

## UNDER SCRUTINY:

### ***SHB's Government Enforcement & Compliance Update***

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#### GOVERNMENT ENFORCEMENT & COMPLIANCE

Our clients face unprecedented enforcement scrutiny and novel legal theories. Today, government enforcement actions can include civil as well as criminal investigations and litigation. They can involve a host of independent actors including federal and state prosecutors, regulators, whistleblowers and their counsel, and class-action attorneys. These cases must be defended under the watchful eye of investors and the public.

Our Government Enforcement & Compliance Practice consists of former prosecutors – including a former U.S. Attorney, former Justice Department officials and even former corporate executives – who counsel and defend companies, their executives and employees in the full range of criminal, civil and regulatory government enforcement actions at the state and federal level. We counsel clients on how to avoid enforcement scrutiny. When investigations do arise, however, we work with our clients to resolve them as efficiently, cost-effectively and quietly as possible.

#### **NEW ORGANIZATIONAL GUIDELINES CHANGES: INDEPENDENT MONITORS ARE BACK IN VOGUE AND YOU BETTER KNOW WHEN YOUR OLD E-MAIL IS DELETED!**

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On January 21, 2010, the U.S. Sentencing Commission published its proposed amendments for the coming year.<sup>1</sup> Somewhat unexpectedly, the amendments contained several changes to Chapter 8 of the federal Sentencing Guidelines dealing with corporate/organizational criminal acts (the Organizational Guidelines). The changes with the most potential impact focus on the *mandatory imposition* of independent monitors and an increased emphasis on document retention policies as part of an effective compliance program.

The most surprising proposed change to Chapter 8 comes in Section 8D1.4 (3) where the commission expands the usual purpose probation, ensuring that restitution is paid, and adds that “the organization shall be required to retain an independent corporate monitor.” As in the usual deferred prosecution agreement circumstance, this monitor will be impartial, and the entity on probation is responsible for paying the monitor and all costs associated with the monitoring. The commission also proposes that the entity submit to a reasonable number of unannounced examinations of the organization’s facilities and records.

The other somewhat surprising change is the commission’s new emphasis on document retention policies. The proposed changes add language to the definition of an effective compliance program, requiring that high-ranking officials at the company and others with compliance responsibility be well versed in the company’s document retention policies. The commission appears to believe that an organization should not get credit at sentencing for an effective compliance program unless the company’s senior-level employees understand the document retention policy, even though the rest of the compliance program may be robust and effective.

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<sup>1</sup> [http://www.ussc.gov/2010guid/20100121\\_Reader\\_Friendly\\_Proposed\\_Amendments.pdf](http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf)

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**Analysis**

While most practitioners would likely agree that the Organizational Guidelines might create results that over penalized most companies, it is difficult to believe that the perceived problems to be addressed by the proposed Guideline changes were causing great consternation among prosecutors and the white-collar bar. The overwhelming majority of corporate prosecutions are resolved through plea agreements or deferred prosecution agreements, where the government and the defendant have agreed to the sentence long in advance of any appearance in court. These agreements detail the level of fine and other conditions, including terms related to on-going compliance efforts and remediation. Moreover, in the current post-*Booker* world of advisory guidelines, the Guidelines are merely guidelines and courts may follow them at their own discretion. For the small number of organizational prosecutions where the court actually sentences an organization outside of the agreement, however, these changes may have some impact.

The imposition of independent monitors runs counter to recent trends. In the post-Arthur Andersen world, where the use of non-indictment resolutions in corporate prosecutions increased significantly, the imposition of independent monitors became almost a standard practice. In light of some disturbing reports about the cost of these independent monitorships and the various accompanying problems,<sup>2</sup> however, their use has decreased dramatically over the past two years. This decline was further marked by the GAO's December 2009 report which essentially stated that the manner in which independent monitors were retained and functioned was simply not working as intended.<sup>3</sup> Currently, with the exception of the U.S. Sentencing Commission, most white-collar practitioners and prosecutors would certainly agree that independent monitors should be used in the rarest of cases only.<sup>4</sup> The idea that the use of these monitors should be required by the courts seems to run counter to all of the criminal justice system's experience over the past several years.

