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March 19, 2010

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs

Re: Notice of Proposed Amendments, 75 Fed. Reg. 3525 (Jan. 21, 2010)

To the Honorable Members of the Sentencing Commission:

Thank you for the invitation to comment on the Proposed Amendments to the Sentencing Guidelines, Policy Statements and Official Commentary. I would like to offer comments on the proposed amendments to Chapter 8 of the United States Sentencing Guidelines based on more than 30 years of first-hand experience with corporate compliance programs.¹

The Role of Records Management in Corporate Compliance Programs

The Commission has proposed additional language for Application Note 3 to § 8B2.1, and an addition to Application Note 6(a) with regard to an organization's "document retention" program. The Commission is to be commended for its recognition of the importance of document retention programs, but I would like to suggest an expansion of this concept, and a different positioning within the Sentencing Guidelines.

Document retention is but one component of a *records management* program.² A company truly interested in legal compliance needs to address all aspects of records and

¹ See biographical note below.

² I've expanded upon this concept in an article that is to appear in Bloomberg Law Reports – Risk & Compliance, "Sentencing Commission Proposals and Business Reality: Records Management Does Matter in Compliance – and Business – Risk." A copy is appended to this letter.

information management, including records creation, storage, security, compliance with discovery requests, and proper disposal. Every one of these elements, and all of them together, are important components of compliance in many areas of the law. Document retention is indeed important, but by itself it is insufficient to address the legal and business needs of an organization with regard to its business records. Limiting focus to document retention ignores the need to create the right records, use clear and accurate language in those records, house them in a location where they can be found and with appropriate security – all of which are necessary for legal compliance. Therefore, any reference to this area in the Sentencing Guidelines should not be to “document retention,” but rather to “records management” with an appropriate definition, such as the one provided by ARMA International: “the systematic control of records throughout their life cycle.”³

Records management is a key element of an effective compliance program⁴ since, without it, most elements of the program will be difficult to implement, and, even if implemented, may be impossible to prove. Improper records management practices have been at the root of countless legal proceedings. For example, the Sarbanes-Oxley Act, at sections 802 and 1102, expanded the scope of criminal liability for document destruction or alteration as an important tool in stopping the kinds of abuses that led to the legislation in 2002.⁵ Where a statute does not include specific recordkeeping requirements, records management requirements are frequently included in consent orders by enforcement agencies to ensure compliance.⁶

Records Management and Due Diligence

The Sentencing Guidelines recognize that an organization’s compliance program may not prevent or detect all instances of criminal conduct. Instead, the Guidelines properly consider whether an organization used due diligence and promoted an organizational culture that encouraged ethical conduct and a commitment to compliance with the law.

³ <http://www.arma.org/pdf/WhatIsRIM.pdf>.

⁴ See, e.g., T. Banks & F. Banks (eds.), *Corporate Legal Compliance Handbook*, Chapter 4 (Wolters-Kluwer, 2009).

⁵ 18 U.S.C §§ 1512, 1519-20.

⁶ For instance, recordkeeping requirements are a fundamental element in the resolution of enforcement actions by the Federal Trade Commission. Some examples: *In re Dynamic Health of Florida*, Dkt. 9317 (FTC Apr. 6, 2006); *FTC v. Frankly Speaking, Inc.*, File No. 042-3072 (FTC May 18, 2005); *FTC v. Carney Direct Marketing*, File No. 032-3074 (FTC Aug. 17, 2004); *FTC v. Integrated Capital, Inc.* File No. 002-3242 (FTC Aug. 1, 2003); *In re Global Instruments, Ltd.*, File No. 022-3122 (FTC July 18, 2003); *United States v. Deer Creek Products*, Consent Decree (S.D. Cal. Aug. 19, 2000); *In re Shaw’s Supermarkets, Inc.*, File No. 991-0075 (FTC June 28, 1999); *In re CVS Corp.*, File No. 1:98CV00775 (FTC March 27, 1998); *In re Grey Advertising*, File No. 952-3231 (FTC Aug. 7, 1996);

Indeed, one might well argue that there is no better indicator of an organization's due diligence than its implementation of a records management program. This is precisely the kind of practice that signals the degree to which management is committed to ensuring that the activities of its employees follow appropriate ethical and legal guidelines. A thorough records management program indicates an organization that wants to record its activities. Proper recordkeeping can help avoid legal violations, and it can also facilitate the discovery of criminal violations by employees of the organization, either by review of the contents of the record, or by noting the absence of records where ones were required. Communication and enforcement of a records management program is certainly consistent with, and may well be an indicator of, "an organizational culture that encourages ethical conduct and a commitment to compliance with the law." As mentioned above, a thorough records management program is necessary to document all aspects of the compliance and ethics program so that the bona fide due diligence efforts of the organization can be proven, if necessary.

