



A Basic Introduction to the Organizational Guidelines

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Initial Development of the Organizational Guidelines

- **Authorization: The Sentencing Reform Act of 1984**
 - Principal purposes to reduce sentencing disparity and prevent crime
 - U.S. Sentencing Commission to develop sentencing guidelines for individuals and organizations
- Initial 1991 Organizational Guidelines pioneered concept of punishment mitigation for organizations with effective compliance program and for cooperation



Amendment 673

Effective Nov. 1, 2004

Created more visible, stand alone **Guideline, §8B2.1**, describing more detailed elements of an Effective Compliance and Ethics Program

- Expressly joined Ethics and Compliance functions, emphasizing importance of Organizational Culture
- Emphasized importance of Risk Assessments
- Established express Governing Authority Responsibilities
- Strengthened all program elements



Amendment 744

Effective Nov. 1, 2010

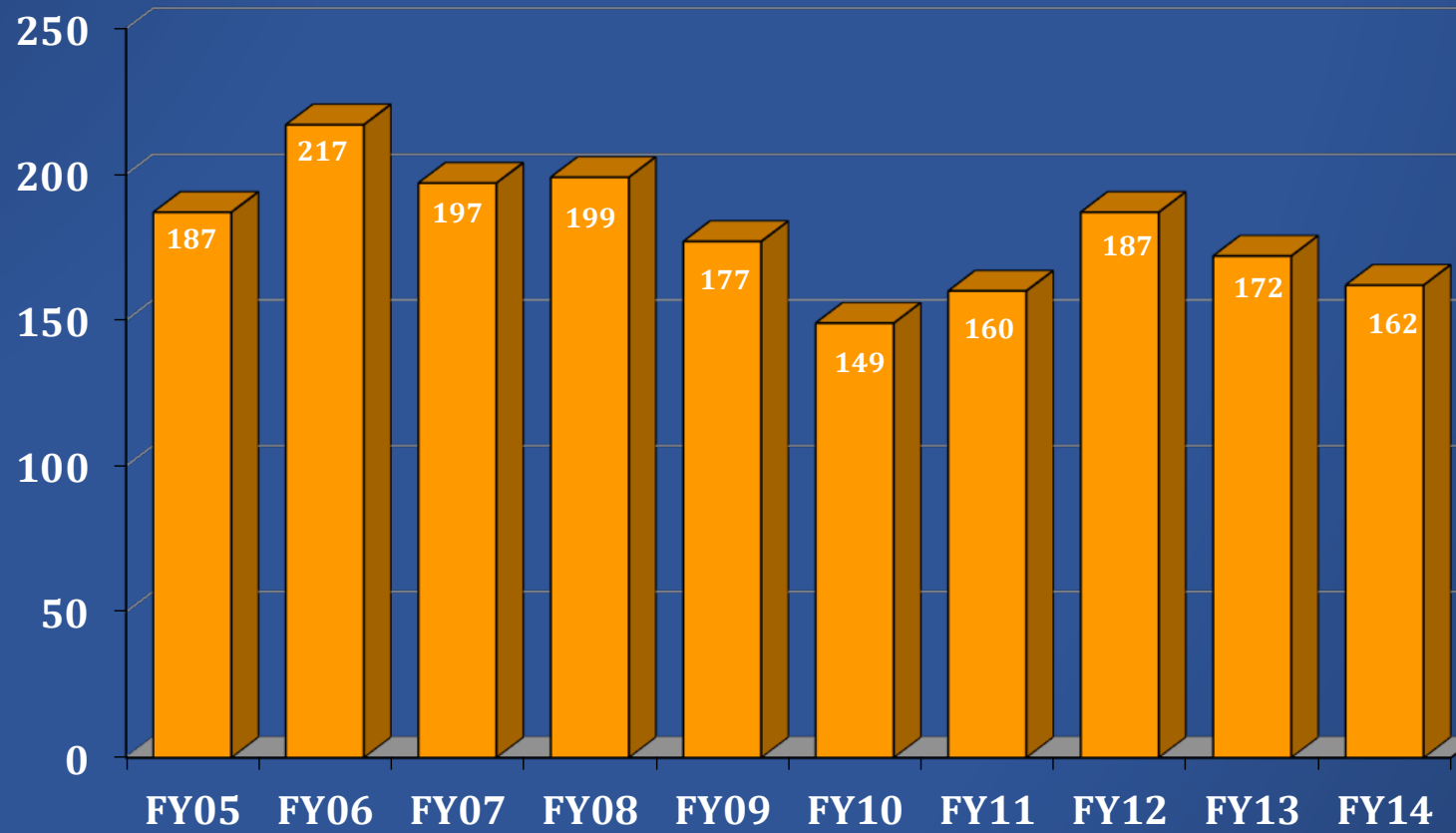
- Clarified expected responsive and remedial actions when violations occur:
 1. Restitution, remediation
 2. Voluntary disclosure
 3. Compliance program review, possible outside expertise

Amendment 744 (cont.)

Effective Nov. 1, 2010

- Emphasized importance of CCO Direct Reporting and Independence
 1. Direct reporting to governing authority regarding criminal conduct occurrences, and at least yearly regarding compliance program operation
 2. Policy expressed in context of judging program as effective even if high level person involved in wrongdoing
- Existence of Whistleblower Report does not render program per se ineffective

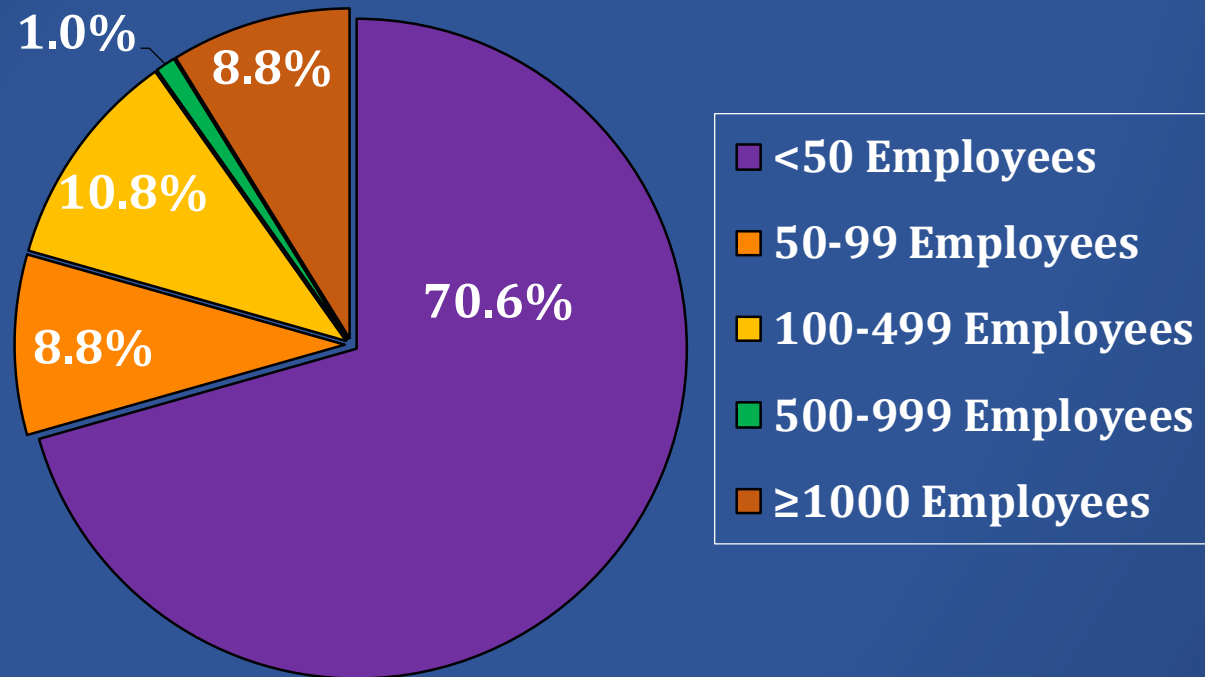
Number of Organizational Cases Fiscal Years 2005-2014



SOURCE: United States Sentencing Commission, 2005-2014 *Sourcebooks of Federal Sentencing Statistics*.



