

**THE IMPLICATIONS OF THE SUPREME COURT'S *BOOKER* DECISION ON CORPORATE COMPLIANCE AND ETHICS PROGRAMS**

On January 12, 2005, in companion cases *United States v. Booker* and *United States v. Fanfan*, Nos. 04-104 and 04-105, slip op., 543 U.S. \_\_\_\_ (2005), the United States Supreme Court announced that federal courts would no longer be required to follow the U.S. Sentencing Guidelines (the "Guidelines") in federal sentencing proceedings.

The Guidelines, which have been in use for more than 15 years, are an intricate set of rules that, up until *Booker*, governed all federal criminal sentencing proceedings. Prior to *Booker*, the Guidelines required judges to calculate a defendant's base sentencing range according to the nature and severity of the offense and the defendant's culpability and, where appropriate, to make additional factual findings "by a preponderance of the evidence" that could raise or lower the applicable sentencing range and the defendant's ultimate sentence. For example, in sentencing an organization, a court would calculate a fine range by taking into account such factors as whether, in mitigation, the organization provided substantial assistance to authorities, or, in aggravation, the organization failed to implement an effective compliance and ethics program.

The Court in *Booker* also held that certain sentence enhancements under the Guidelines based on facts found by a judge, rather than a jury, violated a defendant's right to a jury trial under the Sixth Amendment. This followed the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. \_\_\_, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), in which the Court held that similar enhancements under the State of Washington's sentencing guidelines were unconstitutional. In *Booker*, the Court remedied this constitutional defect in the federal sentencing guidelines by invalidating the provisions that made application of the Guidelines mandatory. In other words, *Booker* rendered the Guidelines advisory only.

The practical effect of *Booker* remains to be seen. In its opinion, the Supreme Court emphasized that federal trial courts, though no longer bound by the Guidelines, must still "consult" the Guidelines and "take them into account when sentencing." Accordingly, courts are still required to consider the applicable Guideline sentencing range and impose sentences reflective of the goals articulated by Congress when it authorized the creation of the Guidelines. Thus, at the very least, the Guidelines will remain the starting point for courts in sentencing criminal defendants. Indeed, one post-*Booker* decision states that the Guidelines are still entitled to "heavy weight" and should only be departed from "in unusual cases for clearly identified and persuasive reasons." *United States v. Wilson* (D. Utah Jan. 13, 2005).

Further, on January 28, 2005, the U.S. Department of Justice (the "DOJ") announced its intention to continue following the Guidelines in making charging decisions and sentencing recommendations. In a memorandum to all federal prosecutors, the Deputy Attorney General instructed prosecutors to adhere to the Guidelines in charging defendants and negotiating plea agreements and to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases."

Based on the foregoing, corporations and other organizations should expect that any post-*Booker* charging decisions, DOJ negotiations, or sentencing proceedings will be governed by the Guidelines, albeit in their new advisory nature. In this respect, *Booker* should have no impact on your implementation of an Effective Compliance and Ethics Program under the newly effective amendments to the Guidelines. These amendments became effective on November 1, 2004, and as we explained in a previous Client Memorandum, dated May 3, 2004, they contain much more stringent requirements for corporate compliance programs. Thus, companies should continue to ask the following questions about their compliance and ethics programs in order to ensure they meet the new standards:

- Is your compliance program designed to detect and prevent not only criminal violations, but violations of any law or regulation for which the organization could be liable?
- Are your board of directors and senior management knowledgeable about the content and operation of your compliance and ethics program and do they oversee and monitor its implementation and effectiveness?
- Is someone within high-level personnel in your company ultimately responsible for your compliance program's effectiveness?
- Does your compliance program include compliance-related training, monitoring and auditing?
- Do you perform periodic risk assessments to ensure appropriate design, implementation and modification of your compliance program?

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If you have any questions concerning the foregoing or would like additional information, please contact Martin J. Weinstein (Chair, Compliance and Enforcement Practice Group) at (202) 303-1122, Robert J. Meyer (Vice-Chair) at (202) 303-1123 or the attorney with whom you regularly work.

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