Therefore, it would seem that the appropriate place to recognize the importance of a records management program is in the elucidation of the minimal standards for an effective compliance program as outlined in § 8B2.1(b). This could be articulated as an addition to subsection (4)(A) as follows:

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities. Such standards and procedures shall include the organization's records management program.

Alternatively, an Application note might be employed to communicate the same principle as follows:

Application of Subsection (b)(4).— The training and communication of the organization's compliance and ethics program should include comprehensive records management standards as may be appropriate to the operations of the organization.

Thank you for the opportunity to provide these comments. I would, of course, be happy to address any questions you might have.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Theodore L. Banks". The signature is written in black ink and is positioned above the printed name.

Theodore L. Banks

Biographical Note

Theodore L. Banks is President of Compliance & Competition Consultants, LLC, and counsel to the firm of Schoeman, Updike, Kaufman & Scharf. He has been involved in corporate compliance programs since shortly after he joined the Law Department at Kraft Foods in 1976, through his retirement from Kraft in 2008 as Chief Counsel and Senior Director, Global Compliance Policy. Among the responsibilities of that position was the supervision of Kraft's global records management program. Since leaving Kraft, he has assisted a variety of companies in implementing or refining their compliance programs. Ted was an early pioneer in the use of computer technology for compliance training, starting in the area of antitrust. He is a frequent speaker at continuing education programs for lawyers and compliance officers, and the author of numerous articles on compliance, antitrust, and legal automation. He is the co-editor of the **Corporate Legal Compliance Handbook** and the author of **Distribution Law: Antitrust Principles and Practice**, both published by Wolters-Kluwer. He is a graduate of Beloit College and the University of Denver Sturm College of Law.

Note: A version of this article will be published in a forthcoming issue of Bloomberg Law Reports – Risk & Compliance.

Sentencing Commission Proposals and Business Reality: Records Management Does Matter in Compliance – and Business – Risk

Theodore L. Banks

On January 21, 2010,¹ the United States Sentencing Commission released a proposal that addressed several different areas in the Organizational Sentencing Guidelines. This article will discuss records management,² which some people, erroneously, seem to think is not part of an "effective compliance and ethics program."

The Commission proposed that the Application Note 3 to § 8B2.1 be amended by adding the following language:

Both high-level personnel and substantial authority personnel 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 (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).

In addition, it also proposed an addition to Application Note 6(a) to suggest an additional consideration as part of the periodic assessment of the risk that criminal conduct will occur:

(iv) The nature and operations of the organization with regard to particular ethics and compliance functions. For example, 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 (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).

The intent behind the inclusion of document retention as part of an effective compliance and ethics program is undoubtedly correct – but a few refinements are in order.

First, it should be noted that document retention is just one part of a records management program. For both legal and business reasons, every company needs to have a program in place to manage the business records it creates. A complete program starts with proper creation of business records, in any format (including email). Those records need to be retained for the proper amount of time ("document retention") and in the appropriate place. There should be procedures in place to cover production of records in the event of litigation and appropriate treatment for records that are privileged, confidential, or sensitive. Records that are no longer needed for business or legal reasons should be destroyed.

¹ 75 Fed. Reg. 3525 (Jan. 21, 2010).

² The Sentencing Commission referred to "document retention" which is, technically, only one part of an overall records management program, as will be discussed below.

As you can see, document retention is just one part of a records management program. If a company focuses only on how long it keeps records, it may well end up with a situation where it has retained a lot of drafts of documents that do not represent actual company practice. Employees may keep records in places where they cannot be readily located. Employees may become so fixated on retaining records that boxes and boxes of documents will be sent off to storage (or computer servers filled up), with no thought as to indexing the contents, removing duplicates, or making them accessible to others. The records may be "retained," but, as a practical matter, are not usable. So, although the Sentencing Commission referred only to the document retention piece, I'll refer to records management in this paper since I think that is what they really wanted to cover – or at least should cover.

Second, it is obvious that the treatment of records management varies widely from company to company. Most companies will have a very well-defined records management program for those areas of activity that have very specific regulations about records retention – and where the failure to do so has fairly certain consequences (e.g., tax records). Beyond this, company practices are all over the map. At one extreme, are the companies that consider themselves to be "knowledge organizations" and have an all-encompassing records management/knowledge management program to capture, organize, and make accessible the intellectual output of its employees. At the other extreme are those with a laissez-faire approach, where employees do what they want with their individual files (paper and electronic) and send (and delete) emails at will. Somewhere in the middle are companies that see the value of records management, but just don't want to devote sufficient resources to go beyond a partial program. And then there are those companies who focus solely on litigation – and design a records management program to enable the company to respond to a subpoena, but don't pay much attention to business needs.