Size of Organizations Sentenced By Number of Employees Fiscal Year 2014



SOURCE: United States Sentencing Commission, 2014 Organizational Datafile, CORPFY14.





Overview of Chapter 8



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General Principles

- Organizations should remedy harm caused by offense (§§8B1.1 - 8B1.4)
- Organizations with criminal purpose should be divested (§8C1.1)
- “Carrot and Stick Approach” - Fine ranges determined by seriousness of offense and culpability (§§8C2.1 - 8C2.10)
- Probation to implement sanctions and reduce recidivism (§§8D1.1 – 8D1.4)



Part A – General Application Principles

- Apply to felony and Class A misdemeanors (§8A1.1)
- Apply Chapter 8 in order (§8A1.2)
 - Part B - Restitution
 - Part C – Fines
 - Part D – Probation
 - Part E – Special Assessments, Forfeitures and Costs





Part B, Subpart 1 Remedying Harm



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Restitution - §8B1.1

- Requires identifiable victim
- If so, court shall either
 - Enter restitution order if authorized by specified statutes
 - or
 - Impose term of probation or supervised release with condition requiring restitution if offense meets criteria for restitution order in § 3663(a)(1)
- Restitution paid before fine



Remedial Order - §8B1.2

- Imposed as a condition of probation
- Remedy harm caused by offense and eliminate or reduce risk that the instant offense will cause future harm
- Examples include a product recall for a food and drug violation or a cleanup order for an environmental violation



Community Service - §8B1.3

- Ordered as a condition of probation
- Must be reasonably designed to repair harm caused by the offense
- Must be preventive or corrective action directly related to the offense and serving one of the purposes of sentencing



Order of Notice to Victims - §8B1.4

- Apply §5F1.4
- Court may order defendant to pay cost of giving notice to victims
- Cost may be set off against fine imposed if imposition of both sanctions is excessive



Criminal Purpose Organizations - §8C1.1

- If court determines that organization operated primarily
 - For a criminal purpose, or
 - By criminal meansthen set the fine in an amount sufficient to divest the organization of all net assets
- Net assets means all assets remaining after payment of all legitimate claims by known innocent bona fide creditors





Part C, Subpart 2 Determining the Fine



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Applicability of Fine Guidelines - §8C2.1

- Apply §§8C2.2 through 8C2.9 to each count for which the offense level is determined under either
 - One of the Listed Chapter Two Guidelines
 - or
 - RICO violations, attempts, solicitations, or conspiracies, aiding and abetting, accessory after the fact, and misprision of felony if offense level for underlying offense is determined under one of the Listed Chapter Two Guidelines

Note: Cross-references to or from one of the Listed Chapter Two Guidelines will affect this determination



Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

- Fraud (§2B1.1)
- Insider Trading (§2B1.4)
- Trespass (§2B2.3)
- Commercial Bribery (§2B4.1)
- Criminal Infringement of Copyright or Trademark (§2B5.3)
- Offenses involving altering or removing motor vehicle identification numbers (§2B6.1)
- Certain offenses involving public officials (§§2C1.1, 2C1.2, 2C1.6)
- Offenses involving drug paraphernalia and drug regulatory offenses (§§2D1.7, 2D3.1, 2D3.2)



(cont.)

- Certain offenses involving criminal enterprises or racketeering (§§2E3.1, 2E4.1, 2E5.1, 2E5.3)
- Obscenity offenses (§2G3.1)
- Certain offenses involving explosive materials or firearms (§§2K1.1, 2K2.1)
- Smuggling, Transporting or Harboring an Unlawful Alien (§2L1.1)
- Odometer Laws and Regulations (§2N3.1)
- Antitrust (§2R1.1)
- Money laundering and structuring offenses (§§2S1.1, 2S1.3)
- Certain tax offenses (§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1)

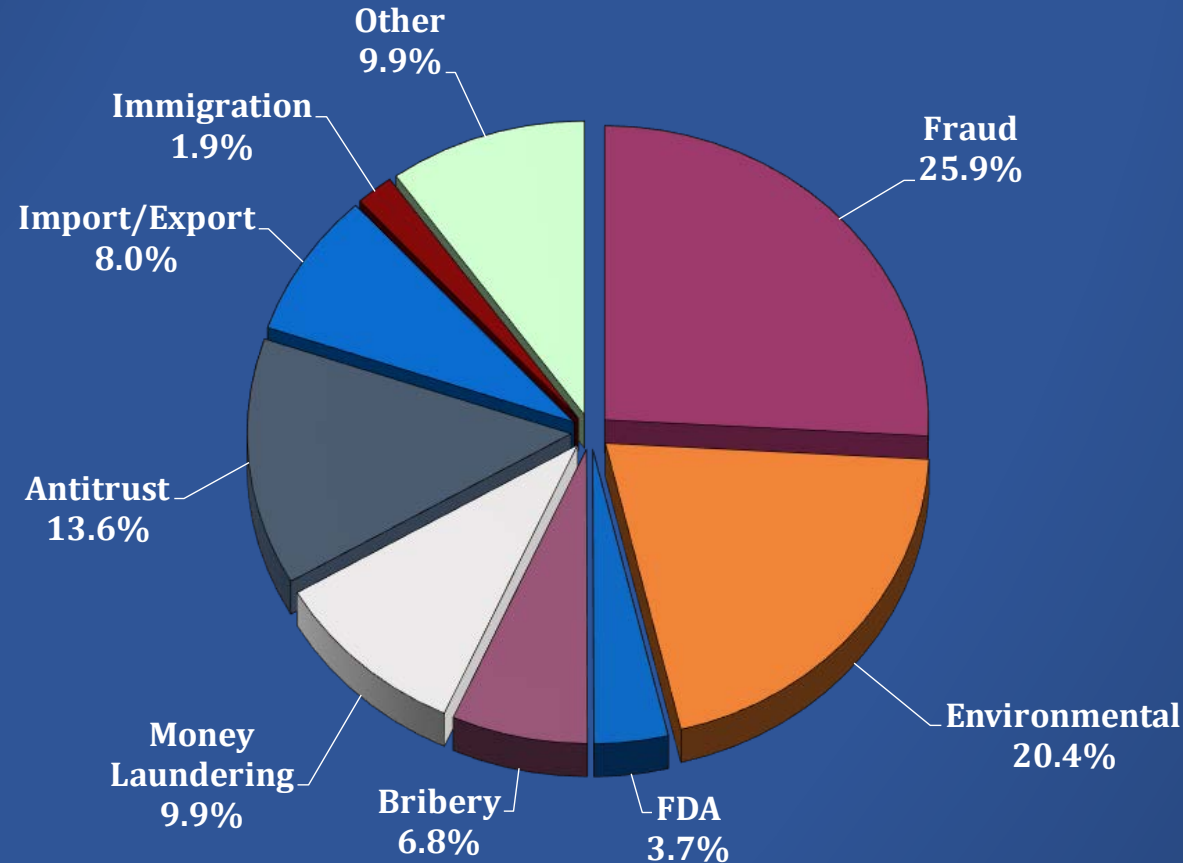


Types of Chapter Two Offenses Not Covered by Guidelines Fine Provisions

- Environmental
- Food, Drugs, Agricultural and Consumer Products
- Civil/Individual Rights
- Administration of Justice (*e.g.*, contempt, obstruction of justice, and perjury)
- National Defense



