



A Basic Introduction to the Organizational Guidelines

2018 National Training Seminar

San Antonio, Texas



Kathleen Cooper Grilli
General Counsel

James T. Strawley
Deputy General Counsel



www.ussc.gov



(202) 502-4500



@theusscgov

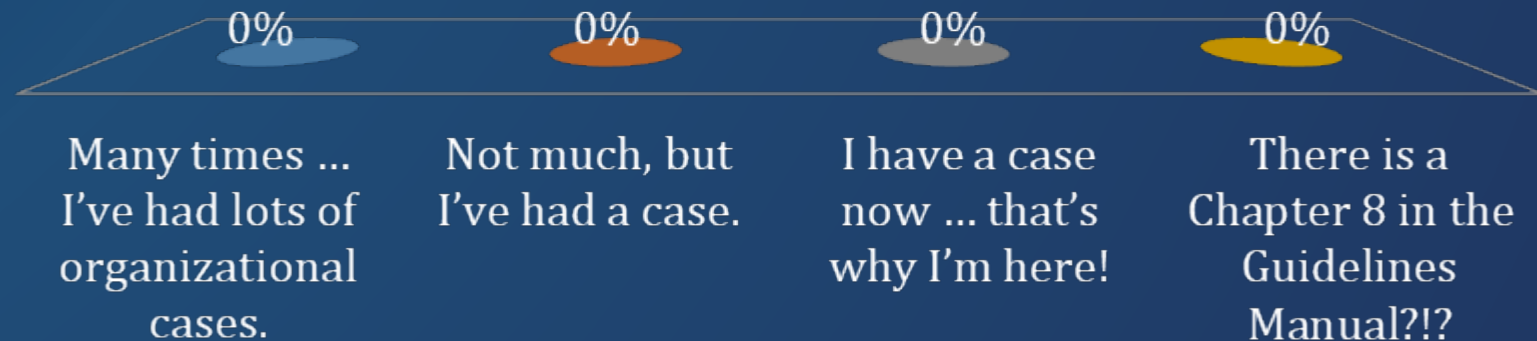


pubaffairs@ussc.gov

There Are Organizational Guidelines???

In my previous experience, I have used Chapter 8 of the *Guidelines Manual*

- A. Many times ... I've had lots of organizational cases.
- B. Not much, but I've had a case.
- C. I have a case now ... that's why I'm here!
- D. There is a Chapter 8 in the *Guidelines Manual*!?!?



Organizational Guidelines Session Outline

- Why do I need to know this?
- How does Chapter 8 work?
 - An organization can't go to jail? What types of sentences are we talking about?
 - When do the Chapter 8 fine provisions apply?
 - How do I evaluate the culpability of an organization?
 - How do I calculate the fine range?
- How does probation work in these cases?

