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## Project: Corporate Counsel (Compliance Readiness)

# The Supreme Court Speaks On The Federal Sentencing Guidelines – How Should Corporations React?

*The Editor interviews Win Swenson, Senior Advisor, Integrity Interactive; Partner, Compliance Systems Legal Group.*

**Editor:** Please tell us about your background with the Sentencing Commission.

**Swenson:** In the late 1980s, I was part of a group of outside attorneys that advised the Sentencing Commission on how to develop sentencing guidelines for organizations. Subsequently, I joined the Commission in 1990 as Deputy General Counsel where I headed the task force that developed the organizational sentencing guidelines that went into effect in late 1991. I continued with the Commission until 1996 with the assignment of monitoring the progress of the corporate sentencing guidelines.

**Editor:** What is the purpose of the sentencing guidelines?

**Swenson:** The purpose of the guidelines is to bring rationality and order to sentencing. Within the statutory limits, judges had been free to apply their experiences and own predilections. Thus, if the statute provided for imprisonment of between 0 and 20 years, judges were able to decide on a sentence anywhere within those parameters. The Commission was created because of the perception that the sentencing of individuals was erratic and did not follow consistent policy. Corporations are also defendants in federal courts – and given that the Commission's mandate was to create guidelines for all federal defendants, the corporate or organizational guidelines were created in 1991. The background of the corporate



Win Swenson

guidelines was somewhat different from the individual guidelines. For the individual guidelines, there was a substantial track record that could be studied. As to corporate sentencing decisions, there was less experience to draw upon. Therefore, the Commission's task was to create a new concept for how to treat corporations that were convicted of crimes.

**Editor:** What do the guidelines do in the case of corporations?

**Swenson:** Under the corporate sentencing guidelines, two variables principally influence a fine – or sanctions like corporate probation where a monitor is appointed to look over the corporation's shoulder. One is whether the company had an "effective" compliance program during the period when the offense occurred, and the other is whether it could have made a voluntary disclosure. If it could not make a disclosure because it did not learn about the event until the

government did, then the fine can be reduced by applying the compliance program criteria. The compliance program criteria consist of seven factors. They focus on logical things, such as whether the company had a strong management structure for the program, including board oversight and whether the company had engaged in a risk assessment process in designing its compliance program. Under the revised organizational guidelines that took effect last November, training is key. The guidelines ask whether there is a company-wide training program based on the risk assessment that enables employees to identify and avoid violations of law. The compliance criteria also look at such things as whether there is a way for a employees to get advice about, and report, possible violations and whether there is an ongoing process for evaluating the effectiveness of the compliance program.

**Editor:** Do the guidelines explicitly make mitigation of the sentence contingent upon having an employee training program under the circumstances you described?

**Swenson:** Yes. Recent amendments to the guidelines, in November 2004, made the requirements more specific. The *sine qua non* is that you must do training of everyone in the organization commensurate with the kind and degree of legal risks – antitrust, fraudulent sales practices, environmental, etc. – posed by their jobs. In my view, this makes online training a critical part of the necessary solution because the guidelines make it clear that all personnel need to be reached with training. Online training is the only feasible way to do this in a large company and it allows resource-intensive live training to be tar-

geted where it is most needed, as part of the overall training approach.

**Editor: Are the guidelines limited to behavior of employees in the U.S.?**

**Swenson:** No. Some U.S. laws are extraterritorial. There are a lot of things that can happen outside U.S. borders that would be subject to enforcement actions in the U.S. Therefore, the sentencing guidelines require a company to train its overseas employees about compliance with those laws. However, a growing number of multinational companies also have concluded that it makes sense to train employees outside of the U.S. in avoiding liability under the laws of foreign countries in which they operate even though the guidelines do not apply.

**Editor: Tell us about the effect of the recent United States Supreme Court decision in *United States v. Booker* and *United States v. Fanfan*?**

**Swenson:** These cases involved sentencing of individuals convicted of drug offenses and did not specifically address the corporate sentencing guidelines. However, the Supreme Court found that a feature of the guidelines common to both individual and corporate sentencing decisions – a guideline requirement that judges consider facts, after a jury has heard the case, that can dramatically increase the sentence – violated a defendant's sixth amendment right to a jury trial.