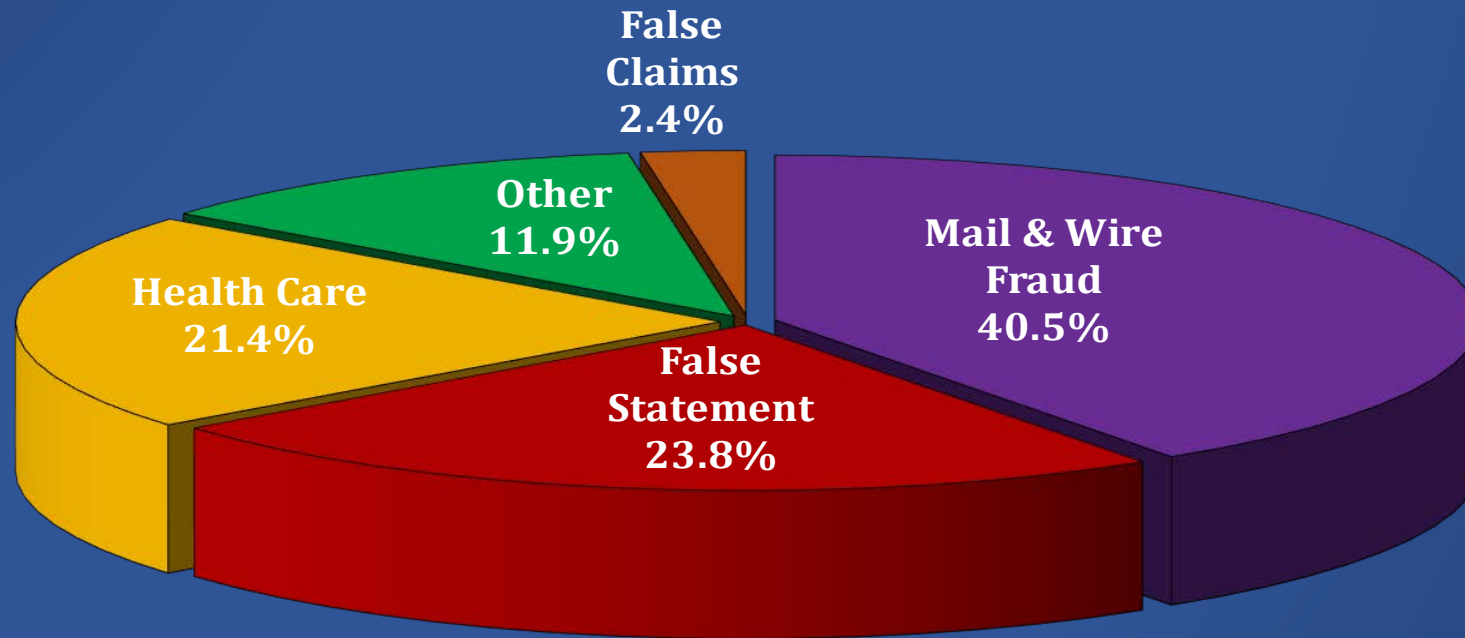
Primary Offenses of Organizational Cases Fiscal Year 2014



SOURCE: United States Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*. The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.



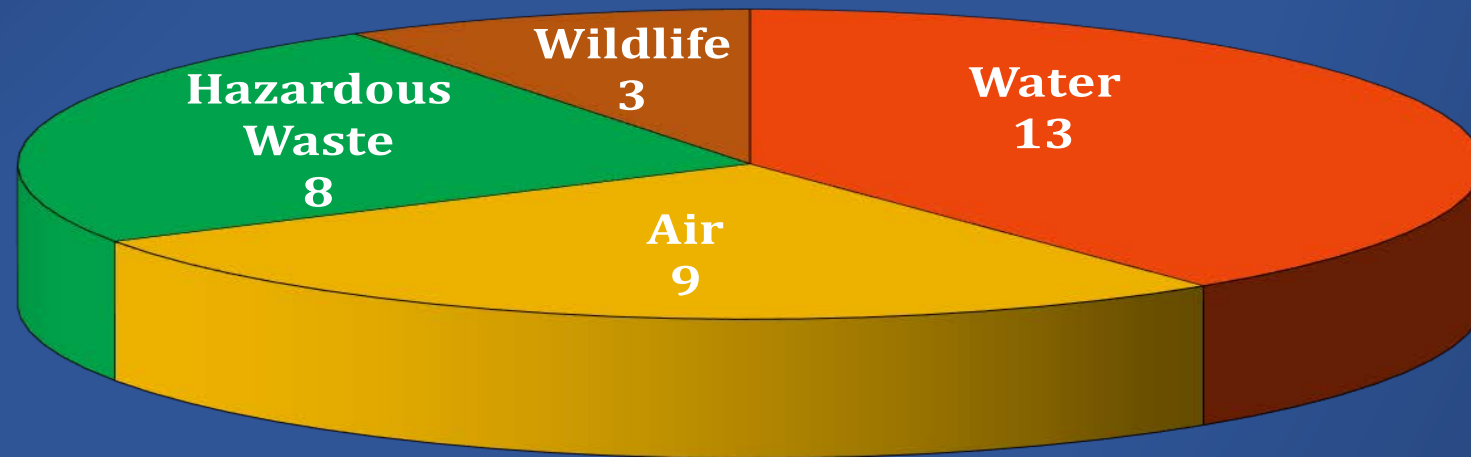
Fraud Offenses in Organizational Cases Fiscal Year 2014



SOURCE: United States Sentencing Commission, 2014 Organizational Datafile, CORPFY14.



Number of Environmental Organizational Cases Fiscal Year 2014



SOURCE: United States Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*.



Preliminary Determination of Inability to Pay Fine - §8C2.2

No need to make guideline fine determination in case where either

- Organization cannot and is not likely to become able to pay restitution required under §8B1.1

or

- Organization cannot and is not likely to become able to pay minimum guideline fine



Offense Level - §8C2.3

For counts covered by §8C2.1

- Use the applicable Chapter Two guideline to determine the offense level (BOL and all applicable SOCs)
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level
- **Do not** apply any other parts of Chapter Three (*e.g.*, Acceptance of Responsibility or Obstruction)



Base Fine - §8C2.4

Apply the greater of

- Amount from Offense Level Fine Table
- Pecuniary gain to organization, *or*
- Pecuniary loss from offense intentionally, knowingly, or recklessly caused by organization

Unless

- Chapter Two guideline includes special instruction for organizational fines, *or*
- Calculation of pecuniary gain or loss would unduly complicate or prolong sentencing process



Base Fine - §8C2.4 (cont.)

- Fine Table in this guideline, along with other monetary tables in the *Guidelines Manual*, revised for inflation, pursuant to Amendment 791, which will take effect on November 1, 2015, unless disapproved by Congress
- Of Note – New Special Instruction

