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Compliance Update[*]

Supreme Court Strikes At Guidelines: The Implications for Corporate Compliance

Last week, on January 12, the U.S. Supreme Court issued its eagerly anticipated decision regarding the constitutionality of the federal sentencing guidelines.[1] The viability of the guidelines had been called into question with the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*.[2] In *Blakely*, the Court found the sentencing guidelines used by the State of Washington to be unconstitutional, holding that any factor that increases a criminal sentence, except prior convictions, must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Last week, in *United States v. Booker* and *United States v. Fanfan*, the Court held that the reasoning in *Blakely* applies to the federal guidelines, rendering them unconstitutional in part.

In *Booker* and *Fanfan*, the Court held that the Sixth Amendment prohibits a judge from increasing a sentence beyond the sentence that could have been imposed solely based upon facts found by the jury or admitted by the defendant. The Court thus found that the federal sentencing guidelines – which require judges to sentence based on numerous facts not necessarily considered by a jury – violate the Sixth Amendment's guarantee of a jury trial in criminal cases. The Court then, in an unexpected move, held that the appropriate remedy for this constitutional flaw is to excise the portions of the Sentencing Reform Act that make application of the guidelines mandatory. Thus, after *Booker* and *Fanfan*, the guidelines continue to exist, but will henceforth be advisory. Federal courts must continue to *consider* the guidelines when sentencing, but they are no longer *required* to sentence within the guidelines' range. As Justice Breyer stated in his decision for the Court, "Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals."

The full ramifications of *Booker* and *Fanfan* for federal sentencing will only be revealed with time, as courts begin to apply the new standards and as Congress determines how, if at all, to respond to the decision. In his opinion for the Court, Justice Breyer essentially

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[1] *United States v. Booker* (No. 04-104) and *United States v. Fanfan* (No. 04-105), (U.S. Jan. 12, 2005).

[2] 124 S. Ct. 2531 (2004).

invited Congress to legislate a response (not that any invitation is necessary): "The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."

The full ramifications of *Booker* and *Fanfan* for corporate compliance is another question that will only be answered with the passage of time.[3] There is, of course, no doubt that the sentencing guidelines for organizations – as promulgated in 1991 and revised just last year – have played an exceedingly prominent role in the development of the law and practice of corporate compliance. The guidelines created the first broad-based incentive for companies to develop compliance programs by providing for the mitigation of fines for federal criminal offenses if a company had an effective compliance program in place at the time the offense was committed. They also set forth the "seven due diligence criteria" around which many companies continue to organize their compliance efforts. However, *Booker* and *Fanfan* are unlikely to diminish the influence of the guidelines on compliance and ethics programs since, while these cases make the guidelines merely advisory, courts are still required to consider them. Thus, the incentive in the guidelines for companies to implement compliance and ethics programs and their guidance with respect to how to do so survive, albeit possibly in a somewhat less compelling form.

It is important to note, of course, that even without the influence of the organizational sentencing guidelines, companies have numerous incentives to adopt compliance and ethics programs. Since the guidelines were originally promulgated in 1991, a host of government agencies and the courts have offered companies important reasons to attempt to prevent and detect legal violations. These include the Department of Justice's promise to consider the existence and adequacy of a company's compliance program in

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[3] Both the *Booker* and *Fanfan* cases involve application of the sentencing guidelines to individuals. It is possible that courts would apply different reasoning to a challenge to the constitutionality of the federal sentencing guidelines for organizations. The Supreme Court has never squarely addressed the question of whether a corporation has a Sixth Amendment right to a jury trial. *See* Peter J. Henning, *The Conundrum Of Corporate Criminal Liability: Seeking A Consistent Approach To The Constitutional Rights Of Corporations In Criminal Prosecutions*, 63 Tenn. L. Rev. 793, 866-75 (1996) (tracing the history of the Supreme Court's decisions bearing on a corporation's right to a jury trial). However, while the law on this issue is unclear, precedent seems to point to a finding that a corporation does have a Sixth Amendment right to a jury trial in criminal proceedings. *See United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). It therefore seems likely that the holding in *Booker* and *Fanfan* would be found to apply to the sentencing guidelines for organizations.

determining whether to bring criminal charges against a company;[4] the Securities and Exchange Commission's promise to consider the existence of compliance efforts in determining whether and how to charge a company being investigated for violations of securities laws and regulations;[5] and similar promises made by the EPA, the Office of the Inspector General of HHS, and other federal and state agencies. Judicial decisions in the areas of civil rights laws and shareholder derivative actions have likewise created incentives for companies to adopt compliance systems.

In addition, if Congress replaces the federal sentencing guidelines with another sentencing framework, it is a fair bet that the new system will likely include a compliance incentive as strong – if not stronger than – the guidelines' incentive, especially given the increased emphasis on compliance efforts in the post-Enron business environment.

In short, and somewhat ironically, the waters of corporate compliance may be much smoother after the *Booker* and *Fanfan* decision than in anticipation of it. Based in part on the continuing value of compliance and ethics programs under the guidelines and in (larger) part on the numerous other incentives for compliance created by government agencies and self-regulatory organizations since the guidelines' promulgation in 1991, companies will continue to be rewarded for their efforts to prevent and detect legal violations and promote ethical corporate cultures.

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[4] U.S. Dep't of Justice, Memorandum Regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.usdoj.gov/dag/cftf/business_organizations.pdf.

[5] *See, e.g.*, SEC Report of Investigation, Exchange Act Release No. 34-44969 (Oct. 23, 2001) *available at* 2001 WL 1301408.