

**Authors**

Paul E. Coggins  
214-740-8104  
pcoggins@lockelord.com

Stacy Williams  
713-226-1297  
swilliams@lockelord.com

Sarah Tubbs  
713-226-1291  
stubbs@lockelord.com

## Update: Amendments to Sentencing Guidelines Related to Sentencing of Organizations

After publishing proposed amendments for public comment earlier this year and assessing public input, the United States Sentencing Commission voted recently to change certain provisions in Chapter Eight of the Federal Sentencing Guidelines regarding the sentencing of organizations. So long as Congress does not take any action, the changes will become effective November 1, 2010.

One amendment clarifies how to respond appropriately to criminal conduct and to prevent further similar criminal conduct after criminal conduct has been detected. The amendment provides that an organization should take reasonable steps to remedy the harm resulting from the criminal conduct through means such as providing restitution to victims or self-reporting and cooperation with authorities. The changes further provide that an organization should assess the compliance and ethics program and make modifications necessary to ensure the program is effective, potentially through the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

Another amendment seeks to eliminate the current automatic bar to compliance credit due to involvement of high-level personnel by creating a limited exception allowing an organization to receive a decrease of the culpability score for an effective compliance and ethics program if the organization meets four criteria: (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup (such as an audit committee of the board of directors); (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely; (3) the organization promptly reported the offense to the appropriate governmental authorities; and (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

These changes are in response to concerns that a general prohibition based on actions of high-level personnel operates too broadly, and that providing an exception to that general prohibition in appropriate cases would encourage internal and external reporting of criminal conduct.

The amendment also adds an application note that provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program." This application note responds to concerns about challenges operational compliance personnel may face

when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

Lastly, an amendment augments and simplifies the recommended conditions of probation for organizations by removing the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

Notably, the Sentencing Commission decided not to incorporate proposed language published for public comment requiring that senior personnel understand the company's document retention policies.

Provided Congress does not prevent these amendments from taking effect on November 1, 2010, organizations may benefit from structuring their compliance and ethics programs to conform with these modifications relating to steps taken in response to criminal conduct as well as enhancing the effectiveness of compliance and ethics programs in terms of reporting and detecting offenses.

### About the Authors

Paul E. Coggins is the head of Locke Lord's national White Collar Criminal Defense and Internal Investigations practice. Mr. Coggins was the United States District Attorney for the Northern District of Texas from 1993-2001. He focuses his practice on white collar criminal defense, and has represented numerous Fortune 500 clients in high stakes litigation before federal courts and the SEC.

Stacy Williams is a partner at Locke Lord. He practices complex commercial litigation and has extensive experience conducting internal and governmental investigations. He also advises clients on corporate governance and compliance matters. He has advised clients on a wide variety of criminal and civil business fraud, including matters involving the Foreign Corrupt Practices Act, antitrust, class actions, export control requirements, and Commodities Exchange Act.

Sarah Tubbs is an associate at Locke Lord. She practices complex business litigation with representative experience including securities litigation, minority shareholder oppression claims, insurance coverage matters, and energy litigation. Ms. Tubbs also concentrates on white collar defense and internal investigations. She has experience defending corporations against government investigations and conducting internal investigations involving the Foreign Corrupt Practices Act, bank fraud, and environmental crimes.

[www.lockelord.com](http://www.lockelord.com)

This *Client Alert* is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. Readers should obtain legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

If you would like to be removed from our mailing list, please contact us at either [unsubscribe@lockelord.com](mailto:unsubscribe@lockelord.com) or Locke Lord Bissell & Liddell LLP, 111 South Wacker Drive, Chicago, Illinois 60606, Attention: Marketing. If we are not so advised, you will continue to receive *Client Alerts*.

Attorney Advertising

© 2010 Locke Lord Bissell & Liddell LLP