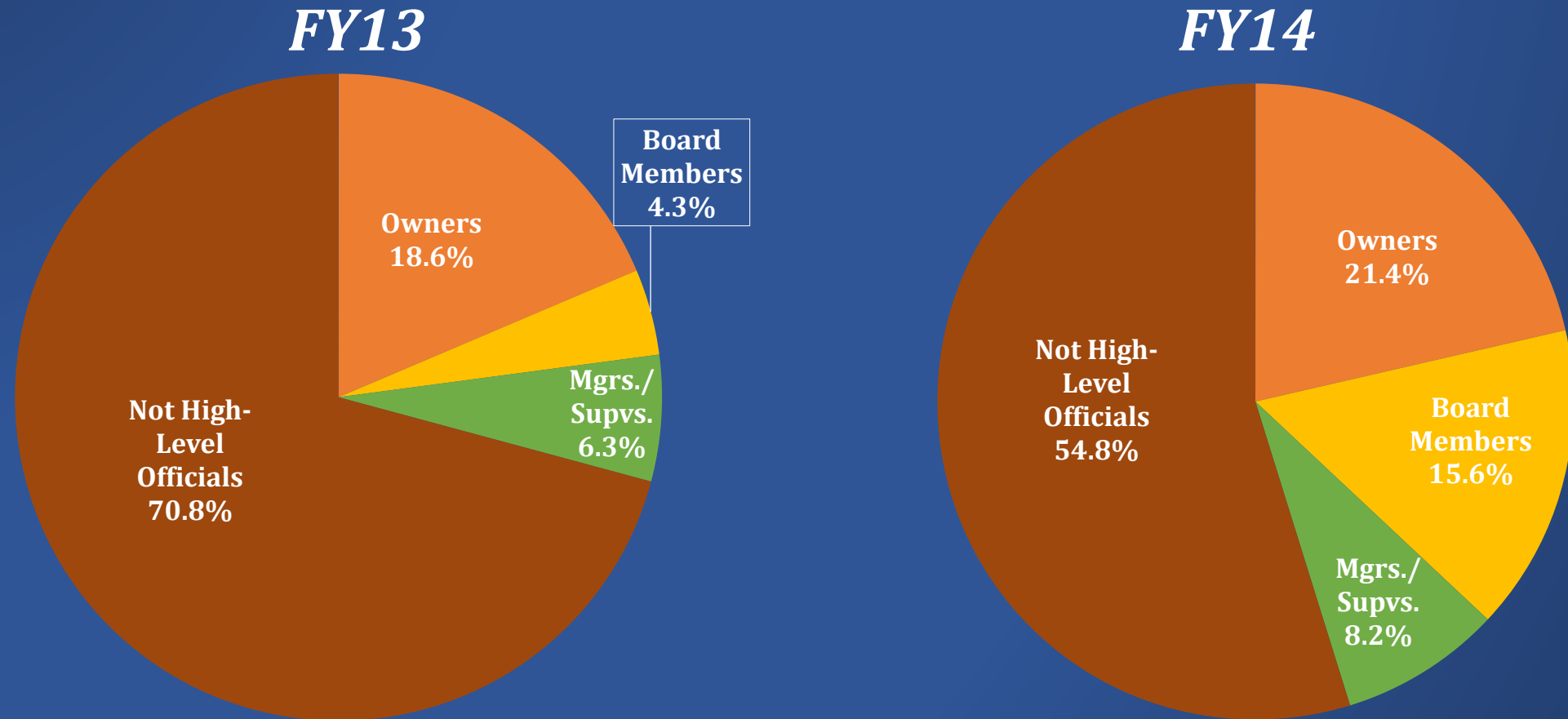
“For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than offense level fine table set forth in subsection (d) above.”



Determining Culpability Score - §8C2.5

BASE OFFENSE LEVEL	5 POINTS
Involvement in or Tolerance of Criminal Activity	+5/ +4/ +3/ +2/ +1
Prior History	+2 or +1
Violation of an Order	+2 or +1
Obstruction of Justice	+3
Effective Program to Prevent and Detect Violations of Law	-3
Self-Reporting, Cooperation <u>and</u> Acceptance of Responsibility	-5/ -2/ -1

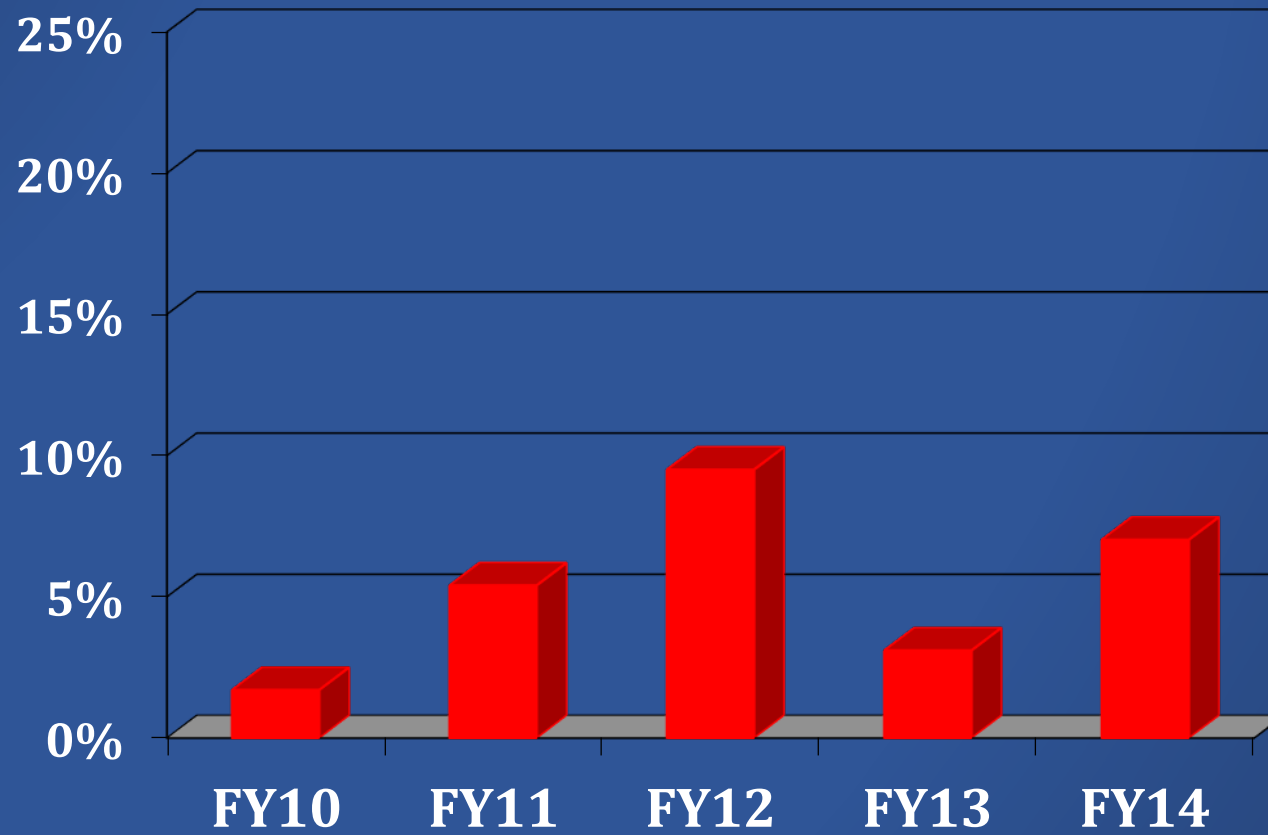
Percentage of Individual Offenders Who Were “High-Level” Officials of Co-Defendant Organizations Fiscal Years 2013-2014



SOURCE: United States Sentencing Commission, 2013-2014 Organizational Datafiles, CORPFY13-CORPFY14.



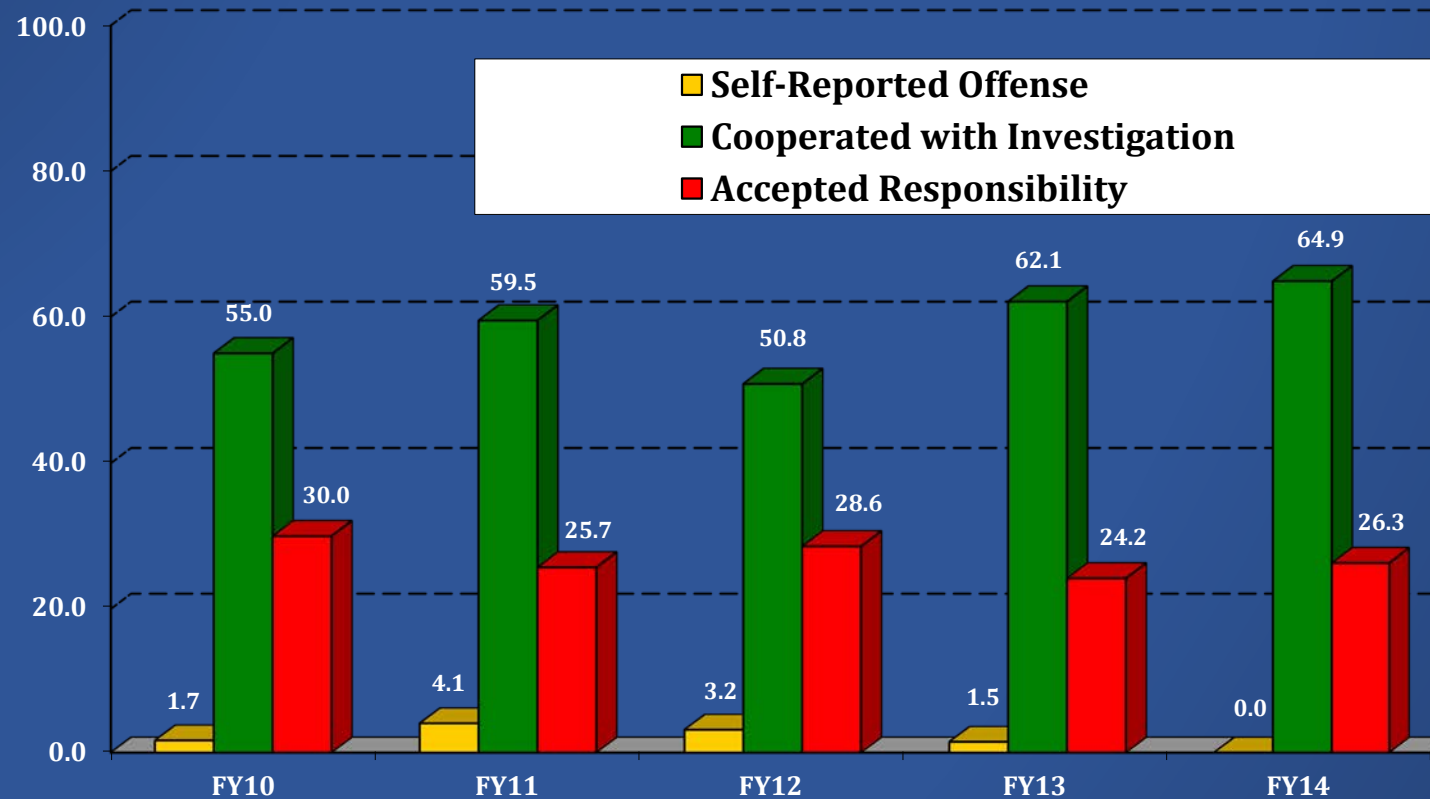
Percentage of Organizations Sentenced that Obstructed Justice (§8C2.5(e)) Fiscal Years 2010-2014



