

May 3, 2004

Corporate Compliance Alert

The U.S. Federal Sentencing Commission has approved changes which compel a re-examination of corporate compliance policies. These changes, on top of the passage of the Sarbanes-Oxley Act of 2002 (SOX), and the resulting SEC and OSHA regulations, new rules from the stock exchanges and new state laws have rendered the compliance policies and practices of many companies inadequate. It is important that all companies review their compliance policies and practices to ascertain that they meet the rigorous new standards for compliance programs imposed by the revised sentencing guidelines and new laws.

Sarbanes Oxley

The Sarbanes-Oxley Act of 2002 (SOX) has motivated many companies to examine their compliance policies and revamp their codes of ethics or codes of conduct. For publicly traded companies, some of SOX's requirements are:

- ♦ The Audit Committee of the Board of Directors must establish procedures for the receipt and proper handling of complaints on a confidential and anonymous basis;
- ♦ The CEO and CFO must certify that annual and quarterly reports are correct in all material respects;
- ♦ All material off-balance sheet transactions or arrangements must be disclosed;
- ♦ No personal loans be made to any executives;
- ♦ The company must adopt a code of ethics for its senior financial officers or if not, publicly disclose why not. Such codes must include standards to promote:
 - ♦ Honest and ethical conduct;
 - ♦ Full, fair, accurate, timely and understandable disclosure; and
 - ♦ Compliance with applicable governmental rules and regulations.

Sentencing Guidelines

The Code of Ethics requirement (set forth in SOX § 406 and Regulation S-K 229.406) is a mandate for a corporate ethics policy and a corporate compliance policy. Many corporations have had compliance policies in existence since

the U.S. Sentencing Commission promulgated the Federal Sentencing Guidelines for Organizations in 1991. Under these Guidelines, a corporation receives sentencing mitigation if it is convicted of a federal crime if the compliance program in place is deemed "effective." In addition to sentencing mitigation, compliance with the Guidelines is thought to be bona fide evidence of corporate intent to obey the law, and can influence prosecutorial discretion in some situations. Further, having an effective compliance program is good business because it can save a corporation from potentially large fines, damages, the expense of litigation and adverse publicity by preventing the occurrence of improper activity.

The Guidelines set forth seven basic criteria as follows:

- ♦ Establish standards and procedures reasonably capable of reducing the chances of criminal conduct.
- ♦ Appointment of compliance officer(s) to oversee plans.
- ♦ Take due care not to delegate substantial discretionary authority to individuals who the organization knows, or should know, are likely to engage in criminal conduct.
- ♦ Establish steps to effectively communicate the organization's standards and procedures to all employees.
- ♦ Take reasonable steps to ensure compliance through monitoring and auditing.
- ♦ Employ consistent disciplinary mechanisms.
- ♦ When an offense is detected, take all reasonable steps to prevent future similar offenses, including modifying the compliance plan, if appropriate.

Sentencing Guidelines Amendments

On April 8, 2004, the U.S. Sentencing Commission unanimously approved a series of amendments to the Guidelines that toughen the seven criteria set forth above. The proposed amendments, scheduled to go into effect on November 1, 2004, add Section 8B 2.1 which elevates the seven requirements from commentary to guideline status. They require an organization to exercise due diligence to detect and prevent violations of law (not just criminal law), and to promote an organizational culture that encourages compliance. They also require that businesses periodically assess the risk that criminal conduct might occur notwith-

standing the organization's compliance and ethics program. Compliance training is explicitly required, and delay in reporting an offense to authorities can disqualify an organization from eligibility. Another change disqualifies an organization if a high-level official in the organization participated in, condoned or was willfully ignorant of the offense. A controversial requirement is that a company must waive the attorney-client privilege if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

Action Required

The convergence of SOX and the amendments to the Sentencing Guidelines makes it critical that all companies review their compliance programs, codes of ethics and codes of conduct to assure that they comply with the new, more rigorous requirements. This involves an examination not only of the policy or code itself to see that it is accurate, appropriate and current, but should also include a review of a company's practices, including training, auditing, investigating and record keeping, to ensure that the compliance effort will be deemed bona fide and effective. Should you have any questions or need additional information, please contact your Seyfarth Shaw attorney.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact Seyfarth Shaw LLP.