According to the U.S. Sentencing Commission's FY2008 *Sourcebook*, the majority of organizations sentenced to some form of probation are companies with fewer than 100 employees (based on 2008 numbers, the new *Sourcebook* is not yet available).<sup>5</sup> For these relatively small companies, the imposition of a monitor may be an expense that they cannot bear. In the post-Arthur Anderson world, the Department of Justice has recognized that criminal convictions and the resulting penalties may very well cause more harm than good. The Sentencing Commission's proposal to increase these costs through the mandatory imposition of monitors does nothing but increase the cost to the company attempting to secure probation. As stated above, there are

<sup>2</sup> See, e.g., Phillip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008.

<sup>3</sup> *CORPORATE CRIME: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*; GAO Report to Congress 10-110, December 2009.

<sup>4</sup> *Id.* at 27. Interestingly, of the two judges interviewed by the GAO staff regarding the judicial involvement in the DPA/monitor process, both judges discussed disadvantages with increased involvement while only one said that there may also be some advantage to the court's involvement.

<sup>5</sup> *USSC Sourcebook*, available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>

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certainly a small number of cases where an independent monitor may be appropriate. The decision as to whether this step is needed to ensure compliance, however, is one that is always going to be addressed by a plea agreement or similar resolution (and if it is not, the court may reject the resolution instead of needlessly inserting itself into the prospective compliance process of the independent monitor). In the several organizational cases that do go to trial, the judges should continue to be able to retain discretion to sentence in a manner they believe fits the crime — without the added proposed requirement of a monitor. While one can hope that courts would use their post-*Booker* discretion to determine fair conditions of probation, having an actual requirement for the appointment of a monitor serves no legitimate purpose with the possible exception of creating more well-paying jobs for the few select individuals who become monitors.

While the commission's proposed independent monitor requirement demonstrates a high level of disregard for the recent history of corporate prosecutions, the additional emphasis on document retention policies as part of effective compliance may be even more ill-advised. One could understand the inclusion of some language relating to document retention if document destruction and obstruction were rampant in corporate criminal cases. Based on Sentencing Commission data of the 199 corporate sentences imposed in 2008, however, only three cases involved an increase in culpability score based on obstruction.<sup>6</sup> This small number does not lead one to believe that the problem is pandemic and that companies should be forced to spend additional resources on bolstering their educational endeavors as they apply to document retention. Moreover, as anyone who has represented organizations in criminal matters knows, the second the company learns of the government investigation, document hold letters are distributed, electronic systems are frozen, and all possible steps to preserve evidence are taken. If individual employees are going to destroy evidence, they will do so regardless of any document retention policy.

While there are countless good reasons why companies should have effective document retention policies in place, including that these policies are often mandatory for regulatory reasons, the addition of the Sentencing Commission's document retention language is misplaced. Forcing the courts to review the company employee and executive's knowledge of document retention policies is an additional requirement that serves no useful purpose. If a compliance system is effective, it should be obvious. Training is given to the right people based on their responsibilities and duties, monitoring systems are in place that should catch potential problems long before they become problems, and most importantly, the company lives by the program in a manner leaving no room for the perception that it is a "paper program." Forcing employees and executives to focus on paper and its location is does not serve any useful purpose except to guarantee additional employment for counsel and various compliance vendors that already put these programs in place. Again, every company,

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<sup>6</sup> *Id.* at Table 54.

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regardless of size, should have document retention policies and procedures in place. Employees should know what these procedures are and how they work. Adding this to the Sentencing Commission's laundry list of what effective compliance should be, however, serves no useful purpose.

Instead, this proposal seems to be a misplaced commission grasp to remain relevant after *Booker* and the Justice Department's increased use of alternatives to indictments in resolving organizational matters. Hopefully, the commission will abandon the proposal before its final vote in April. If not, it is likely that most judges will simply exercise their post-*Booker* discretion and focus on the important parts of the company's compliance system and not the manner in which e-mails are saved and how familiar the CEO is with these procedures.

The commission's public comment period on these proposals runs until March 20, 2010. With luck, those versed in current trends in corporate prosecutions will convince the commission to abandon this package of amendments. ■

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