SOURCE: United States Sentencing Commission, *2010-2014 Sourcebooks of Federal Sentencing Statistics*.



Percentage of Organizational Cases Receiving Reduction in Culpability Score Under §8C2.5(g) Fiscal Years 2010-2014



SOURCE: United States Sentencing Commission, *2010-2014 Sourcebooks of Federal Sentencing Statistics*.



Effective Compliance Programs - §8B2.1(a)

AN EFFECTIVE COMPLIANCE PROGRAM MUST:

1. Exercise due diligence in fulfilling the seven minimum requirements at §8B2.1(b)(2)
(see next slide)
2. Promote ethical conduct and organizational culture that encourages a commitment to compliance with the law



Seven Minimum Requirements - §8B2.1(b)(2)

1. Standards and procedures to prevent and detect criminal conduct
2. Board must be knowledgeable about and oversee program; top management must ensure effectiveness of program; specific individual(s) within high-level personnel must have responsibility



Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

3. Reasonable efforts not to include within substantial authority personnel individuals whom organization knew or should have known have engaged in illegal activities or conduct inconsistent with effective program
4. Communicate standards and procedures by **training** directors, employees and, as appropriate, agents, and by other means



Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

5. Monitor and audit to detect criminal conduct; evaluate program periodically; have and publicize a system for reporting suspected violations and seeking guidance
6. Promote and consistently enforce through appropriate incentives to perform in accordance with the program and appropriate discipline



Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

7. After criminal conduct is detected, take reasonable steps to respond appropriately and prevent further similar criminal conduct, including necessary modifications to program



Guideline Fine Range - §8C2.7

Base Fine x Multipliers = Fine Range
(§8C2.4) (§8C2.6) (§8C2.7)



Determining the Fine Within the Fine Range - §8C2.8

Factors to consider (§8C2.8(a)):

- The purposes of sentencing under § 3553(a)
- Role in the offense
- Collateral consequences of conviction
- Nonpecuniary loss caused or threatened
- Involvement of vulnerable victim
- Prior criminal record of high level personnel
- Prior civil or criminal misconduct not counted in culpability score



Determining the Fine Within the Fine Range - §8C2.8 (cont.)

Factors to consider (§8C2.8(a)) (cont.):

- Culpability score higher than 10 or lower than 0
- Partial but incomplete satisfaction of conditions of culpability score factors
- Any factor in § 3572(a)
- Failure to have effective compliance and ethics program

Court may weigh importance of these factors and others (§8C2.8(b))



Other Guideline Provisions Relating to Calculation of Fine

Disgorgement - §8C2.9

- Add to fine any gain that has not or will not be paid as restitution or for other remedial measures

Calculation of Fine for Other Counts - §8C2.10

- Determine fine for counts not covered under §8C2.1 by applying provisions of §§ 3553 and 3572





Part C, Subpart 3

Implementing the Sentence of a Fine



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Imposing a Fine - §8C3.1

- Use guideline fine range as determined under §§8C1.1 and 8C1.9, or §8C1.10 *unless*
 - Guideline minimum fine exceeds statutory maximum fine, in which case statutory maximum fine becomes guideline fine
 - or*
 - Guideline maximum fine is lower than statutory minimum fine, in which case statutory minimum fine becomes guideline fine



Payment of the Fine - §8C3.2

- Immediate for organizations operating as criminal purpose or by criminal means
- Otherwise, immediate unless organization is financially unable or the immediate payment would pose undue burden on organization; then payment at earliest possible date, either by date certain or installment schedule



Reduction of Fine Based on Inability to Pay - §8C3.3

- If fine would impair ability to make restitution
- *or*
- If organization unable and unlikely to become able to pay fine

