

COMMENTS DUE ON POSSIBLE REVISIONS TO CORPORATE SENTENCING GUIDELINES

by
Barry Hartman

In 1991, the United States Sentencing Commission, pursuant to the Sentencing Reform Act, issued guidelines governing the sentencing of organizations convicted of certain federal crimes (“Organizational Guidelines”). Federal judges are constrained to follow these Organizational Guidelines. Among other things, they allow a judge to reduce fines when organizations report violations, cooperate in criminal investigations, discipline responsible employees, and take the steps needed to prevent and detect criminal conduct by their agents. They also mandate higher fines for organizations that lack meaningful programs to prevent and detect criminal violations or when management was involved in the crime. Judges may also impose corporate compliance programs as conditions of probation. Some suggest that a company with a properly functioning compliance program that meets the criteria of the Organizational Guidelines can convince a prosecutor to decline prosecution of the institution.

It is widely believed that failures in corporate governance and compliance lay at the heart of the scandal surrounding the Salt Lake City Olympic Bid Committee in 1998 and the current circumstances surrounding the Arthur Andersen indictment. There is also little doubt that effective corporate compliance programs are necessary to prevent and detect wrongdoing. The effect of the Organizational Guidelines on corporate culture has been profound, ranging from increasing the exposure of individual Board members to liability where there are institutional failures, to the creation of a new position in corporate America — Compliance Officer. At the same time, there may be honest differences of opinion as to what constitutes an effective compliance program, and the appropriate criteria for judging such programs.

Last September, the Commission announced its intent to consider revisions to the ten-year old Guidelines. In that regard, an ad hoc advisory committee with an 18-month term has been created to review the general effectiveness of the Organizational Guidelines and to place particular emphasis on examining the criteria for evaluating the effectiveness of an organization’s program to ensure compliance with the law. On March 19, 2002, the Advisory Group solicited public opinion regarding the nature and scope of what it should consider in this regard.

Some of the concepts being considered include:

- Mandating industry-wide standards for organizational ethics;
- Requiring evaluation of compliance plans against industry benchmarks;
- Devising procedures, such as neutral offices, to assure confidentiality to employees reporting misconduct; and
- Developing effective self-evaluative privileges.

Given the impact that the current Organizational Guidelines have had on corporate America, there is little doubt that revisions will impact corporate operations. Because of the unique nature of the Sentencing Commission’s authority and procedures, now is one of the few opportunities that those most affected by these Organizational Guidelines will have to educate the Commission and the ad hoc advisory committee on what

works and what does not. It must be remembered that any changes to these Organizational Guidelines will not be subject to judicial review, other than in the context of challenges by a defendant facing sentencing under them.

Comments are due on or before **May 20, 2002**. All submissions should be addressed to the Attention of the Advisory Group on Organizational Guidelines, c/o Office of Public Affairs, United States Sentencing Commission, Suite 2-500 South Lobby, One Columbus Circle, NE, Washington, D.C. 20002. (Fax 202-502-4699; Phone 202-502-4500).

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