

# K&LNGAlert

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## White Collar Crime / Criminal Defense

### The Department of Justice Responds to The Supreme Court's Recent Decision on the Sentencing Guidelines

On January 28, 2005, Deputy Attorney General James B. Comey issued a memorandum to all federal prosecutors in response to the United States Supreme Court's recent decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*. The memorandum, recognizing the potentially sweeping impact of the Court's decision on federal sentencing under the United States Sentencing Guidelines, provides guidance to federal prosecutors after *Booker* and *Fanfan* and sheds light on how the government will approach federal sentencing in the wake of the Court's landmark decision.

#### THE COURT'S DECISION RENDERS THE SENTENCING GUIDELINES ADVISORY

On January 12, 2005, a divided Court issued a two-part holding rendering the previously binding Guidelines advisory. First, in a 5-4 majority opinion authored by Justice Stevens, the Court held that the Sixth Amendment right to a trial by jury applies to the Federal Sentencing Guidelines and that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Second, in a separate 5-4 majority opinion authored by Justice Breyer, the Court held that the remedy for the Sixth Amendment violation found in the first opinion was not to invalidate the Guidelines. Rather, the Court declared that the Guidelines will no longer be mandatory on federal judges, and called the remaining Guidelines system "effectively advisory."

The Court explained that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." In addition to making the Guidelines advisory, the Court held that sentences will now be reviewed on appeal for "reasonableness."

Thus, so long as the sentencing judge considers the Guidelines, he is apparently free to impose a sentence anywhere within the statutorily authorized range for the specific offense and is free to depart from the sentence the Guidelines previously would have mandated – subject to the constitutional constraints outlined by the Court. On appeal, sentencing decisions will be reviewed for "reasonableness." For a further discussion of the Court's decision and the potential impact on business organizations, see [http://www.klng.com/files/tbl\\_s48News/PDFUpload307/11115/wcccd0105.pdf](http://www.klng.com/files/tbl_s48News/PDFUpload307/11115/wcccd0105.pdf).

#### FEDERAL PROSECUTORS ARE DIRECTED TO ADVOCATE STRICT APPLICATION OF THE GUIDELINES

The memorandum by Deputy Attorney General Comey issued in response to the Court's decision acknowledges the "shifting landscape" of federal sentencing and directs federal prosecutors to "remain focused on our principles and our mission, which are clear and enduring." To that end, the memorandum stresses that federal prosecutors should "do everything in [their] power to ensure that sentences carry out the fundamental purposes of sentencing" and "take all steps necessary to ensure adherence to the Sentencing Guidelines."

After articulating the Justice Department's basic philosophy on federal sentencing, the memorandum states that the role of prosecutors is "to enforce the law by bringing appropriate charges and advocating the consistent application of the Sentencing Guidelines and mandatory minimums, which reflect the judgments Congress has made about appropriate sentences for federal crimes." Accordingly, the memorandum provides specific guidance in four distinct areas to "help [prosecutors] faithfully execute that role in the wake of *Booker*."

First, the memorandum directs federal prosecutors to consult the Guidelines at the charging stage and to "continue to charge and pursue the most serious readily provable offenses," e.g., offenses "that would generate the most substantial sentence pursuant to (1) the Guidelines; (2) one or more applicable mandatory minimums; and/or (3) a consecutive sentence required by statute." According to the memorandum, the purpose of charging defendants with offenses that will carry the most significant penalty is to "ensure that sentences reflect real offense conduct."

Second, the memorandum directs federal prosecutors to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases." To that end, federal prosecutors "must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range or to refrain from objecting to a defendant's request for such a sentence."

Third, federal prosecutors are instructed to "preserve the ability of the United States to appeal 'unreasonable' sentences." Thus, whenever a sentence imposed is below what the United States believes is the appropriate Guidelines range, "federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position possible on appeal." When a sentence "fails to reflect the purposes of sentencing," the prosecutor should seek approval to file an appeal from the Solicitor General.

Fourth, while the Justice Department has not proposed or endorsed any particular action by Congress or the Sentencing Commission in response to *Booker*, the memorandum instructs federal prosecutors to continue following "[t]he existing requirements for reporting

adverse decisions" in order to "assess the impact" of the Court's decision.

Ostensibly to aid in that assessment, the memorandum includes a "Booker Sentencing Report Form" that is to be used if a sentencing court (i) imposes a sentence outside of the Guidelines range (unless on request of the government); (ii) refuses to calculate a Guidelines range; or (iii) if a motion is made by the government for a departure based on substantial assistance to authorities or pursuant to an early disposition program, but the court sentences below the government's recommended range. This form supplements already existing reporting requirements for adverse sentencing decisions pursuant to the U.S. Attorney's Manual § 9-2.170(B), which requires federal prosecutors to report adverse sentencing decisions for a variety of reasons, including but not limited to departures based on criminal history, departures based on "discouraged" or "unmentioned" factors, and departures on remand.

#### CONCLUSION

The memorandum issued by Deputy Attorney General Comey clearly indicates that the Justice Department is concerned about the impact of the Court's decision on federal sentencing, noting that these are "difficult circumstances." The memorandum concludes with encouragement for federal prosecutors, stating that "[y]our ability and dedication will get the job done in these challenging times."

In practice, the memorandum instructs federal prosecutors to pursue an application of the Guidelines as if nothing has changed. The basic directive of the memorandum is that federal prosecutors must continue to advocate a strict application of the Guidelines and report all cases where the district court does not impose the sentence called for by the Guidelines.

Whether the government's approach will have the desired impact of maintaining a consistent application of the Guidelines in federal sentencing remains to be seen. To be sure, district court judges remain free to follow the Guidelines after *Booker* exactly as they would have before *Booker* – provided that the facts necessary to support the sentence were admitted by the defendant or proved to the jury beyond a reasonable doubt. It is likely that a number of judges

will do just that – because the Guidelines have been the foundation of federal sentencing for twenty years. However, judges are also apparently free to consult and reject the Guidelines and impose different sentences within the statutorily authorized range, subject to appellate review for “reasonableness.” While the government will undoubtedly advocate against that approach, the hands of the sentencing judge are no longer tied to the extent they were under the mandatory Guidelines regime.

Corporations and individuals facing federal prosecution as well as the lawyers who represent them must be aware that the government will continue to aggressively advocate for a strict application of the Guidelines. Federal prosecutors will pursue the most

serious offenses under the Guidelines when making charging decisions and will attempt, through appeals if necessary, to maintain the system of federal sentencing under the Guidelines exactly as it existed before the Court handed down its decision in *Booker* and *Fanfan*. How federal district and appellate courts will react to this stance by the government remains to be seen.

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