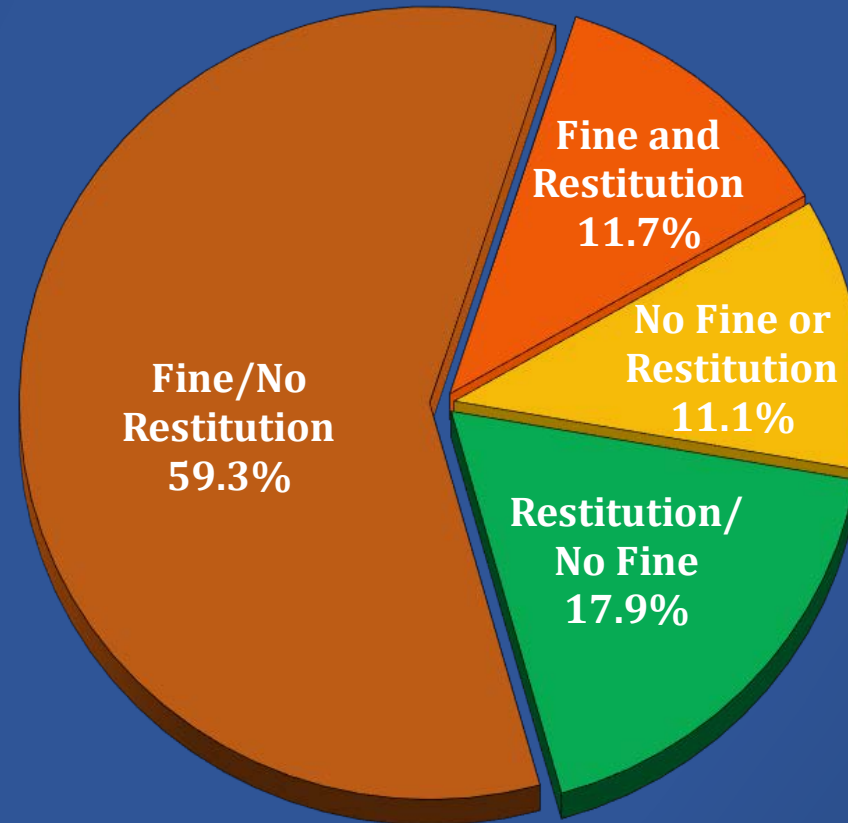


Fines Paid by Owners of Closely Held Organizations - §8C3.4

- Organization's fine may be offset by owners' fines for same offense conduct



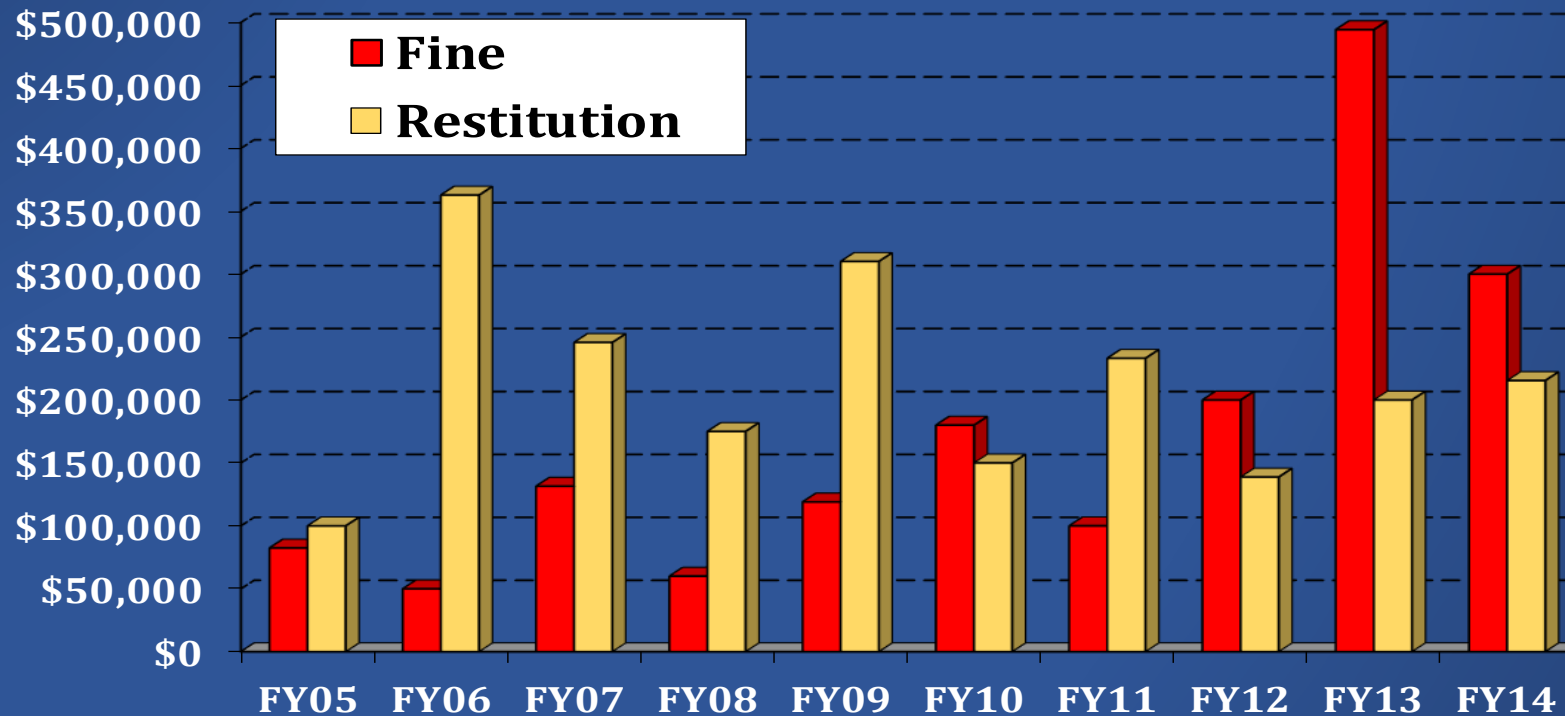
Types of Monetary Sentences Fiscal Year 2014



SOURCE: United States Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*.



Median Fine and Restitution for Organizations Fiscal Years 2005¹-2014



¹FY05 data consists of only post-*Booker* data from January 12, 2005 through September 30, 2005.
SOURCE: United States Sentencing Commission, *2005-2014 Sourcebooks of Federal Sentencing Statistics*.



Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) Fiscal Year 2014

Fines	
Fraud	\$ 822.0
Antitrust	\$ 425.0
Drugs	\$ 334.0
Bribery	\$ 209.0
Antitrust	\$ 195.0
Antitrust	\$ 190.0
Antitrust	\$ 135.0
Antitrust	\$ 120.0
Antitrust	\$ 103.3
Bribery	\$ 88.0

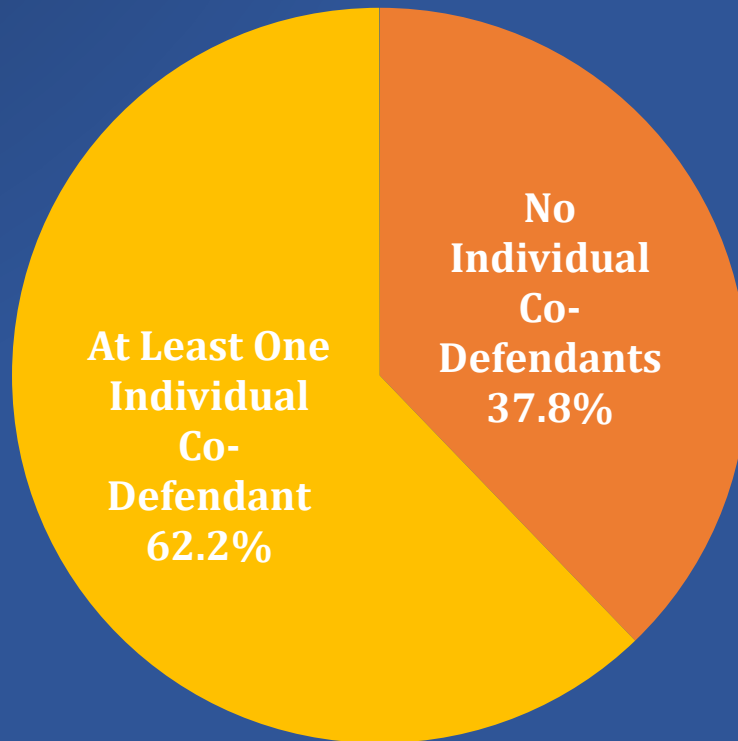
Restitution	
Environmental	\$ 21.4
Money Laundering	\$ 4.7
Fraud	\$ 4.3
Fraud	\$ 4.0
Import/Export	\$ 3.4
Fraud	\$ 2.6
Fraud	\$ 2.0
Fraud	\$ 1.5
Racketeering	\$ 1.2
Fraud	\$ 1.0

SOURCE: United States Sentencing Commission, 2014 Organizational Datafile, CORPFY14.

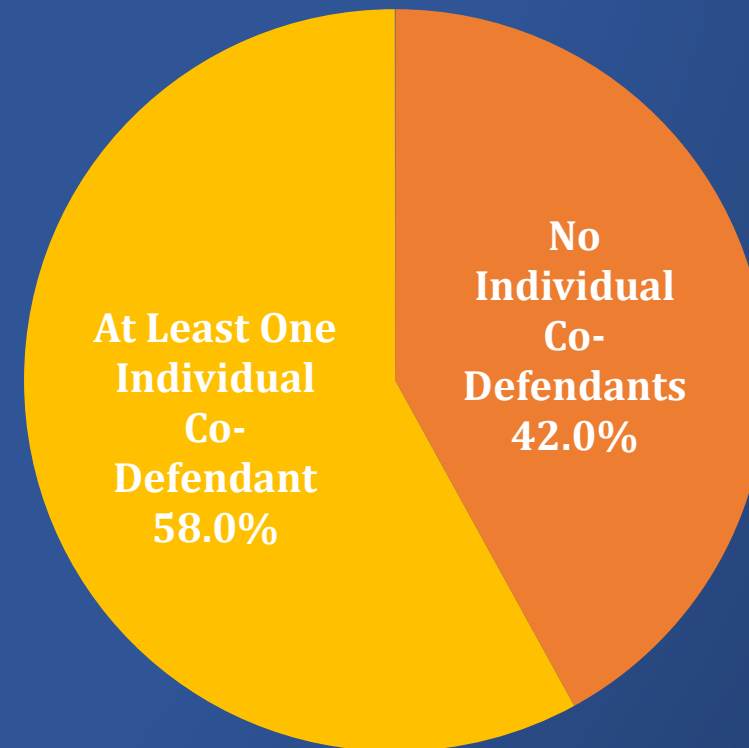


Relationship of Individual Offender To Organizational Cases Fiscal Years 2013-2014

FY13



FY14



SOURCE: United States Sentencing Commission, 2013-2014 Organizational Datafiles, CORPFY13-CORPFY14



Imposition of Probation - §8D1.1

Court shall order probation

- If necessary to secure any remediation required by court (restitution, remedial order, community service)
- If payment of monetary penalty is required, which is not paid in full at sentencing
- If organization has 50 or more employees, is required to have E&C program, and does not
- If within five years, organization engaged in similar criminal misconduct and instant offense occurred after adjudication



Imposition of Probation - §8D1.1 (cont.)

