

CORPORATE COMPLIANCE & RISK MANAGEMENT UPDATE

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Supreme Court Strikes Down Federal Sentencing Guidelines Mandated Sentences

In today's post-Enron, Sarbanes-Oxley world, corporations and their leaders increasingly are concerned about their exposure to criminal prosecution if the organization, its employees, or its agents in a federal crime under Title 18 of the United States Code covered by the Federal Sentencing Guidelines, including felony violations of Sarbanes-Oxley and other securities laws; personal identity theft; technology transfer, copyright, trademark, cybercrime, and other computer laws; the Foreign Corrupt Practices Act; RICO; the Fair Labor Standards Act, ERISA, OSHA, the Hobbs Act, the LMRA, and other employment laws; Environmental Protection Act; false claims, and other fraud laws; copyright; I-9 and other immigration; bribery; and others.

On January 12, the US Supreme Court in *United States v. Booker* ruled unconstitutional certain provisions of the Federal Sentencing Guidelines relating to the determination of the sentences that corporations, corporate leaders and other defendants convicted of committing a felony or Class A misdemeanor that constitute a felony or class A misdemeanor under Title 18 of the United States Code. In *Booker*, the Supreme Court ruled unconstitutional provisions of the Federal Sentencing Guidelines (1) requiring sentencing courts impose a sentence within the applicable Federal Sentencing Guidelines range except under limited circumstances and (2) providing for *de novo* judicial review on appeal when a judge imposes a sentence outside the presumptive range mandated by the Federal Sentencing Guidelines as applied to criminal prosecutions where the 6th Amendment right to jury trial attaches.

While the *Booker* decision affirms the authority of federal judges to depart from the sentencing guidelines when sentencing corporations, corporate leaders and others convicted of crimes covered by the Federal Sentencing Guidelines, the decision makes clear that corporations and their leaders should continue to implement and administer effective internal controls and corporate compliance strategies to prevent, detect, and address potential criminal actions under Federal law. Following the *Booker* decision, for instance, the Federal Sentencing Guidelines still require judges to take account of the Guidelines together with other sentencing goals, to consider the Guidelines "sentencing range established for ... the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to retribute victims; and to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public. Accordingly, evidence that a corporation or business leader sought to prevent wrongful actions through an effective compliance program, implemented internal controls to monitor potential violations, and/or took prompt action to investigate and redress potential violations will continue to be critical to their ability to avoid prosecution for federal crimes and to impact the sentences or other sanctions that they are likely to face if found guilty of a federal felony or Class A misdemeanor.

If you have questions about the *Booker* decision or your organization's compliance efforts, please contact Cynthia Marcotte Stamer, Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, L.B. 48, Dallas, Texas 75240. Telephone: (469) 767-8872 or (972) 419-7188. E-mail: cstamer@cynthiastamer.com or cstamer@gpm-law.com. www.cynthiastamer.com

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