K&LNG Alert

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White Collar Crime / Criminal Defense

Guidelines Are Just "Guidelines": The Impact on Corporations of The Supreme Court's Decision on The United States Sentencing Guidelines

THE MANDATORY SYSTEM OF SENTENCING

The United States Sentencing Guidelines, promulgated by the Sentencing Reform Act of 1984, have been used by district judges to calculate criminal punishments in federal court for the past twenty years. Judges were bound to apply the mandatory Guidelines using formulas that calculated a range of minimum and maximum sentences. In some instances, the Guidelines mandated sentence enhancements based on facts found by the judge by a "preponderance of the evidence", and not by the jury "beyond a resonable doubt", at a post-trial sentencing hearing. Moreover, district judges were largely unable to exercise leniency – even if they wanted to – because the Guidelines only permitted departures from the mandatory range in very limited circumstances and upon specific findings by the sentencing judge.

On January 12, 2005, the United States Supreme Court issued a landmark decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan* that dramatically changed the federal sentencing scheme established when the Guidelines were passed.

The Court held that the Guidelines are no longer binding on district judges and that the Guidelines will now be "effectively advisory."

The Court's decision will have a profound impact on sentencing practices for federal criminal violations. The effects of the decision, however, will go beyond the mechanics of calculating a prison term or the amount of a fine. The decision has the potential to impact the policies and procedures of corporations, their counsel, and their agents.

This Alert will discuss how the Court's decision has changed the fundamental nature of the Guidelines and the impact of this change on corporations. Specifically, the Court's holding will impact how judges sentence corporations, the way prosecutors and corporate counsel negotiate during the early stages of investigation into wrongdoing, and the way organizations choose to structure their own internal monitoring and control systems through compliance and ethics programs.

THE SUPREME COURT DECLARES THE GUIDELINES "ADVISORY"

The facts underlying the Court's decision in *Booker* and *Fanfan* involved convictions for federal drug offenses. Booker was convicted of possession with intent to distribute at least 50 grams of crack cocaine. The Guidelines mandated a sentence between 210 and 262 months. However, the judge found additional facts by a preponderance of the evidence at a post-trial sentencing proceeding that mandated an increased sentence of 30 years to life. The judge sentenced Booker to 30 years – over eight years longer than the maximum sentence authorized under the Guidelines on the basis of the facts found by the jury. The judge in Fanfan's case also found additional facts at sentencing but refused to follow the Guidelines, which required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the facts found by the jury. The Court granted government petitions for certiorari before judgment in both cases.

The Court – in an incredibly divided and complicated set of opinions – issued a two-part holding. 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 mandatory Guidelines are not consistent with the Sixth Amendment. Thus, to "remedy" the constitutional flaw inherent in the Guidelines, the Court excised two provisions, declared that the Guidelines will no longer be mandatory on federal judges, and called the remaining Guideline 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, the result of the Court's decision is that district judges are no longer bound to apply the Guidelines. Although judges must "consider" the Guidelines, the Court's decision does not shed much light on what that will mean in practice. What is clear, however, is that district judges now effectively possess the same discretion in sentencing they had before the Guidelines went into effect. A judge is free – for all practical purposes – 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 — provided that any increase in a defendant's sentence is not based on facts found by the judge and not the jury. On appeal, sentencing decisions will be reviewed for "reasonableness."

THE APPLICATION OF THE GUIDELINES TO CORPORATIONS BEFORE THE COURT'S DECISION

The impact of the Guidelines on white collar crime has been sweeping. For example, Sarbanes-Oxley enforcement has been critically tied to the Guidelines, with mandatory enhancements in securities fraud cases that greatly increased the prison time or fine imposed on defendants. Individual and organizational defendants accused and/or convicted of other crimes, such as insider trading, mail fraud, wire fraud, and antitrust violations, to name a few, have been faced with the prospect of mandatory enhancements and harsh sentences under the Guidelines.

Chapter eight of the Guidelines provides for the sentencing of "organizational" defendants – defendants who are legal "persons" other than individuals. Under federal criminal law, such organizations may be vicariously liable for the acts of their agents. Organizations were punished under the Guidelines through provisions requiring, depending on the facts of the case, restitution, fines, and probation.