Third, records management is at the foundation of legal violations in every compliance area you can imagine: antitrust, employment, securities, tax, FCPA, etc. Mistakes in documentation result in criminal violations or civil liability merely because a company cannot prove that it did not do anything wrong. Employees say stupid things – and memorialize them – because nobody explained to them that it was important to use appropriate language in business communications. As in other compliance-related areas, many companies get the "religion" of records management after they have had a disaster – usually along the lines of a spoliation situation, or the production of casual emails that have a dramatic impact on a jury far out of proportion to the business significance of the document in question.

But arguments about the importance of preventing compliance disasters, as well as education about the business benefits of a more robust records management system, often fall on deaf ears. Records management is not sexy. It is seen erroneously as a cost, not as an investment that will have a positive payback.

So, in some respects, we are at a point where we were when the Organizational Sentencing Guidelines were first released. Codes of conduct and compliance training were not uncommon in 1991, but comprehensive programs were rare, and prosecutors and judges did not take consistent positions as to the value of these programs.³ Once the Organizational Guidelines were promulgated, corporate counsel could point to a government-sanctioned standard for an effective compliance program, and management in many companies could be persuaded, finally, to move forward with the creation of more robust programs.

But as the compliance programs moved ahead, records management was not always part of this effort. In many companies, it remained an afterthought, perhaps assigned to a junior lawyer on staff or relegated to the facilities management department whose primary concern was where to store the boxes.

³ However, notwithstanding the logic of the Sentencing Guidelines, the Department of Justice still insists that compliance programs "don't count" in antitrust prosecutions, even if they do in other areas.

Records management should be a concern of senior management, particularly now that risk management is receiving more attention by ratings agencies and shareholders. Management should have the assurance that it can locate business records when it needs them. It needs to know that its employees won't waste time reinventing the wheel. And it should have some comfort that it is not wasting money saving records that simply do not need to be kept.

Education about records management should start with every employee at his or her new employee orientation. Their orientation should contain a few basic points:

- When you communicate on the job, you are sending a business, not personal, message, so take care in what you write or say. Proofread. Think.
- Keep your business records, electronic and paper, in the proper place and for the proper length of time.⁴
- Do not erase records unless it is appropriate to do so. But in most cases, you do not need to keep multiple drafts of one document. If you are not the author ("owner") of a record, you may not need to keep it at all. If litigation is threatened or pending, don't erase or destroy records until cleared by counsel.
- Maintain confidential records in confidence. Do not remove corporate records, or share them with anyone, inside or outside of the company, unless authorized to do so. Take special care with any records that have been sent to or received from lawyers.
- If your records are the type that needs to be used by a work group, a department, or the entire company, make sure they are kept in the appropriate place so others can find and use them.
- When the life of the record is over (i.e., it is no longer needed for business or legal reasons), destroy it.

It is not terribly complex, although some thoughtful work is needed to implement an effective records management system. Procedures and retention periods need to be established, employees need to be trained, and some resources need to be dedicated to the process. Cooperation is needed from several departments – law, finance, human resources, facilities, systems. But once all of these departments find out how they can benefit from an effective records management program (saving money by avoiding needless storage costs, finding records when they need them, saving time by not re-doing work that was already done, avoiding legal disasters), they are usually avid supporters of an enhanced records management program.

Employees, far from resisting the program, often are grateful to learn what to do with their on-the-job work product. The program does not need to be complex, and, if connected to a document management system, may even be automated. The importance of records management should be communicated to employees as part of their new employee orientation, along with other key components of a compliance program. Seeing that the company takes seriously everything they do tends to reinforce the notion that they are important to the success of the company, and that everyone is responsible for every aspect of compliance. Knowing that a company is ethical and values the contribution of every employee increases the pride that employees have in their organization, motivates them to truly take ownership of their job, and do it in an ethical fashion.

Senior management, notwithstanding all of the rational arguments, may still view records management as just another expense that could be deferred or avoided altogether. But, perhaps all that is needed is one more push. The United States Sentencing Commission is saying through its proposals, in effect, "You should have listened to those people who told you for many years how important records management is to your company. We are telling you now, so please listen. Sloppy records management increases the risk that your company will have legal problems. It is the duty of management to assure itself that the company has an effective records

⁴ An excellent one-page summary of the essence of a records and information management program is available from ARMA International, at <http://www.arma.org/pdf/WhatIsRIM.pdf>.

management program, and this program must involve every employee that is involved with any sort of company records. When we see a company that doesn't take records management seriously, we tend to think that it doesn't take any aspect of compliance seriously, and will assume that it really has not used due diligence to establish an effective compliance and ethics program."

Of course, I really don't know what the Sentencing Commission was thinking when it proposed including records management (or at least document retention) in the Sentencing Guidelines. But I remain convinced that records management is an essential part of an effective compliance program – and will have business benefits. If the rational arguments don't persuade management to provide the needed support, perhaps a scare from the Sentencing Commission will do the trick.

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