Court shall order probation (cont.)

- If high level personnel involved in offense engaged in similar criminal misconduct within five years of instant offense and instant offense occurred after adjudication
- To ensure changes made within organization to reduce likelihood of future criminal conduct
- **If sentence does not include fine**
or
- If necessary to accomplish one or more of the purposes of sentencing



Term of Probation - §8D1.2

For Felony Offenses

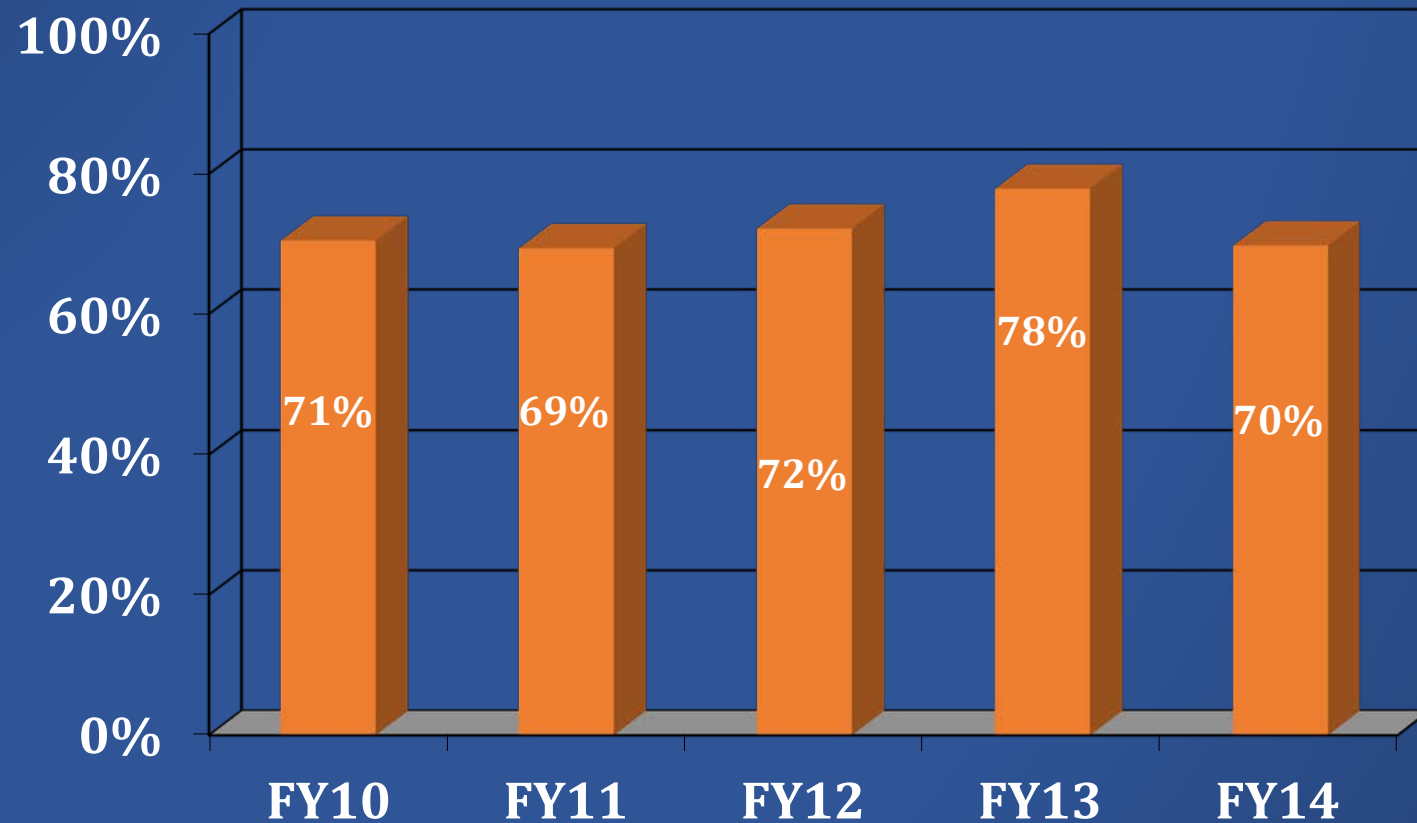
One – Five years

For Class A misdemeanors

No more than five years



Percentage of Organizational Cases Receiving Probation Fiscal Years 2010-2014



SOURCE: United States Sentencing Commission, *2010-2014 Sourcebook of Federal Sentencing Statistics*.



Conditions of Probation - §8D1.3

- No new federal, state or local crimes
- Unless fine is imposed or court makes finding that condition is plainly unreasonable, impose at least one of the following conditions for felony offenses:
 - Restitution, *or*
 - Community service
- Other conditions reasonably related to nature and circumstances of offense or history or characteristics of organization and involving only deprivation of liberty and property necessary to effect purposes of sentencing



Recommended Conditions of Probation - §8D1.4

- Publicize information about offense, conviction, sentence, and any steps to prevent future misconduct
- If probation is imposed under §8D1.1, the following conditions may be appropriate
 - Develop an Ethics and Compliance (E&C) program
 - Once E&C program approved, notify employees and shareholders about criminal conduct and E&C program

