

## COURT: STORED E-MAILS OUTSIDE SCOPE OF FEDERAL WIRETAP LAW

On June 29, 2004 in a 2-1 decision, the federal Court of Appeals in Boston ruled that the federal Wiretap Act (the "Act") did not prohibit the reading of e-mail messages that were being electronically stored on a computer but had not yet been opened by the intended recipient. The Act makes it a federal crime to intercept e-mail messages being sent to others. In *U.S. v. Bradford C. Councilman*, the vice president of an online listing service for rare and hard to find books, was charged with intercepting thousands of e-mail messages sent to his subscribers in order to gain a competitive advantage. The e-mails were sent from an online book seller through the listing service's e-mail server.

The defendant argued that the Act did not apply because the e-mail messages were in "electronic storage" rather than in transit, and therefore, they could not be "intercepted" as a matter of law. In agreeing with the defendant, the court also noted that the plain language of the Act and its legislative history indicated that Congress intended to exclude electronically "stored" messages from a higher level of privacy and protections. Advocates have assailed the ruling as opening the door to further interpretations that could erode personal privacy rights.

**In light of this and similar rulings by other courts, companies should be cautious in sending confidential information via e-mail to others that rely upon e-mail services provided by third parties.**

### ■ SEC TO PUBLICLY RELEASE REVIEW LETTERS

The SEC announced that, effective August 1,

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2004, it will begin publicly releasing the comment letters it issues when reviewing stock registration statements and annual and quarterly reports filed by companies. Also, it will make public the companies' respective responses. These documents have not been released in the past by the SEC except in response to Freedom of Information Act (FOIA) requests. This SEC action comes after one commercial database service initiated a FOIA request program and obtained hundreds of these review letters.

Because even the responses by companies to the SEC will become public, companies should consider treating them as the equivalent of public statements to the market. Any matter that a company does not wish to publicize should not be included in any written response to the SEC.

While companies may still request confidential treatment for specific parts of their responses, the SEC intends to reject those requests that seem overly broad. Note that the SEC review letters themselves will be made public in their entirety.

**Companies may wish to address sensitive or confidential issues with the SEC via supplemental oral discussions before sending a written response.**

## ■ SUPREME COURT RULING ON SENTENCING GUIDELINES COULD AFFECT COMPANIES

*Alan Strasser of our Washington, DC office writes:*

The Supreme Court's decision last week in *Blakely v. Washington*, which threatens to invalidate a significant part of the federal sentencing guidelines, could also affect corporations or its officers facing criminal indictments.

The Court held 5-4, in an opinion written by Justice Scalia, that the Constitution forbids a judge from increasing a sentence beyond the level provided for in a sentencing guideline unless the facts on which the judge relies have been proven to a jury beyond a reasonable doubt. Although the *Blakely* case held unconstitutional a portion of the state sentencing guidelines in the State of Washington, the holding should apply to key provisions of the federal sentencing guidelines as well.

In *Blakely*, the defendant had pled guilty to kidnapping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that the petitioner had acted with deliberate cruelty, which Washington law recognized as a ground for imposing a harsher sentence.

The Supreme Court held the sentence was unconstitutional, because it violated the rule announced in its 2000 *Apprendi* decision that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court also held that "[t]he relevant statutory maximum... is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." Several federal judges have since reduced previously imposed sentences because the additional terms were based on facts heard only by the judge, not the jury.

The Justice Department reacted swiftly to the *Blakely* decision by issuing written guidance to federal prosecutors requiring, among other things, that federal criminal indictments contain allegations about any fact that the prosecutor wishes to use to increase the sentence of the defendant.

This new Justice Department policy may affect any corporation that is subjected to a federal indictment. The indictment could now contain quite detailed allegations of wrongdoing and of accusations of misconduct that the government hopes to prove at a trial. The accumulation of such detail in an indictment may impose additional disclosure obligations on any company that must make public disclosures under the securities laws, or that bears reporting obligations under other regulatory schemes or under agreements with third parties.

**In addition to triggering public disclosures that a company may be required or feel the need to make, more detailed criminal indictments could highlight corporate practices that might trigger stockholder lawsuits or alert competitors.**

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