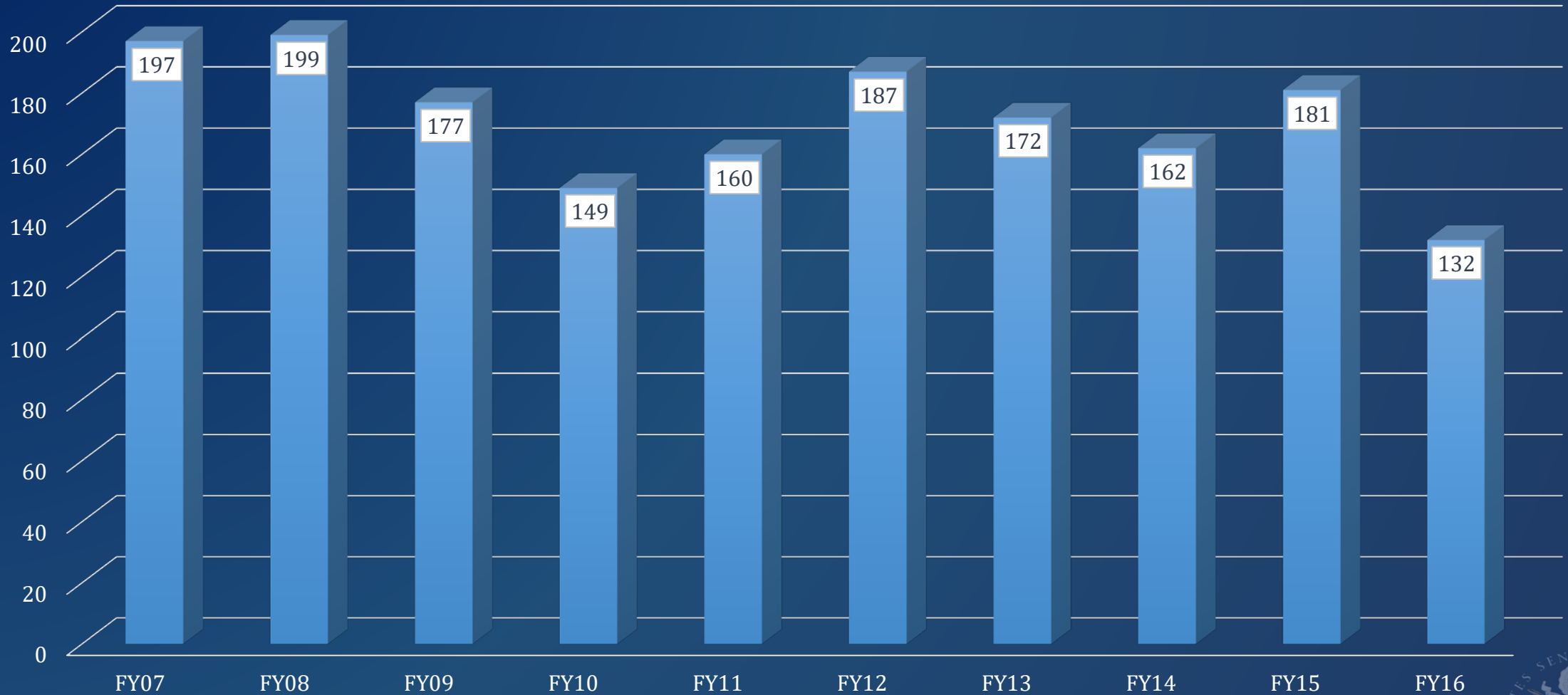


Why Do I Need to Know About Chapter 8?

- Authorization: **The Sentencing Reform Act of 1984**
 - U.S. Sentencing Commission to develop sentencing guidelines for individuals and organizations
 - Like other GL calculations, courts must consider the guideline sentence where applicable.
- Chapter 8 has some difference from your typical GL calculations – **Avoid the common mistakes.**
- While there aren't that many cases each year, they do come up.



Number of Organizational Cases Fiscal Years 2007-2017



SOURCE: United States Sentencing Commission, 2007-2017 *Sourcebooks of Federal Sentencing Statistics*.





How Does Chapter 8 Work?



When Do I Turn To Chapter 8?

- Applies to “Organizations”
 - Corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions, and non-profit organizations
- Applies to felony and Class A misdemeanors (§8A1.1)



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)



General Application Principles

- Apply Chapter 8 in order (§8A1.2)
 - Part B – Remedying Harm from Criminal Conduct
 - Part C – Fines
 - Part D – Probation
 - Part E – Special Assessments, Forfeitures, and Costs



Restitution

§8B1.1

- Requires identifiable victim
- If so, court shall either
 - Enter restitution order if authorized by specified statute
 - 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

- 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





Determining the Fine



Organizational Fines

- Fine provisions are found in **Part C** of Chapter 8
- The step-by-step process for determining the guideline fine range is found in §§8C2.3 – 8C2.9

But Don't Jump Right In

- Before calculating the fine range, there are a series of decision points.



Organizational Fines Decision Point #1

Did the organization operate primarily for a criminal purpose or by criminal means?



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



Organizational Fines Decision Point #1

Did the organization operate primarily for a criminal purpose or by criminal means?

YES

Sufficient Fine to Divest
Organization of All Net Assets

NO

Is the type of offense covered by
the *Guidelines* fine provisions?



Organizational Fines Decision Point #2

NO

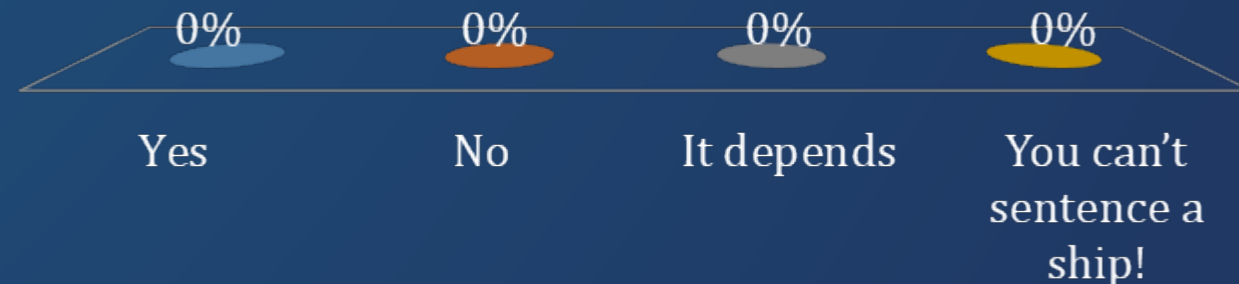
Is the type of offense covered by
the *Guidelines* fine provisions?



