



CRIMINAL DEFENSE AND COMPLIANCE PRACTICE GROUP

**CORPORATE COMPLIANCE PROGRAMS:
WORTH THE INVESTMENT AFTER SUPREME COURT'S RECENT
FEDERAL SENTENCING GUIDELINES DECISIONS?**

This past January, after eighteen years, the United States Supreme Court held that the Federal Sentencing Guidelines were no longer to be applied by sentencing courts in a mandatory manner. In *United States v. Booker*, the Court held that, the Federal Sentencing Guidelines, henceforth, are advisory only. However, the trial court is still required to take the Guidelines into consideration when arriving at an appropriate sentence. In sentencing businesses under the Federal Sentencing Guidelines, the sentencing commission has stated that the "prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense."

As a result of the *Booker* decision, some companies are assuming that it is no longer important to implement and maintain a corporate compliance program. This is a dangerous misconception. For several reasons, creating and maintaining an effective compliance program is just as important as it has ever been. First, many judges are using the Guideline range for sentencing defendants, just as they did pre-*Booker*. Secondly, and more importantly, long before any sentencing decisions come into play, an effective compliance program can be the difference between a prosecutor choosing to bring criminal charges against a company or declining to prosecute.

CHARGING DECISION

It is up to the U.S. Attorney's Office to decide if a particular company should face criminal charges for the conduct of its employees. The U.S. Attorney's Manual specifically states that a federal prosecutor is to consider the existence and adequacy of a corporation's compliance program in reaching a charging decision.

According to the U.S. Attorney's Manual the fundamental questions each prosecutor should ask in making a corporate charging decision are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" Prosecutors are more likely to charge a corporation criminally where the corporation's compliance program is a "paper program" rather than an effectively designed and rigorously maintained compliance program. Prosecutors are directed to determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts." Additionally, prosecutors "should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." If the prosecutor determines that the corporation was committed to adopting and implementing a truly effective compliance program, there is a much greater chance that the corporation, itself, can escape criminal charges.

FEDERAL SENTENCING GUIDELINES

Although the Federal Sentencing Guidelines are no longer mandatory, they must still be considered by judges in determining a sentence. In fact, many judges are still fashioning sentences which fall into the applicable Guideline range, just as they did pre-*Booker*. Regardless of whether the Guidelines are mandatory or advisory, judges take a dim view of companies that either, do not have a compliance program, or have such a program but fail to effectively monitor and implement it. It is common sense that a company that takes the time and puts forth the effort to adopt and maintain an effective compliance program will stand a better chance of leniency with a sentencing judge.

Under the Guidelines, a corporation's fine for a criminal violation may be reduced by the existence of an "effective program to prevent and detect violations of the law." The key word here is "effective." The Guidelines now require a corporation to establish specific standards and procedures for its compliance program. No longer can a corporation simply pay lip service to having a compliance program but not take the time and effort to fully implement it.

To receive the benefit of having a corporate compliance program when it comes time for sentencing, a corporation must ensure that board members and senior management assume specific responsibilities for the compliance program. Under the Guidelines, the new "hallmarks" of an effective compliance program are:

- 1 Standards and procedures to detect and prevent criminal conduct;
- 2 High-level personnel having responsibility for ensuring the corporation has an effective compliance program and employees with specific day-to-day responsibility for the program must report directly to the high-level personnel;
- 3 Due diligence in hiring and assigning personnel to positions with substantial authority;

- 4 Communication of standards and procedures to all employees of company, including high-level personnel. This includes a specific requirement for training at all levels;
- 5 Monitoring and auditing to detect criminal conduct, periodic evaluation of the program's effectiveness and implementing and publicizing an anonymous and confidential reporting system;
- 6 Promotion and enforcement of compliance and ethics program; and
- 7 Taking reasonable steps to respond appropriately to criminal conduct and prevent further similar criminal conduct.

Once a thorough and effective compliance program has been established, a corporation's work is not done. The Guidelines require that the corporation "must periodically assess the risk of the occurrence of criminal conduct and...take appropriate steps to design, implement, or modify" each of the seven requirements above to reduce the risk of criminal conduct.

