

## Small Business Securities Bulletin

Pending Amendments to the Federal Sentencing Guidelines – Why Now is a Good Time to Review Your Corporate Compliance and Ethics Program

**June 2010 (No. II)**

**Penny Somer-Greif**

410.347.7341

[psomergreif@ober.com](mailto:psomergreif@ober.com)

The U.S. Sentencing Commission recently voted to amend the federal Sentencing Guidelines with respect to corporate compliance and ethics programs. These amendments will be effective on November 1, unless Congress takes action to block them, which is unlikely. The Sentencing Guidelines allow for mitigation of the sentence imposed on a company that has been convicted of a crime if the company can show that, at the time the crime was committed, it had in place an effective compliance and ethics program as set forth in the Guidelines. However, the Department of Justice and other federal agencies often consider Sentencing Guidelines criteria in determining whether to institute regulatory proceedings, and the elements of an effective compliance program under the Sentencing Guidelines generally work their way into the “best practices” for corporate compliance and ethics programs generally.

Under the current Sentencing Guidelines, a company cannot receive “credit” (i.e. a reduction in its sentence) for an effective compliance and ethics program if high-level personnel within the company

(generally a director or officer) “participated in, condoned, or was willfully ignorant of” the criminal offense. Under the amendments, a sentence reduction may be permitted even under such circumstances if:

- The company personnel with “operational responsibility for the compliance and ethics program” have direct reporting obligations to the board of directors or an appropriate committee thereof, such as the audit committee, including prompt reporting on any matters involving or potentially involving criminal conduct and at least annual reporting on the implementation and effectiveness of the program;
- The program detected the criminal violation before discovery by persons outside the company or before such discovery was likely;
- The company promptly reported the violation to the appropriate authorities; and
- No individual with operational responsibility for the program “participated in, condoned, or was willfully ignorant of” the violation.

In addition, the amendments clarify the steps a company should take to “respond appropriately to ... and prevent further similar, criminal conduct,” a necessary element of an effective compliance and ethics program under the Sentencing Guidelines. An appropriate response, depending on the specific circumstances, may include remediation of the harm resulting from the conduct, including restitution to victims, self-reporting and cooperation with authorities. Appropriate steps to prevent similar conduct, again depending on the circumstances, may include assessing the compliance and ethics program and making necessary modifications to ensure its effectiveness, including retaining outside advisors to ensure adequate assessment and implementation of any such modifications.

We believe that companies should use these amendments, as well as recent statements by Department of Justice officials emphasizing that “paper programs” – i.e. having a compliance and ethics program in place but not effectively in operation throughout the organization, are not sufficient, as an opportunity to not only revise their corporate compliance and ethics programs to comply with the new Sentencing Guideline amendments, but to reassess their programs generally, including assessing the operation and

awareness of the program in the organization and determining whether any employee educational efforts or other changes to the form or operation of the program may be warranted.

***About Me***

I am a former SEC attorney who also has prior “big firm” experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you.

Visit my bio at [www.ober.com/attorneys/penny-somer-greif](http://www.ober.com/attorneys/penny-somer-greif).

***About Ober|Kaler***

Ober|Kaler is a national law firm that provides integrated regulatory, transaction and litigation services to financial, health care, construction and other business organizations. The firm has more than 120 attorneys in offices in Baltimore, MD, Washington, DC and Falls Church, VA. For more information, visit [www.ober.com](http://www.ober.com).

---

This Bulletin contains only a general overview of the matters discussed herein and should not be construed as providing legal advice. If you have any questions about the information in this Bulletin or would like additional information with respect to these matters, please contact me at 410.347.7341 or [psomergreif@ober.com](mailto:psomergreif@ober.com).

Feel free to – and please do – forward this Bulletin to anyone that you think might be interested in it. If you did not receive this Bulletin from Ober|Kaler directly, you may sign up to receive future Bulletins like this via e-mail at: [marketing@ober.com](mailto:marketing@ober.com).