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The War on Judicial Sentencing Discretion

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What Corporate Counsel Needs to Know

The face of federal sentencing law, policy and practice has changed dramatically over the past year — not just for individual criminal defendants, but for corporations as well. Sentencing laws that were stiff before have now become even more onerous, and the opportunities for leniency under the new regime are scarce. This article discusses the legislative and policy changes that specifically impact sentencing for corporations.

The PROTECT Act

The "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003," better known as the PROTECT Act, became law on April 30, 2003. Ostensibly, its purpose was to provide federal funds for a national Amber Alert program. Despite this benign appearance, the legislation has raised the ire of the federal judiciary to an unprecedented level.

Buried in the legislation was a provision designed to greatly inhibit federal judges from sentencing below the applicable sentencing guidelines. *See generally* Pub. L. 108-21, § 401. Some in Congress believed that federal judges — many of whom were former federal prosecutors and Republican appointees — had too often been departing downward from the guidelines.

The purpose of the Sentencing Guidelines is to reduce sentencing disparity for similarly situated offenders and provide certainty in sentencing. To achieve these ends, the guidelines assign particular weights to a plethora of factors pertaining both to the offender and the offense. Obviously, given the infinite combination of offenders and offenses, the guidelines could not possibly take into account every possible relevant factor. And even those factors taken into account could conceivably be present to a degree not contemplated by the US Sentencing Commission when it promulgated the guideline.

Accordingly, Congress expressly wrote into the Commission's enabling legislation that the guidelines must allow judges to depart above or below the otherwise applicable guidelines when factors are present to a degree or kind not otherwise accounted for or contemplated. In this way, federal judges retained, at least until recently, some discretion at sentencing.

In addition to greatly limiting judges' departure authority, the PROTECT Act also required the

Department of Justice (DOJ) and the Commission to develop policies consistent with the legislation that would "ensure that the inciden[ts] of downward departures are substantially reduced." On July 28, 2003, Attorney General John Ashcroft issued a memorandum to all federal prosecutors outlining new Department of Justice's policies with respect to downward departures. It stated that prosecutors should not "acquiesce" to departures except in rare occurrences. In addition, when a judge imposes a departure over the prosecutor's objections, the memo requires the prosecutor, within 14 days, to report the departure to DOJ.

The Organizational Sentencing Guidelines

The first edition of the Sentencing Guidelines, promulgated on Nov. 1, 1987, applied only to individual offenders. The implementation of sentencing guidelines for organizations was delayed by the Commission pending the study of the issue in greater detail by an ad hoc advisory group comprised of national experts on corporate law.

On Nov. 1, 1991, the Commission finally adopted sentencing guidelines applicable to organizations modeled after recommendations of the advisory group. In recognition of the fact that simply fining organizations for criminal offenses may not be sufficient to prevent and punish criminal conduct, the sentencing guidelines for organizations were premised upon compliance programs — a rather novel approach to sentencing. Rather than seeking only to deter crime through stiff penalties *in terrorem*, the organizational sentencing guidelines sought mainly to provide incentives for businesses to adopt new practices designed to prevent crime.

In order for a compliance program to be considered effective for purposes of mitigation at sentencing, the defendant organization had to provide evidence that

- It had established standards and procedures reasonably capable of reducing the prospect of criminal conduct;
- It assigned high-level personnel to oversee compliance with its standards and procedures;
- It exercised due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, to have a "propensity to engage in illegal activities";
- It effectively communicated the standards and procedures to all employees and other agents-for example, through mandatory training programs;
- It took reasonable steps to achieve compliance with its standards, eg, through monitoring and auditing systems reasonably designed to detect criminal conduct, and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution;
- It consistently enforced standards through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals who fail to detect an offense; and
- Upon detection of an offense, the organization took all reasonable steps to respond appropriately to the offense and to prevent further similar offenses - including making any necessary modifications to its program to prevent and detect violations of law.

Corporations that had in place effective in-house programs could receive a significant mitigation in their sentences should they be convicted. Accordingly, their implementation by corporate counsel began to become commonplace even though they were not required by law. Under DOJ charging policy, an effective compliance program could, in some instances, save a company from indictment. Such programs can also reduce civil liability.

Changes to the Criteria

On Feb. 21, 2002, shortly after the 10-year anniversary of the implementation of the sentencing guidelines for organizations, the Commission convened a new ad hoc advisory group to study their effectiveness and to consider possible changes. On Oct. 7, 2003, the advisory group published its report, which made the following recommendations to amend the then-current sentencing guidelines for organizations:

- Emphasize the importance within the guidelines of an organizational culture that encourages a commitment to compliance with the law;
- Provide a definition of "compliance standards and procedures";
- Specify the responsibilities of an organization's governing authority and organizational leadership for compliance;
- Emphasize the importance of adequate resources and authority for individuals within organizations with the responsibility for the implementation of the effective program;
- Replace the current terminology of "propensity to engage in violations of law" with language that defines the nature of an organization's efforts to determine when an individual has a reason to know, or history of engaging in, violations of law;
- Include training and the dissemination of training materials and information within the definition of an "effective program";
- Add "periodic evaluation of the effectiveness of a program" to the requirement for monitoring and auditing systems;
- Require a mechanism for anonymous reporting;
- Include the phrase "seek guidance about potential or actual violations of law" within the criteria in order to more specifically encourage prevention and deterrence of violations of law as part of compliance programs; and
- Provide for the conduct of ongoing risk assessments as part of the implementation of an "effective program."

On April 8, 2004, the Commission "voted unanimously to amend the existing organizational guidelines to make more stringent the guidelines' criteria for effective compliance and ethics programs." While still retaining the seven criteria for effective programs, according to a Commission press release issued on April 13, 2004, the amendments make "the standards for the compliance and ethics program[s] *more rigorous* and put greater responsibility on boards of directors and executives for the oversight and management of compliance programs." (Emphasis added.) Further, the Commission decided that there even may be limited situations in which "an organization may need to waive its attorney-client privilege to qualify for a full, potential fine reduction."

These changes reflect the incorporation of a more philosophical approach to sentencing organizations: ethics. According to the Commission's Vice Chair, Judge Ruben Castillo of the Northern District of Illinois, "A good corporate citizen must in the first instance operate ethically." As a result, not only do the revised guidelines require an organization to "exercise due diligence to prevent and detect violations of law," but the organization must also "promote an organizational culture that encourages a commitment to compliance with the law."

According to the Commission's synopsis of the amendment, the latter requirement "is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms." As the Commission itself realizes, this "focus on ethical corporate behavior is a unique development in the 13-year history of the organizational sentencing guidelines."

Conclusion

Under the new sentencing regime, it now is more difficult for organizations to establish that their compliance programs qualify for consideration in the sentence calculation. At the same time, the PROTECT Act makes it very difficult to obtain a downward departure on other grounds. In-house counsel must be cognizant of these changes in law, policy, and practice in order to minimize the corporation's possible exposure to ever-stiffer penalties under the sentencing guidelines.

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