Scenario: Applicability of Fine Range Provisions

The Defendant company, a multi-million dollar business, operated cargo ships that knowingly operated in U.S. waters without required equipment to separate oil and other waste from bilge water before being pumped into open waters. Company was charged with failure to maintain an accurate oil record book and unlawful discharge in violation of 33 U.S.C. § 1908(a). Is it necessary to calculate a fine range under the guidelines?

- A. Yes
- B. No
- C. It depends
- D. You can't sentence a ship!



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 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

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)

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)

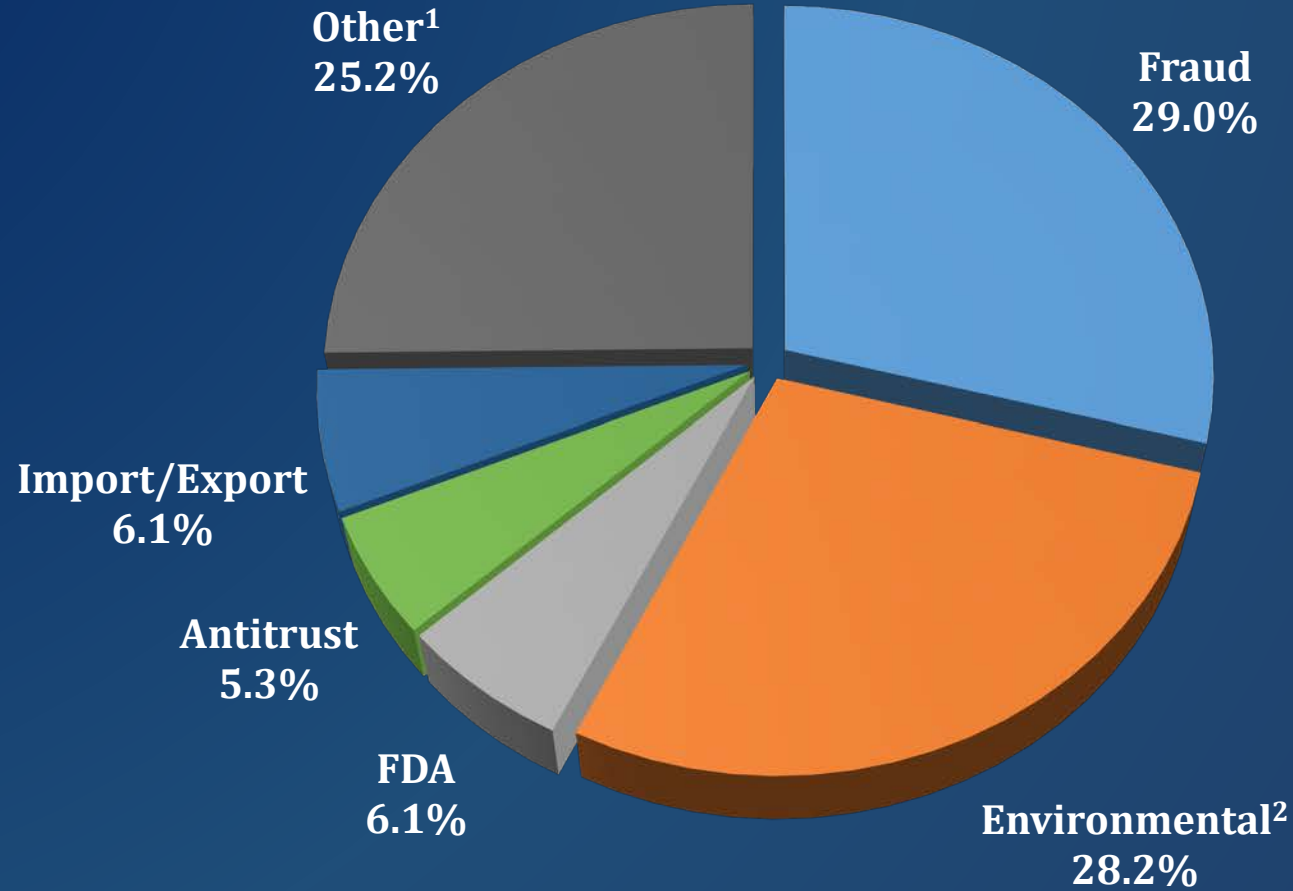
Antitrust (§2R1.1)

