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## Proposed Amendments to Sentencing Guidelines Related to Sentencing of Organizations

The United States Sentencing Commission voted last month to publish for public comment proposed amendments to Sentencing Guidelines on a wide range of topics, including potential amendments that would affect the sentencing of organizations. The United States Sentencing Commission was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines have structured the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences. While the Sentencing Guidelines are only advisory and courts are not bound by them under the Supreme Court's 2005 decision in *United States v. Booker*, courts must take the Guidelines into account when sentencing, and a sentence within the Guidelines' recommended range is presumptively valid.

A January 21, 2010, Federal Register Notice details the proposed amendments. Included in the notice are proposed changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations, specifically changes to sections relating to Effective Compliance and Ethics Programs (§8B2.1) and Recommended Conditions of Probation for Organizations (§8D1.4). Also included is an issue for comment relating to reporting mechanisms, which would encourage compliance officers to report directly to the board. There is a 60-day public comment period running through March 22, 2010, and a public hearing on the proposed amendments is scheduled in Washington, D.C., for March 18, 2010.

### Proposed Changes Regarding Effective Compliance and Ethics Programs

The proposed amendment clarifies remediation efforts required for an effective compliance and ethics program. A new application note is proposed that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution, self-reporting, and modifications to the

existing compliance and ethics program to ensure the program is more effective.

Also included are two proposed additions to existing Commentary regarding compliance programs. The first proposed addition to existing Commentary includes a new paragraph clarifying what is expected of high-level personnel and substantial authority personnel with respect to document retention policies. The proposed addition provides that such personnel "should be aware of the organization's document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law."

The second proposed addition to existing Commentary clarifies that when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters assessed. The proposed addition further provides that "all employees 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."

### Proposed Changes Regarding Recommended Conditions of Probation for Organizations

The proposed amendment changes provisions relating to probation by augmenting and simplifying the recommended conditions of probation for organizations. The policy statement currently distinguishes between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason. Under the proposed amendment, the distinctions are consolidated and all conditional probation terms are available for consideration. The proposed amendment also inserts specific language regarding the engagement of an independent (*i.e.*, no conflict of inter-

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est), appropriately qualified, corporate monitor. This language reflects current governmental policy and best practices relating to the appointment of independent corporate monitors. The proposed amendment also inserts specific language requiring the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.

**Proposed Reduced Penalties for Direct Reporting to Board**

Also included is an issue for comment on whether to encourage compliance personnel to report directly to the board by allowing an organization with such a structure to benefit from a three level reduction of the culpability score, even if high-level personnel are involved in the criminal conduct. The Sentencing Commission has commented that direct communication between compliance officers and the board is crucial because it raises matters to the highest levels of the company. Such a reporting structure would help to circumvent the people responsible for illegal acts, and reveals the government's interest in compliance programs with strong reporting mechanisms.

The proposed amendments highlight the importance of comprehensive and effective compliance programs. With the proposed amendments comes more written guidance on how to structure compliance programs and a demonstration of how a thorough compliance program can favorably affect sentencing decisions.

**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.

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