Although the existence of an effective and well-implemented compliance program is no guarantee against either criminal prosecution or a large fine, having such a program is arguably the single most important step a corporation can take to protect itself against criminal charges at the outset or a large fine in the event of an Indictment. Designing and maintaining an effective compliance program can be a time-consuming endeavor, but the alternative, failure to have such a program, is a risk too great for any corporation to take.

The Department of Justice realized long ago that given the vastness of our country's business and financial systems, it is impossible to detect or prevent every business crime using conventional law enforcement investigation and prosecution. Effective law enforcement can only be achieved through a self-policing system that corporate compliance programs are intended to promote.

As an example of the importance the federal government attaches to compliance programs one only has to look as far as the remarks of James Robinson, former Assistant Attorney General of the Criminal Division of the U.S. Department of Justice. Mr. Robinson has said that while the existence of an effective compliance program will not render a

corporation immune from prosecution, “a compliance program has value...both at the charging and sentencing phases.” According to Mr. Robinson, the Department of Justice “cannot emphasize too much the importance of an effective compliance program in ensuring that a corporation is a good citizen.”



Armstrong Teasdale LLP is pleased to announce the hiring of prominent white collar criminal defense lawyer **Jeffrey T. Demerath**, formerly with the Greensfelder law firm. Demerath joins the Firm’s Litigation Department, in our St. Louis office as a partner, with an emphasis in the areas of white collar criminal defense and governmental compliance issues. He brings a national practice, having represented both individuals and corporations before Federal and State regulatory agencies, as well as Federal grand juries across the country. Demerath has been recognized in several area publications regarding his accomplishments in recent major white collar cases in St. Louis.

If you or your company would appreciate further explanation in a confidential setting, the attorneys of our Criminal Defense and Compliance Practice Group can be contacted through the following offices:

Amy E. Engel (Author)
aengel@armstrongteasdale.com
2345 Grand Boulevard
Kansas City, Missouri 64108
(816)221-3420

Thomas M. Bradshaw
tbradshaw@armstrongteasdale.com
2345 Grand Boulevard
Kansas City, Missouri 64108
(816)221-3420

Joseph P. Bednar
jbednar@armstrongteasdale.com
3405 West Truman Boulevard
Jefferson City, Missouri 65109
(573) 636-8394

Steven C. Tabackman
Tighe Patton Armstrong Teasdale, PLLC
stbackman@tighepatton.com
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 454-2800

Daniel O. Herrington
dherrington@armstrongteasdale.com
2345 Grand Boulevard
Kansas City, Missouri 64108
(816) 221-3420

Glenn E. Davis
gdavis@armstrongteasdale.com
One Metropolitan Square
St. Louis, Missouri 63102-2740
(314) 621-5070

Jeffrey T. Demerath
jdemerath@armstrongteasdale.com
One Metropolitan Square
St. Louis, Missouri 63102-2740
(314) 621-5070

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<i>Springfield, IL</i> 3201 Pleasant Run, Suite A P.O. Box 13317 Springfield, IL 62791 (217) 726-8200	<i>St. Louis, MO</i> One Metropolitan Square St. Louis, Missouri 63102-2740 (314) 621-5070	<i>Kansas City, MO</i> 2345 Grand Boulevard Kansas City, Missouri 64108 (816) 221-3420	<i>Jefferson City, MO</i> 3405 West Truman Boulevard Jefferson City, Missouri 65109 (573) 636-8394	<i>Sydney, Australia</i> Level 31, No. 1 O’Connell Street Sydney, NSW 2000 Australia +61 29-262-6700
	<i>New York, NY</i> 230 Park Avenue New York, New York 10169 (212) 551-7790	<i>Shanghai, China</i> 1376 Nan Jing Xi Lu Shanghai Centre - Suite 718 Shanghai 200040 P.R. China 011-8621-6279-8808	<i>Washington, DC</i> 1747 Pennsylvania Avenue, N.W. Washington, D.C. 20006 (202) 454-2800	