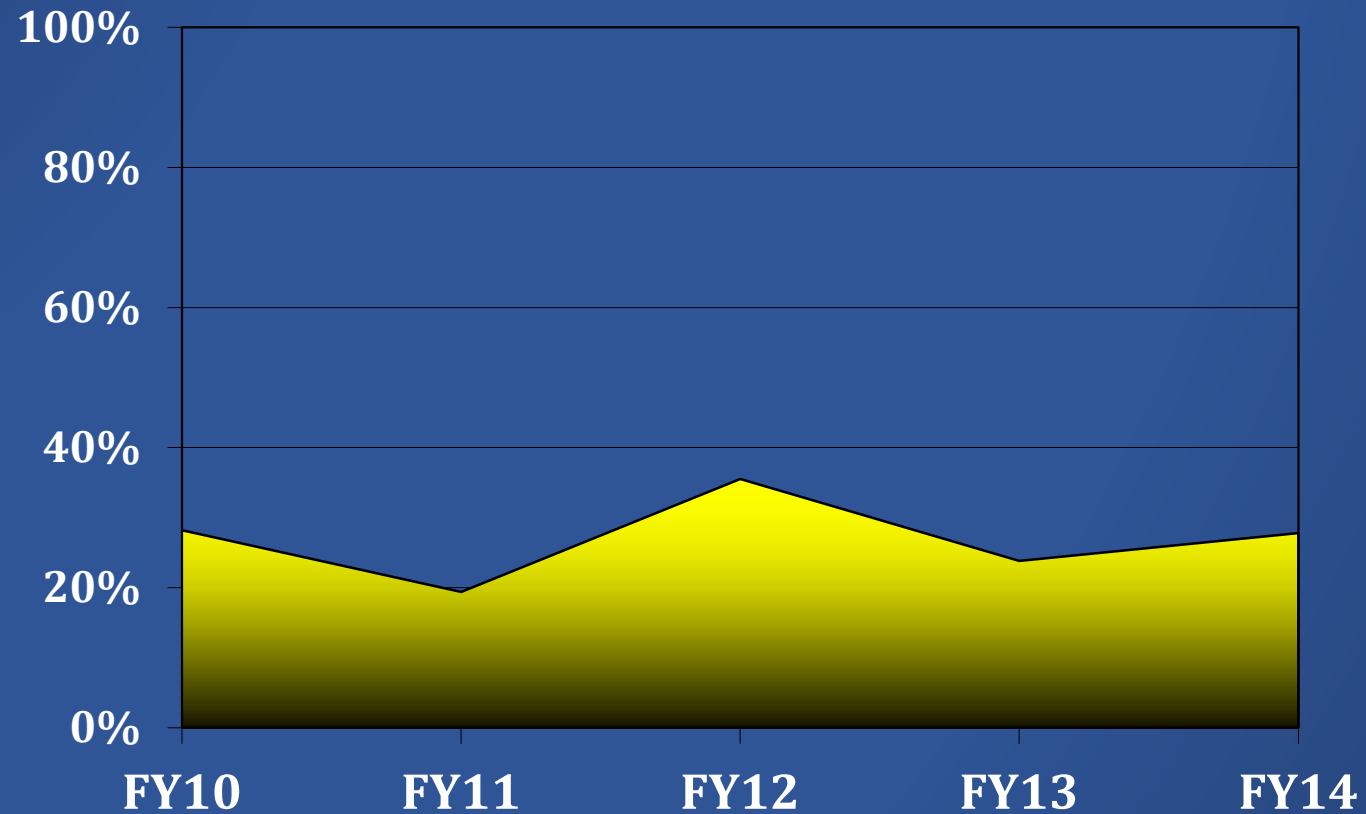


Recommended Conditions of Probation - §8D1.4 (cont.)

- Make periodic submissions to court about financial condition and report on progress implementing E&C program
- Notify of material changes in financial condition or commencement of administrative, civil, or criminal litigation against organization, or any investigations or formal inquiries by governmental authorities
- Submit to reasonable inspection of books and records and interrogation of knowledgeable employees and pay any costs associated with experts
- Make periodic payments toward monetary sanctions (priority to restitution, fine and then other)



Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Years 2010-2014



SOURCE: United States Sentencing Commission, *2010-2014 Sourcebook of Federal Sentencing Statistics*.



Organizational Defendant Presentence Report Outline

- THE FACE SHEET

- PART A. THE OFFENSE

- Charge(s) and Conviction(s)
- The Offense Conduct
- Victim Impact
- Offense Behavior Not Part of Relevant Conduct
- Obstruction of Justice
- Self Reporting/Cooperation/Acceptance of Responsibility



- PART B. PRIOR HISTORY OF MISCONDUCT
 - Similar Misconduct
 - Other Misconduct
 - Pending Charges

- PART C. ORGANIZATION CHARACTERISTICS
 - Organizational Data
 - Effective Compliance and Ethics Program
 - Financial Condition: Ability to Pay



- PART D. GUIDELINE APPLICATION

- Offense Level Computation
- Base Fine Calculation
- Culpability Score Computation
- Fine Range Computation
- Fine Adjustments

- PART E. SENTENCING OPTIONS

- Restitution
- Fines
- Probation
- Impact of the Plea Agreement



- PART F. FACTORS THAT MAY WARRANT DEPARTURE
- ADDENDUM TO THE PRESENTENCE REPORT
- RECOMMENDATION



Fact Pattern #1

- One count of money laundering in violation of 18 U.S.C. § 1956
- Successful advertising agency that employs 200 people
- Scheme involved cashing \$10,000 checks - returning \$9,000 in cash to Neighbor and keeping the remaining \$1,000 for itself - for total of \$250,000 in checks



Fact Pattern #1 (cont.)

- Legitimate business, no prior illegal activity
- Assets - \$3 million. Annual net income - \$200,000
- Cooperated and accepted responsibility
- Owner sentenced to a prison term and a \$20,000 fine



Fact Pattern #1 - *Answer*

- *Determine whether Defendant has the ability to pay restitution*
- *Because the applicable guideline offense level for 18 U.S.C. § 1956 is determined under §2S1.1, a listed guideline at §8C2.1(a), compute the Chapter Two offense level for §2S1.1 – OL 22*
 - *base offense level 8*
 - *+12 for \$250,000 in laundered funds*
 - *+2 because defendant was convicted under 18 U.S.C. § 1956*



Fact Pattern #1 – *Answer* (cont.)

- *The base fine is \$1,200,000*
- *The culpability score = 6*
- *The minimum and maximum multipliers are 1.20 and 2.40*
- *The guideline fine range is \$1,440,000-\$2,880,000 but the statutory maximum fine is \$500,000. Accordingly, the guideline fine in this case is \$500,000*
- *Fine may be offset by \$20,000, the amount owner was fined*



Fact Pattern Variation #1A

- Assume the same facts as Fact Pattern 1, except Defendant has pleaded guilty to three counts of money laundering



Fact Pattern Variation #1A - *Answer*

- *As noted in the Commentary to §8C3.1, the maximum fine authorized by statute may increase when an organization is convicted of multiple counts*
- *If Defendant has pleaded guilty to three counts, its aggregate statutory maximum fine will be \$1,500,000*
- *Accordingly, the guideline fine range will be \$1,440,000-\$1,500,000 (as limited by the statutory maximum aggregate)*



Fact Pattern Variation #1A – *Answer (cont.)*

- *Pursuant to §8C2.2(b), after establishing the guideline fine range, the court would make a preliminary determination whether Defendant is able to pay the minimum of the guideline fine range*



Fact Pattern #2

- One count of Medicare Fraud in violation of 42 U.S.C. § 1320a-7b
- Defendant company provides ambulance transport services and employs 75 people
- Loss amount = \$275,000 based on 900 fraudulent claims



Fact Pattern #2 (cont.)

- Defendant company transported a total of 3000 patients during period of fraud
- Assets - \$2 million. Annual net income - \$175,000
- Cooperated and accepted responsibility



Fact Pattern #2 - *Answer*

- *Determine whether Defendant has the ability to pay restitution*
- *Because the applicable guideline offense level for 42 U.S.C. § 1320a-7b is determined under §2B1.1, a listed guideline at §8C2.1(a), compute the Chapter Two offense level for §2B1.1 – OL 18*
 - *base offense level 6*
 - *+12 for \$275,000 loss*



Fact Pattern #2 – *Answer* (cont.)

- *Under §8C2.4, the base fine is \$350,000*
- *The culpability score = 5*
- *The minimum and maximum multipliers are 1.00 and 2.00*
- *The guideline fine range is \$350,000-\$500,000 (as limited by the maximum statutory penalty)*



Fact Pattern Variation #2A

- Assume the same facts as in Fact Pattern #2, *except*
- Defendant company only operated during the period in which the 900 fraudulent bills were submitted
- During that period Defendant company transported only 975 patients



Fact Pattern Variation #2A - *Answer*

- *In this case, the court may determine that Defendant is a criminal purpose organization pursuant to §8C1.1*
- *If the court makes such a determination, the guidelines provide that the fine “shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.”*



Fact Pattern Variation #2A – *Answer (cont.)*

- *Because the maximum statutory fine in this case is \$500,000, that is the limit of the fine that can be imposed, even if that is not sufficient to divest the organization of all its net assets*



Fact Pattern #3

- One count of making campaign contributions in the name of another person, in violation of 2 U.S.C. § 441f
- The Defendant company's CEO approached 15 employees and suggested that the corporation would give them a \$3,000 bonus in exchange for making a \$2,500 donation to the political campaign of the CEO's brother



Fact Pattern #3 - Answer

- *Appendix A references violations of 2 U.S.C. § 441f to §2C1.8*
- *Because §2C1.8 is not listed in §8C2.1(a), and the applicable guideline offense level would not be determined under §8C2.1, the provisions of §§8C2.2 through 8C2.9 do not apply*
- *The fines for all counts not covered under §8C2.1 are governed by §8C2.10, which provides that “the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572.”*





Thank you!



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