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While focusing in our primary areas, our attorneys maintain expertise in a broad range of specialized practice areas and subspecialties including:

- Business law and transactions
- Securities law
- Commercial litigation
- Environmental law
- Water law
- Real estate
- Estate planning
- Legal ethics

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Briefly

... from Burns, Figa & Will, P.C.

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Briefly. . . from Burns, Figa & Will, P.C. is published periodically to provide general information to our clients and friends about legal issues and new developments in the law. Additional articles prepared by our attorneys can be found on our website at www.bfw-law.com.

What, you are wondering, is an article on federal criminal sentencing doing in our firm's staid newsletter. The answer is that, in this age of complex "white collar criminal"

investigations and prosecutions of conduct by formerly respected companies and corporate executives from Wall Street to board rooms in Colorado, it is more important than ever for our corporate clients to be mindful of the need to implement "effective compliance program" to prevent and detect violations of federal criminal laws. **The existence of such an effective compliance program can mitigate the potential fine range for an organization's violation of federal criminal laws by up to 95 percent.**

This is so even though the United States Supreme Court, in two well-publicized recent cases entitled *United States v. Booker* and *United States v. Fanfan*, held that the current

Corporate Compliance Programs to Detect and Prevent Crime are more Important than Ever

Michael J. Norton

mandatory Federal Sentencing Guidelines violated the U.S. Constitution's Sixth Amendment guarantee of a right to trial by jury on grounds the Guidelines empowered judges to enhance sentences beyond the maximum sentence supported by the facts found by a jury or admitted to by a defendant. The Supreme Court declared, as a result, that the Guidelines were only advisory and that a trial judge, in imposing a sentence deemed "reasonable," could consider the Guidelines and other relevant sentencing considerations, including the avoidance of sentencing disparities, the provision of restitution, and the imposition of sentences that reflect the seriousness of the offense, respect for the law, and just punishment. Although the Guidelines are likely to be followed in imposing federal sentences, those judges who consider the Guidelines to be too harsh or too lenient likely will depart from the recommended Guideline range and impose sentences that are deemed "reasonable."

In the wake of corporate scandals in recent years and legislation, e.g., the Sarbanes-Oxley Act of 2002, enacted to provide for greater corporate director and executive

officer accountability, the part of the Guidelines applicable to public and private corporations and non-profit organizations has, in recent years, been amended to encourage companies to develop and implement "effective" compliance and ethics programs to prevent and detect violations of the law. An effective program is one whereby a company exercises due diligence to prevent and detect criminal conduct and promotes an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

So, since the Guidelines are now advisory, not mandatory, just what does the Supreme Court's *Booker/Fanfan* decisions do to the concept of Guideline approved compliance and ethics programs? The answer is that these decisions make such programs more important than ever. Now, even though a federal judge may depart from the Organizational Sentencing Guidelines, a company with a strong and effective compliance and ethics program will likely be treated even more favorably as a sentencing judge considers the program in determining what fine to impose on the company for a violation of federal criminal laws. Importantly, smaller companies with limited resources may be able to more effectively argue for mitigation credit even if the program is not as "effective" as would be expected of larger companies.

No one likes to be "caught" having violated the law. **It makes sense, however, for a company to self-police the conduct of its employees by being able to identify, assess, and correct compliance problems before the problems are discovered by regulators or federal criminal investigative agencies.** Such compliance and ethics programs are sound risk management tools that most companies should have in place. Moreover, even if regulators pursue civil remedies against a company, the existence of such a program may serve to convince federal prosecutors not to prosecute and may result in reduced civil penalties or elimination of administrative actions. For example, the U. S. Securities and Exchange Commission has established prosecutorial guidelines for leniency where a company has an effective compliance program.

The bottom line is that, notwithstanding the Supreme Court's *Booker/Fanfan* decisions, **effective compliance and ethics programs are important to protect the value of a business and may, just may, keep a corporate executive out of federal prison.**



Michael J. Norton is a senior member of the law firm. Mr. Norton's practice areas include complex civil litigation and white collar criminal defense, real estate law, including real estate broker and licensing law, and wills, trusts, and estate planning. For more information contact Michael J. Norton at 303.796.2626 or mjnorton@bfw-law.com.

“SEC Increases Scrutiny of Environmental Disclosures”

Herrick K. Lidstone, Jr., Lee E. Miller, and Alix L. Joseph

Corporate environmental disclosures are receiving greater scrutiny by the United States Securities and Exchange Commission (“SEC”) as a result of the Sarbanes-Oxley Act and a Congressional investigative report.

