

A Crime Has Been Committed and the U.S. Attorney is Investigating: How Should Your Organization “Respond Appropriately”?

Does Your Ethics Program Need a Tune-Up?

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As of November 1, 2010, there are new requirements for how an organization must “respond appropriately” to criminal conduct within its ranks, and steps the organization must take to improve its ethics and compliance program, when a crime or other wrongdoing has been committed and detected. Does your ethics program need a tune-up?

A 2004 amendment to Federal Sentencing Guidelines (first adopted in 1991) imposed new, tougher requirements and mandated a cultural imperative for ethical behavior and compliance with law by all corporations and business organizations, large and small -- even non-profit organizations. **All business organizations, particular those dealing with federal agencies, and exposed to risk of non-compliance with federal law requirements,** must now devote high-level attention, leadership and sufficient resources to their ethics and compliance programs. These programs should establish an effective, ongoing process that makes ethical conduct an essential element of a successful business plan and successful operations of the organization.

The 2010 amendment makes some important changes to the Sentencing Guidelines regarding the sentencing of organizations. Notably, the amendment provides encouragement and incentives (by means of potential sentence mitigation) for an organization to adopt a structure that assigns compliance and ethics officers **direct reporting obligations** and **direct access** to the governing authority of the organization (e.g., the board of directors). The 2010 amendment also clarifies the **remediation efforts** required of an effective compliance and ethics program. Finally, the new amendment describes and further clarifies the reasonable steps an organization should take to **“respond appropriately”** after criminal conduct is detected and to prevent further similar criminal conduct, including making appropriate changes to its ethics program to address the risk and to prevent the conduct from happening again.

This recent change in the federal law means that your organization should assess whether your current compliance and ethics program meets the new and tougher requirements for such programs. Making sure that your program meets the standards to be considered

“effective” could prevent violations of law before they occur, and will help you mitigate or reduce the punishment for a criminal offense, if the organization is accused or found guilty of a criminal offense.

The important question for the organization, in light of the recent amendment to Sentencing Guidelines requirements, is whether the compliance and ethics program should be evaluated to appropriately assess the risks of criminal misconduct and to incorporate new processes to address those risks and to prevent and detect violations of law.

The criteria a corporation and other business organizations must follow in order to create “an effective compliance and ethics program” are now more rigorous. There are **seven minimum requirements** that an organization must meet in order to demonstrate that its compliance and ethics program is “effective.” Establishing and maintaining an effective program is essential for an organization seeking to mitigate its punishment (including fines and terms of probation), and to reduce its “culpability score” under the Sentencing Guidelines, for a criminal offense.

The key provision in the Sentencing Guidelines and the recent amendments is a simple mandate: **the organization’s leaders and governing body must instill and promote a culture of ethical behavior and knowledgeable compliance with the law.** The fundamental purposes of the 2010 amendment are to sharpen the focus on ethical conduct, to improve corporate compliance programs, and to prevent and detect criminal conduct within organizations.

Consult with knowledgeable legal counsel to design – or to re-design – and to improve, implement and promote an effective compliance and ethics program for your organization, and to make sure your ethics program is up-to date and in accord with the latest amendments to applicable federal law and the 2010 guidelines amendment.



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