The Guidelines contain several features applicable specifically to organizational defendants that were binding on district judges prior to the Supreme Court's decision, including but not limited to:

- Mandatory formulas to calculate fines and mandatory minimum and maximum "fine multipliers";
- Mandatory enhancements for involvement in or tolerance of criminal activity, a prior history of similar criminal or <u>civil</u> misconduct, and obstruction of justice;
- Downward departures for substantial assistance to the government <u>only</u> upon motion by the government;
- Mandatory probation under a broad range of circumstances, including but not limited to: failure to have an effective compliance and ethics program as defined by the Guidelines, a sentence without a fine, and if probation is necessary to reduce the likelihood of future criminal conduct;

- Mandatory addition to the fine of any gain to the organization from the offense not paid as restitution or through other remedial measures.

The Supreme Court's decision directs that these mandatory provisions – and all other mandatory Guideline provisions – are no longer binding on sentencing judges.

THE IMPACT OF ADVISORY SENTENCING GUIDELINES ON CORPORATIONS

While the Guidelines were mandatory, prosecutors were able to apply significant leverage on corporations and corporate counsel at the earliest stages of investigations into potential wrongdoing. Prosecutors were empowered to request that organizations waive attorney-client privilege and work product privilege – effectively transforming corporate counsel into an investigative arm of the government.

Indeed, such requests were supported by the Guidelines, because to qualify for a reduction in punishment based on cooperation, the Guidelines state that such cooperation must be both "timely" and "thorough." In effect, the Guidelines required organizations to begin cooperating as soon as the government informed the organization of an investigation, and to disclose any and all information that the organization possessed. The government could leverage the organization by informing corporate counsel that absent full capitulation by the organization, the government would not seek a downward departure based on the organization's cooperation at any potential sentencing.

Moreover, the mandatory Guidelines system required that organizations have an "effective" compliance and ethics program. While organizations with such programs qualified for reduced punishment, the determination of whether such a program was "effective" was defined by the Guidelines and binding on judges. Further, the failure of an organization to have an "effective" compliance and ethics program under the mandatory system not only prevented organizations from receiving lighter sentences, but in some instances <u>required</u> the district judge to mandate probation.

The Supreme Court has taken this tool from the government's arsenal. The prosecutor can no longer <u>guarantee</u> an organization or individual that a particular fine or sentence will result if they are charged and convicted. The district judges must <u>consult</u> the Guidelines but may disregard them – provided they stay within the statutorily prescribed range of punishment. However, judges are also free to follow the Guidelines to the letter – provided they do not violate the Sixth Amendment by imposing sentences that are contingent on judicially-found facts. Indeed, the Department of Justice has already indicated that it will continue to urge judges to apply the Guidelines in all cases.

CONCLUSION

Most expect Congress to act quickly in response to the changes to the Guidelines system, including the Court. Justice Breyer wrote, "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."

Whether or not Congress takes action, the landscape of federal sentencing has been permanently altered. Kirkpatrick & Lockhart Nicholson Graham LLP will continue to examine the issues raised by the Court's decision and the new system of advisory Guidelines the Court has created. In future Alerts, K&LNG will examine in greater detail some of the issues facing corporations and individuals, including:

- How will advisory Sentencing Guidelines specifically change the range of fines facing a corporation charged with federal criminal misconduct?
- How will advisory Sentencing Guidelines impact the way corporate counsel communicates with agents of the corporation when conducting internal investigations?
- Should corporations and their attorneys re-evaluate the development and implementation of internal compliance and ethics programs?

- How should corporate counsel proceed in light of the new Guidelines system when faced with a request from the government that the organization waive its attorney-client privilege at the beginning of an investigation?
- How will the new standard of review for appeals from sentencing decisions affect individual and organizational defendants?
- How will the lack of mandatory Guidelines impact negotiations with prosecutors when there are both individual and corporate defendants?

These issues are a few of the many raised by the Court's landmark decision. Federal sentencing and the practice of federal criminal law will continue to evolve as judges apply the Court's ruling, organizations evaluate their internal controls and investigative procedures, and Congress contemplates what – if anything – to do next.

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