GAO Report

In July 2004, the Government Accountability Office (“GAO”) issued a report to Congress entitled “Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information” (the “GAO Report”) that highlights the problems with environmental disclosures in SEC filings.

Undisclosed environmental risks and liabilities impair the public’s ability to make sound investment decisions. SEC regulations require disclosure of environmental liabilities in their public filings. **The GAO found, however, that little is known about the extent to which companies are disclosing environmental liabilities in their public filings.**

GAO recommended that the SEC develop a system for tracking SEC comment letters that will: **1)** enable the SEC to determine the most frequently identified problem areas; **2)** enable the SEC to analyze trends over time within particular industries; **3)** allow the SEC to assess the need for additional guidance in certain areas; and **4)** enable the public to review SEC comment letters and company responses. Additionally, **the GAO recommended that the SEC more closely track company’s disclosures with information available from the EPA detailing enforcement actions.** SEC comments to the GAO Report indicate that the SEC agrees with the GAO’s recommendations and is likely to begin taking a closer look at corporate environmental disclosures.

The Securities Act of 1933

Both small and large companies are already required to disclose environmental liabilities in their public filings. This disclosure is required by several requirements of the securities regulations governing disclosure and by generally accepted accounting principles (“GAAP”).

Regulation S-K Item 101(c)(xii) requires disclosure of “the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.” See, also, Regulation S-B, Item 101(b)(11).

Similarly, Regulation S-K, Item 103 requires disclosure of material litigation, including, but not limited to, proceedings “arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment . . . if financially material – or if the litigation involves a governmental agency and penalties could exceed \$100,000 (regardless of materiality).” See, also, Instruction 3 to Regulation S-B, Item 103.

Regulation S-K, Item 303 requires that the management’s discussion and analysis set forth management’s view of known trends and uncertainties that may impact the company’s liquidity, capital resources, and results of operations. Potential environmental liabilities, whether or not they have resulted in litigation or an administrative proceeding, must be disclosed under this Item when known or should reasonably anticipated by the company. See, also, Regulation S-B, Item 103.

Generally accepted accounting principles require that the company make an assessment of actual, threatened, and potential liabilities to determine whether disclosure is appropriate. Actual liabilities must be determined (and estimated if necessary) and set forth on the company’s

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balance sheet, and may require an expense accrual on the company's statement of operations. Contingent liabilities must be reviewed and a determination must be made whether they are material – and a materiality determination would require disclosure in the notes to the financial statements. Thus the disclosure requirement for material environmental liabilities exists under SEC regulation, and has existed for quite some period of time.

Sarbanes-Oxley Act of 2002, P.L. 107-204

SOA has several requirements that impact corporate disclosure, including environmental disclosures. 15 U.S.C. § 7266(a) (added by SOA) requires the SEC to conduct a regular and systematic review of disclosures made by certain classes of corporations.

In response to the requirements of 15 U.S.C. 7241(a) (added by SOA), the SEC adopted Item 307 to Regulation S-K (and Regulation S-B). This requires that the principal executive officer and the principal financial officer review the company's disclosure controls and reach conclusions regarding their effectiveness to ensure that material information is brought to the attention of the appropriate officers within a timeframe necessary to make appropriate disclosure. Clearly this includes disclosure of environmental issues. SEC Rule 13a-14(a) requires that the principal executive officer and the principal financial officer certify as to the effectiveness of these disclosure controls on each annual report (Forms 10-K or 10-KSB) and quarterly report (Forms 10-Q or 10-QSB) filed with the SEC. See Exhibit 31, Item 601, of Regulations S-K and S-B.

Finally, 18 U.S.C. § 1350 (implemented by SEC Rule 13a-14(b)) requires a second certification by the chief executive and financial officers. This certification, which carries criminal penalties if wrong, requires the chief executive officer and the chief financial officer to certify that the financial statements contained in a periodic report filed with the SEC "fairly presents, in all material respects, the financial condition and results of operations of the issuer to a similar effect." See Exhibit 32, Item 601, of Regulations S-K and S-B.

Applicability to Environmental Disclosure

Thus, as a result of the GAO Report and the requirements imposed by the Sarbanes-Oxley Act, it is likely that the SEC will be reviewing all corporate disclosures, including environmental disclosure, with greater scrutiny. The key question for public companies is how corporate officers analyze any environmental information in determining

what information is appropriate for disclosure. We recommend that any company designing a process to ensure compliance establish a communication process between business executives, environmental managers and consultants, and legal counsel. Each of these parties should carefully review pending and threatened litigation, current regulatory obligations, general enforcement trends and proposed regulations which may affect business operations or environmental compliance. Finally, executives and legal counsel should discuss disclosure requirements to determine which issues are appropriate for disclosure. Such regular communication and analysis will aid in ensuring that all appropriate information is disclosed.



