a confidential reporting system. *Id.* § 8B2.1(b)-(c).

[6] Sentencing Guidelines § 8B2.1(b)(2).

[7] Sentencing Guidelines § 8B2.1 (Application Note 3).

[8] Sentencing Guidelines § 8B2.1, Proposed Amendment: Organization Guidelines (Synopsis).

[9] Sentencing Guidelines § 8B2.1 (Application Note 3).

[10] Sentencing Guidelines § 8B2.1 (Application Note 9(A)(iv)).

[11] Sentencing Guidelines § 8B2.1, Proposed Amendment: Organizational Guidelines (Proposed Application Note 6).

[12] Sentencing Guidelines § 8B2.1, Proposed Amendment: Organizational Guidelines (Proposed Application Note 6).

[13] Sentencing Guidelines § 8B2.1, Proposed Amendment: Organization Guidelines (Synopsis).

[14] Sentencing Guidelines § 8D1.2 (background).

[15] The typical steps that a corporation would go through to design FCPA, export control, sanctions, and anti-money laundering compliance programs are provided in Gregory Husisian, “Coping with U.S. Regulation of International Conduct,” a three-part series on compliance with the FCPA, export control, and sanctions regulations that was published in the November 2009 through January 2010 issues of *Insights: Corporate Securities & Law Advisor*. The series can be found at FCPAenforcement.com, a Web site maintained by Foley & Lardner LLP, which summarizes ongoing developments with the FCPA and provides guidance to corporations and individuals seeking to deal with the complications of the FCPA.