LegalNews

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In a fractured opinion released this morning in *United States v. Booker* and *United States v. Fanfan*, Nos. 04-104 and 04-105, 543 U. S. ____ (Jan. 12, 2005), the United States Supreme Court struck down the 17-year old federal sentencing guidelines, reducing them to advisory rather than mandatory status. Business and compliance officials have been anxiously awaiting the Court's decision to assess the impact on the federal sentencing guidelines' requirement that business entities maintain an "effective" compliance program. That wait is now over, and for the reasons discussed below, companies should assume that the compliance program aspect of the guidelines remains in force.

**The Ruling**

By a 5-4 vote (Justice Stevens, joined by Justices Scalia, Thomas, Souter, and Ginsburg), the Court applied the Sixth Amendment analysis advanced in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (June 24, 2004), to the federal sentencing guidelines. In *Blakely*, the Court held that Washington State's sentencing guidelines violated the defendant's Sixth Amendment right to a jury trial because the judge increased his sentence with evidence not presented to the jury, and based on a "preponderance" rather than "beyond a reasonable doubt" evidentiary standard.

As most analysts had predicted, the Court's ruling this morning in *Booker/Fanfan* held that because the federal sentencing guidelines scheme was mandatory, and included enhancement procedures indistinguishable from those declared unconstitutional in *Blakely*, the federal guidelines were equally unconstitutional.

The surprise of the decision lay in the Court's determination of remedy.

Justice Breyer wrote on this issue for the Court (joined by the other 3 dissenters and Justice Ginsburg), and said that the correct remedy was to declare unconstitutional the provisions that made the guidelines mandatory, leaving the rest of the system intact. As a consequence, the federal sentencing guidelines are now "advisory."

**About the Authors**

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You can read Brian's Compliance Week article by clicking here.

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**The Fallout**

Time will tell as to what "advisory" means in practice once the lower federal courts resume sentencing. According to Justice Breyer's majority opinion on remedy, a sentencing court is still required to consider the "advisory" sentence yielded by the guidelines, even if the judge ultimately chooses not to apply that sentence. Presumably it would be error, then, for a lower court to refuse even to calculate the sentence otherwise called for under the guidelines. Justice Breyer also emphasized that on appeal, the reviewing court must review the "reasonableness" of the sentence by reference to various statutory criteria, including the criteria established by the Sentencing Commission under the sentencing guidelines for a given offense.

As a practical matter the sentencing guidelines will still serve as the starting point for determining a criminal sentence, and although judges no longer are required to follow the guidelines, they are still required to calculate a sentence under the guidelines, and offer some reasoned basis for refusing to apply the sentence otherwise called for by the guidelines.

Justice Scalia in dissent predicted that Justice Breyer's solution will "wreak havoc" on the judicial system, but Justice Breyer responded that his is unlikely to be the last word, as Congress will now undoubtedly be called upon to pass new sentencing guidelines that satisfy the Court's constitutional concerns.

**The Impact on Corporation Compliance Programs**

There is one additional aspect of the fallout from this ruling likely to be of immediate interest to businesses and those who counsel them on compliance issues. The federal sentencing guidelines require businesses to maintain "effective" compliance programs that prevent and detect violations of law. The United States Sentencing Commission recently overhauled the relevant standards and procedures, which became effective November 1. After today's ruling, corporate compliance officials are no doubt wondering whether the Court's ruling rendering the guidelines "advisory" means they no longer need to have a corporate compliance program, or if they have one, need to ensure that it meets the new standard that became effective November 1.

As noted above, Justice Breyer writing for the Court emphasized that even though the guidelines are now "advisory," a sentencing judge is still required to at least calculate the sentence called for under the guidelines, and sentence according to the factors defined in 18 U.S.C. § 3553(a). § 3553(a) refers to the guidelines, and additionally states that a judge "shall consider the need for the sentence imposed to protect the public from further crimes of the defendant." Thus, any judge sentencing a business entity will still be required to examine the adequacy of the entity's compliance program according to the guidelines, as amended on November 1. Moreover, if the judge finds that the program is deficient under the guidelines' standard, as part of the sentence the judge can order the company to implement a compliance program that meets the standard "to protect the

public from further crimes of the defendant." Thus, the now "advisory" nature of the guidelines does not change the fact that companies' programs still will be reviewed according to the standard defined in the guidelines, or that they could have a program that meets the standard imposed on them as part of the terms of a sentence. Stated another way, it is highly unlikely that federal district courts will discard the guidelines' definition of an "effective" compliance program in favor of a standard created by the lower courts on an ad hoc basis. Many district court judges have expressed dissatisfaction with the guidelines' calculations for street crimes. No district court judge has ever publicly expressed dissatisfaction with the guidelines' definition of an "effective" compliance program.

Most corporations will never be sentenced by a federal judge, whether under the advisory guidelines or based solely on a judge's discretion. But, paradoxically, that fact emphasizes why there are many other good reasons why compliance officers should continue to view the guidelines' definition of an "effective" compliance program as controlling. Anyone involved in corporate compliance for the last decade would agree that the definition of an effective corporate compliance program in the federal sentencing guidelines has become the gold standard for many other purposes beyond sentencing. First, under the Department of Justice's Principles of Federal Prosecution of Business Organizations, federal prosecutors examine whether the corporation has a compliance program effectively designed to prevent wrongdoing when deciding whether to bring criminal charges. Second, the need to maintain an effective compliance program is not restricted to the criminal realm. Case law defining the fiduciary duties of directors and officers, most preeminently *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 967 (Del. Ch. 1996), and *McCall v. Scott*, 250 F.3d 997 (6th Cir. 2001), hold that officers and directors must ensure that a corporation has an effective compliance program. Third, Sarbanes-Oxley's Sections 302 and 404 require periodic assessments and certification of the effectiveness of a company's internal control structure and procedures for financial reporting, which, as a practical matter, is merely a subset of most, if not all, compliance programs that follow best practices.

In sum, what the Court announced today is less dramatic than might appear at first glance, and businesses should continue assessing their compliance programs to make sure that they are "effective" for purposes of the sentencing guidelines.