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THE FRIEDMAN LLP SEC SERVICES GROUP

Whether you are formulating an initial public offering or are a mature corporation with multiple needs, Friedman LLP's SEC Services Group can make the complex clear. We help companies across the business spectrum negotiate the maze of assurance, regulatory and transactional demands, from managing critical rules and regulations governing reporting procedures and deadlines to reviewing internal control systems and resolving complex SEC matters.

GOVERNANCE, RISK AND COMPLIANCE SERVICES

Friedman LLP's newly launched Governance, Risk and Compliance (GRC) Services Practice provides advisory and implementation services that enable our clients to efficiently and effectively meet their corporate governance, risk management and legal and regulatory responsibilities. We are committed to helping senior management and board members achieve the peace of mind that comes with knowing that significant risks to their "must achieve" objectives are being controlled within acceptable levels of exposure.

An "Effective" Ethics and Compliance Program: A "Must-Have" Mitigation

by Kevin M. Hyams, FCA

Organizations, like individuals, can be found guilty of criminal conduct. The measure of their punishment for felonies and Class A misdemeanors is governed by Chapter Eight of the U.S. Federal Sentencing Guidelines ("the organizational sentencing guidelines"). While organizations cannot be imprisoned, they can be heavily fined, sentenced to probation for up to five years, ordered to make restitution and issue public notices of conviction to their victim and exposed to applicable forfeiture statutes. The Justice Department recently announced heightened enforcement efforts to find and prosecute corporate crime, including, for example, fraud, tax offences, money laundering, environmental waste discharge, antitrust offenses, health and safety offences and food and drug violations.

The organizational sentencing guidelines, amended in 2004 in response to the Sarbanes-Oxley Act and further amended in April 2010, require that all organizations establish and maintain an "effective" ethics and compliance program in order to prevent unethical and illegal conduct.

The potential fine range for a criminal conviction can be significantly reduced--*in some cases up to 95 percent*--if an organization can demonstrate that it had put in place an "effective" compliance and ethics program. Conversely, the absence of an effective compliance and ethics program may be used to increase the punishment the organization receives.

Paula Desio, Deputy General Counsel of the United States Sentencing Commission, in an article entitled "An Overview

Equally important, our GRC services methodology is designed to assist our clients in identifying and exploiting cost-saving and revenue-generating opportunities. [Click here](#) for more information.

[Kevin M. Hyams, FCA](#)



Kevin Hyams is the partner-in-charge of Friedman LLP's

Governance, Risk and Compliance Services Practice. With more than 30 years of experience, he has served a broad spectrum of clients in the retail, manufacturing, financial services, technology, not-for-profit, professional services and telecommunications industries. He is a leading authority on assisting entities of all sizes and across all industries to achieve and maintain governance frameworks and control processes optimized for risk mitigation and cost efficiency.

THIS ISSUE'S SEC SPOTLIGHT INCLUDES:

[Marc G. Nochimson, CPA](#)



Marc Nochimson has over 30 years of experience providing

auditing and accounting services to both public and privately held businesses. As a partner in the SEC Services Group, Marc has an extensive understanding of the requirements of the Sarbanes-Oxley Act, assisting clients with registration statements, comment letters, financial reporting and due diligence procedures on acquisitions and reverse mergers. Marc has also performed operational audits, assessments of internal control and forensic analysis of transportation infrastructure project costs. He has co-

of the Organizational Guidelines," makes it clear that: "Criminal liability can attach to an organization whenever an employee of the organization commits an illegal act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions."

The organizational sentencing guidelines have evolved into the *de facto* blueprint for how companies should structure their corporate ethics and compliance programs and compliance function. The guidelines explicitly define seven minimally required elements to have an "effective" program in the eyes of the law:

1. Standards and procedures designed to prevent and detect criminal conduct
2. Knowledge by the corporation's board about the content and operation of the program and the exercise of reasonable oversight with respect to its implementation and effectiveness
3. Due care in delegating substantial discretionary authority
4. Reasonable steps to communicate the program's standards and procedures throughout the organization, and training that is tailored to each audience
5. Reasonable steps to ensure that the corporation's compliance program is followed, including monitoring and auditing to detect criminal conduct, periodically evaluating the program's effectiveness, and publicizing a system that allows reporting or the receipt of guidance about potential and actual criminal conduct without fear of retaliation
6. Consistent promotion and enforcement of the program with appropriate incentives for proper performance and appropriate disciplinary measures for those who engage in criminal conduct or fail to take reasonable steps to prevent or detect it
7. Reasonable steps to respond appropriately to criminal conduct when detected, and to prevent further similar criminal conduct, including any needed changes to the program

Additionally, the April 2010 amendments, which become effective on November 1, identify four criteria to qualify for credit even if a high-level executive's behavior is in question:

- The person or persons with operational responsibility for the compliance and ethics program must have "direct reporting obligations to the governing authority or an appropriate sub-group,"

authored and presented various national seminars on the subject.



Founded in 1924, Friedman LLP, Accountants and Advisors, is headquartered in New York City with offices in New Jersey and Long Island. The firm employs over 325 personnel, providing accounting, tax and consulting services to public and privately held companies.

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such as an audit committee;

- The compliance program must have detected the offense before any outsiders did or "before such discovery was reasonably likely;"
- The company must have promptly reported the offense to appropriate governmental authorities; and
- Nobody in charge of the ethics and compliance program participated in the misconduct, condoned it or deliberately ignored it.

The new amendments define "direct reporting obligations" as meaning that the person in charge of daily compliance operations has "express authority to communicate personally to the governing authority, or appropriate subgroup thereof, (a) promptly on any matter involving criminal conduct or potential criminal conduct; and (b) no less than annually on the implementation and effectiveness of the compliance and ethics program."

The organizational sentencing guidelines apply to all organizations - publicly or privately held corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities, and governmental units.

Given the high level of protection afforded by implementing the Commission's recommendations, senior management and the board should waste no time in reviewing and revising their ethics and compliance program to ensure that it meets the Commission's standard and affords the organization the maximum mitigation and leniency in the event that it does face the prospect of having to pay criminal fines and other penalties.

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