

SUPREME COURT RULING ON SENTENCING GUIDELINES AFFECTS CORPORATE COMPLIANCE PROGRAMS

Companies that have developed compliance programs over the years, partly as a defense against harsh penalties under the federal sentencing guidelines (Guidelines), should not abandon them just because the Guidelines were ruled to be voluntary rather than mandatory by the Supreme Court on Wednesday. Instead, companies should keep the plans they currently have or adopt a plan if they do not currently have one.

Why Compliance Programs Arose

The Guidelines for organizations provided much of the initial impetus for the creation of corporate compliance programs. The existence and content of those compliance programs were factors that judges considered when imposing a sentence under the Guidelines on an organization found guilty of a crime. After a conviction, whether by plea or verdict, the judge would assess whether the organization had an effective compliance program under the Guidelines. If the judge found that the organization lacked an effective compliance program, that finding had the effect of increasing the fine imposed on the organization. If the organization had an effective compliance program, the Guidelines required the judge to impose a lower fine.

The Supreme Court Ruling

In a pair of opinions issued on January 12, 2005, the U.S. Supreme Court held that the Guidelines are unconstitutional as applied because sentences were increased based on facts that were not put before a jury. However, the Guidelines were not invalidated; they were instead allowed to remain intact. Judges can consider the Guidelines when rendering sentences, but they are no longer bound by them.

The Court held that a judge can rest a criminal sentence only on facts found by a jury or admitted by a defendant, rather than on facts found by a judge at sentencing. In one case, for example, the judge increased the defendant's sentence by ten years by finding at sentencing that he had possessed another 566 grams of crack beyond those the jury convicted him of possessing. The Supreme Court held that the additional sentence of ten years violated the defendant's right to trial by jury.

The decision calls into serious question whether a judge could increase an organization's sentence based on factual findings that the judge made at sentencing, rather than those factual findings made by a jury verdict or by agreement with the organization.



The U.S. Supreme Court

What You Should Do

Keep the programs. While the Supreme Court has made the Guidelines discretionary rather than mandatory, the Court also held that judges must consider the Guidelines when imposing sentences. Even if the judges were not required to consider the Guidelines, though, we believe most federal judges are likely to do so regardless. The organizational portion of the Guidelines set forth factors that many judges will regard as relevant in determining the proper punishment of an organization, even if the law does not require them to assess these factors or weigh them in the precise manner that the Guidelines had required.

Even apart from the potential benefits to an organization if it faces a criminal sentencing, though, a compliance program brings other benefits. Prosecutors assess a corporation's compliance program when they decide whether to bring charges at all. Other regulatory agencies will also consider these kinds of compliance programs in deciding whether to bring enforcement action or seek administrative sanctions.

The Next Development

Finally, we have not heard the last word on federal sentencing. The Supreme Court's opinion says the "ball now lies in Congress' court." It has yet to be seen whether Congress, with the strong backing of the U.S. Department of Justice, changes federal sentencing and reinstates a requirement for compliance programs. ■

For more information on this topic, please contact **Alan Strasser** or **Paul Borja**, partners resident in our Washington D.C. office, at (202) 828-2400