Herrick K. Lidstone, Jr. is a senior member of the law firm. Mr. Lidstone practices in the areas of business transactions, including corporate law, federal and state securities compliance, mergers and acquisitions, contract law, tax law, real estate and zoning law, and natural resources law. For more information contact Herrick K. Lidstone, Jr. at 303.796.2626 or hklidstone@bfw-law.com.



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When a developer is building a shopping center, office building, or parking garage, city or county approval of the project is required. A developer may find him or herself in an unfamiliar jurisdiction. The developer may not know what is important to the particular community in which he or she is dealing. In the past several years, I have helped businesses through this process. My prior service on a deliberative body (the Greenwood Village City Council) contributed to my experience for helping clients navigate these sometimes choppy waters.

Leading Developers through the Local Government Approval Process

Candace Cole Figa

While a developer may be very excited about bringing new businesses to an area, he/she may find that the local city council, county commissioners, or planning commission might not share that enthusiasm. After all, for example, the city council while eyeing the tax revenues that the development will bring into the city coffers, they are also elected by the residents and are the closest government to them. They are influenced by those voters and particularly those that show up to voice opposition or concerns about particular projects. A developer must not ignore these concerns.

Usually in a development project, **the first step is to consult with city or county staff.** They are concerned with technical compliance with local zoning and development laws in effect and whether or not the proposed project fits within the city or county's comprehensive plan. Developers are required to give notice of proposed developments, zoning change

requests, and the like, by way of posting signs on the property detailing the place and time of the public hearing on the matter, mailings to neighbors within a certain perimeter of the project, and publication of the same information in the local newspaper. **Some governments require the developer to meet with surrounding neighbors.** At this point, a developer may be able to predict whether or not the project will be approved. On the other hand, a developer may not depend on the indications that there is little or no opposition until the project is actually before the city council or county commissioners. The governmental body may have concerns or sensitivities of which the staff or even the neighbors are unaware. In other words, "it's not over until it's over."

At the public hearing, the staff will present its findings and usually recommend **a course of action which may be approval, conditional approval, or denial of the proposal.** Then the developer will be asked to present the project. Sometimes the developer does the presentation, sometimes the architect, and sometimes it's their lawyer. Whoever it is, must be fully prepared to explain the project, address any staff or neighbor concerns, and certainly be cordial, even in the course of tough questioning or criticism. The compatibility of not only the project but also the developer is a concern. In other words, "is the developer a good neighbor?" On occasion, what a council or commission requests makes the project financially less feasible. It is often a matter of aesthetics and requires creative thinking to make it a win-win for both the developer and the city or county.

An example of a recent project that I helped take through this process involved a national company which wanted to consolidate its local work force into one location. The building could accommodate the number of workers but did not have enough parking spaces. The business was a good fit for the community because its workers would occupy the building during normal working hours. Part of the problem was that the building had been vacant for a few years and the neighbors got used to not having additional workers or the traffic they generated. A portion of the opposition was based on this alone, but the real protest to the project came with a proposed parking structure. The existing condition was a surface parking lot. The new project included a one-story garage, obscuring the front of the building and becoming the view from the windows of many high-end residential neighbors. These are the people who attended the public hearing and objected to the project. The project was defeated 4-2.

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New Provision for Colorado Corporations

Herrick K. Lidstone, Jr.

At that point, I was hired to quickly help find a solution to the problem because the tenant had a timeline to relocate its workers based on the expiration of other leases. With my familiarity of the area, I knew that a parking garage had just been built a block away and that the aesthetics of having a similar structure so close was objectionable. We met with the neighbors and took detailed note of all of their concerns. We also met with city staff to discuss options. There was talk of relocating the garage to the other side of the building, away from residential neighbors, but that was not a good choice because of utility location, the size of the space, and the obstruction of western views from the building itself. The idea of sinking the garage underground was proposed. For many developers this would have finished the project because of the added cost. This, however, became the most plausible solution. It addressed the concerns of the neighbors and the council about the aesthetics while giving the tenant the additional parking spaces. The new structure, accommodating almost twice as many cars, would only extend a foot or two above the sight lines of the old surface parking. Plans were redrawn and presented again to the neighbors. **This accomplished everyone's goals.** The neighbors, the staff, and the council were pleased with the proposal and also appreciated the attempts by the developer, through me, to work with the community to find a win-win solution. The project passed unanimously.