The Supreme Court's decision included two opinions. The first opinion was that the guidelines as applied to individuals were unconstitutional under the sixth amendment analysis I just described. The second opinion stated that to the extent the guidelines are treated as advisory as applied to individuals they can still be used. In fact, under the second opinion, judges are still required to at least "consider" the guidelines criteria. In essence, they have become required reading before a sentence is handed down; however, a judge is not required to apply them. Sentencing decisions will also be subject to appellate review for a determination of their reasonableness. Thus, there has been a shift from a mandatory system to one where judges have more discretion but are required to look at the guidelines to determine if, and to what extent, they should be applied.

No one is exactly sure how the appellate courts are going to respond. I would speculate that whether a sentence is high or low, the sentencing judge is going to have to include in the reasoning of her sentencing decision some analysis of why the guidelines were or were not used. If the judge did not indicate why she gave a sentence different from that provided in the guidelines, I predict that the appellate court will remand with a request that the reasoning behind the decision be stated.

**Editor: Recognizing that the Supreme Court's decision involved individual sentencing, how will it affect the application of the corporate sentencing guidelines?**

**Swenson:** The sentencing guidelines for individuals have always been controversial. In contrast, the corporate guidelines have been well received. I do not see an incentive for judges to depart much from the corporate guidelines and my prediction is that they will not.

Another factor militating in favor of the corporate guidelines is that the sentencing ranges are broader in the corporate context than in the individual context. Under the corporate guidelines the criteria for a compliance program and voluntary disclosure are well spelled out. But the breadth of the resulting sentencing ranges give judges a fair amount of room to maneuver in picking the precise amount of a fine.

An interesting question is whether corporations have a sixth amendment right to a jury trial – the central concern in the recent Supreme Court cases. That is a little unclear. The prevailing view is that they probably do have that right, but it has not been completely settled. As a practical matter, the Justice Department will urge the guidelines to be applied and the courts will look at them as a useful model where they have not had one before and they will tend to apply them.

**Editor: There is some talk that Congress will consider legislation to reimpose a requirement that judges follow the guidelines. Do you foresee anything happening to the corporate guidelines if Congress does get involved?**

**Swenson:** I think that Congress will get involved in the individual guidelines, because that is where most of the fairness concerns are raised. My fear is that Con-

gress will rush in and statutorily mandate everything which is permissible under the Supreme Court's decision. Given that the focus has been primarily on the individual guidelines, I do not know what Congress will do with respect to the corporate guidelines. I am monitoring developments on the Hill to see what will happen on that question.

**Editor: Should companies continue to comply with the organizational guideline standards?**

**Swenson:** Federal courts are still required to consider them under the Supreme Court decisions and they are apt to apply them. The Department of Justice's charging policies say that having a compliance program and meeting the sentencing guidelines standards are important criteria that federal prosecutors will consider when determining whether to charge a target company under investigation – in at least one case, a United States Attorney has retained experts to evaluate a company's compliance program to help her decide whether to indict. In an antitrust situation, the antitrust division will provide complete amnesty for companies that are the first to disclose a price fixing conspiracy. By sensitizing employees to information about potential violations, a compliance training program can provide a company with early warning of antitrust problems so that employees will report concerns and the company, in turn, can report any substantiated violations to the government, taking advantage of the amnesty program.

Moreover, compliance programs have enormous benefits entirely apart from sentencing. These additional benefits run from preventing criminal charges, civil penalties, director and officer liability, reputation damage to a corporation and business disruption because key people are tied up in litigation. Moreover, an ethical and law-compliant corporate culture is a positive generator for employee morale and allows companies to keep the good people they want to retain. So I think that there are enormous benefits to having a meaningful compliance and ethics program.

My advice to companies is to stay the course because the sentencing guidelines and employee compliance training will continue to play a significant role in the future in lots of different settings.