Burns, Figa & Will has many lawyers who have been involved in land use issues from working with local governments like I do, to working on environmental compliance and water issues. We would like to help you if you or someone you know faces a situation in which it must go through a governmental process to achieve its ultimate development or leasing goal.



Candace Cole Figa is a shareholder with the firm. Her practice includes litigation and trials of business, contract, commercial and real estate matters, personal injury, products liability and insurance law and land use planning. For more information contact Candace Cole Figa at 303.796.2626 or cfiga@bfw-law.com.

On April 22, 2005, Governor Owens signed Senate Bill 76 which provides flexibility when seeking shareholder consents to corporate actions. Under the previous law, shareholders of a Colorado corporation could only act by unanimous written consent or at a shareholders' meeting (usually requiring a majority vote or, in some cases, a two-thirds vote).

Senate Bill 76 provides that shareholders of a **Colorado corporation can act by less than unanimous written consent – but only if the right to do so is expressly provided for in the corporation's articles of incorporation.** We do not believe that any articles of incorporation for a Colorado corporation contain this right, and that all Colorado corporations should consider amending their articles of incorporation to include this right. There are some issues to be considered in deciding whether to include this new right, and minority shareholders may see this as a method of infringing on their rights. Delaware and Nevada have similar statutes, and this does provide greater flexibility to Colorado corporations.

Even if these provisions are adopted, public corporations will still have to comply with the information statement provisions of SEC Regulation 14C or the proxy rules. Thus the incremental benefit to public corporations will not be as significant as it may be for privately-held corporations. **We recommend that any person who owns a Colorado corporation and is considering whether to adopt the new flexibility contact us to discuss the advantages and disadvantages.**



Herrick K. Lidstone, Jr. is a senior member of the law firm. Mr. Lidstone practices in the areas of business transactions, including corporate law, federal and state securities compliance, mergers and acquisitions, contract law, tax law, real estate and zoning law, and natural resources law. For more information contact Herrick K. Lidstone, Jr. at 303.796.2626 or hklidstone@bfw-law.com.



Firm News

- **Denver Business Journal Honors Burns, Figa & Will, P.C.** Burns, Figa & Will was recently honored in the June edition of the Denver Business Journal as one of the Top 50 Law Firms in Colorado. The firm will also be recognized in the Denver Business Journal's 2005/2006 Book of Lists.
- **Colorado Bar Association Appoints Alec R. Rothrock to Chair Ethics Committee:** Alec R. Rothrock has been appointed Chair of the Ethics Committee of the Colorado Bar Association (CBA) for a one year term which began August 2005. Mr. Rothrock has been an active member of the CBA Ethics Committee since 1994. The CBA Ethics Committee is a standing committee of the Colorado Bar Association that exists for the purpose of giving ethics advice to Colorado attorneys. The CBA Ethics Committee has approximately ninety members. For more information, visit the Colorado Bar Association at www.cobar.org.
- **Eismeier Goes International:** Dana Eismeier has been handling several cases involving international parties, law and venue issues. These international issues have arisen in the context of complex commercial litigation cases he handles.
- **J. Kemper Will** will be facilitator for a breakout session, entitled **Mining Communities in Transition**, at the National Brownfields 2005 Conference in Denver, November 2005.
- **D. Merc Pittinos** was recently elected secretary of the Duke Alumni Club of Colorado.
- **Girl Scouts – Mountain Prairie Council, honored Alix Joseph** with the Appreciation Pin, a national award given for outstanding service. Recipients of the Appreciation Pin are nominated by their peers and the awards are approved by the council's board of directors. Joseph has been a member-at-large on the board of directors for three years. She has shown a strong commitment to Girl Scouting, offering her insight regarding council goals and objectives, and participating in the council's performance assessment.
- **Turkey Day 5K Family Fun/Walk.** The 2005 Turkey Day 5K presented by Burns, Figa & Will is scheduled for Thursday, November 24, 2005 at 9:00am and will start and finish at Shea Stadium in Redstone Park in Highlands Ranch. Proceeds from the 2005 run will again benefit the Colorado National Guard Foundation, which was established as a result of the Gulf War in 1991. Many Guard members have experienced financial hardship due to their deployment. Please visit www.turkeyday5k.com for more information.