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)

Primary Offense of Organizational Cases

Fiscal Year 2017



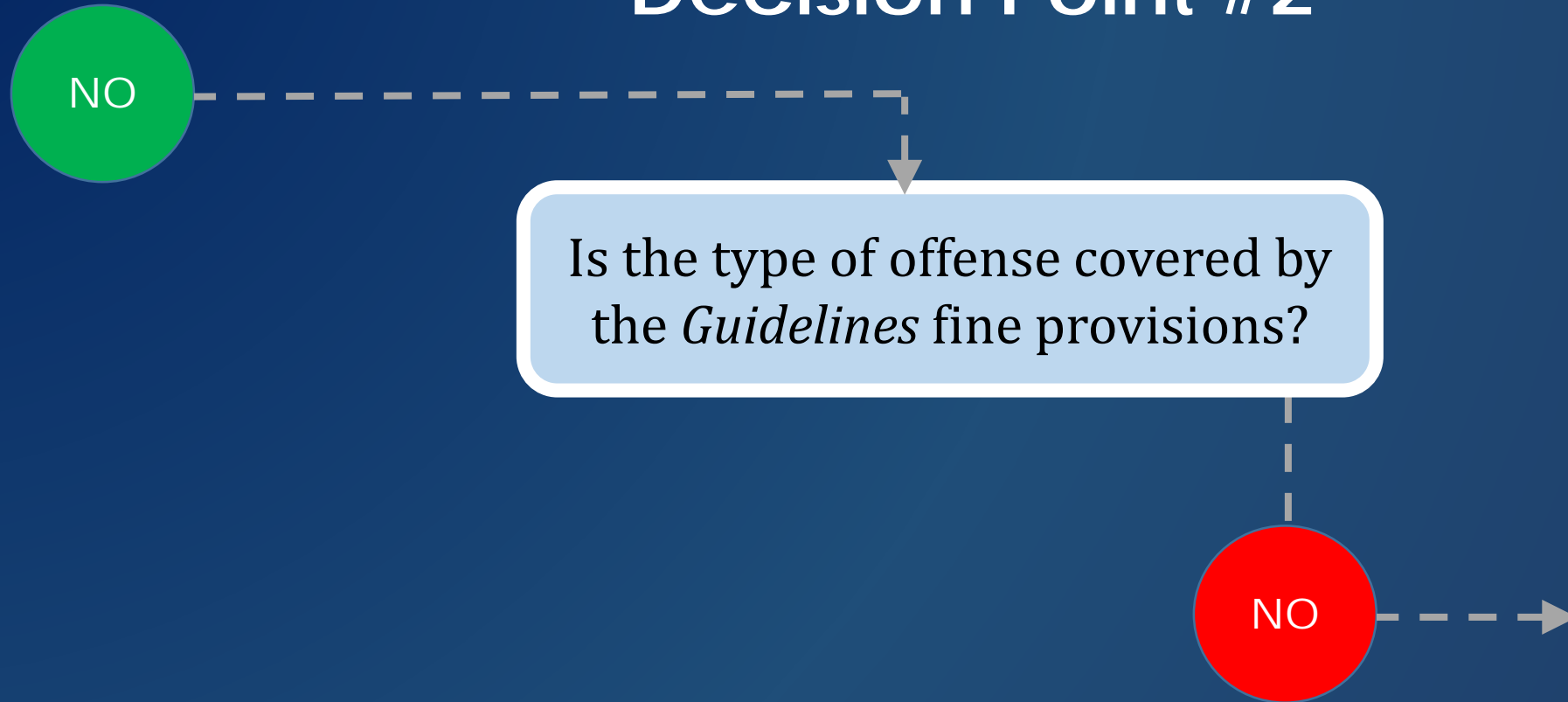
¹ The Other category includes the following offense types: Copyright/Trademark Infringement, Drugs (not FDA), Firearms, Food Stamps, Gambling, Obstruction of Justice, Racketeering, Tax, and Other.

² The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.

SOURCE: United States Sentencing Commission, 2016 Datafile. CORP16.



Organizational Fines Decision Point #2



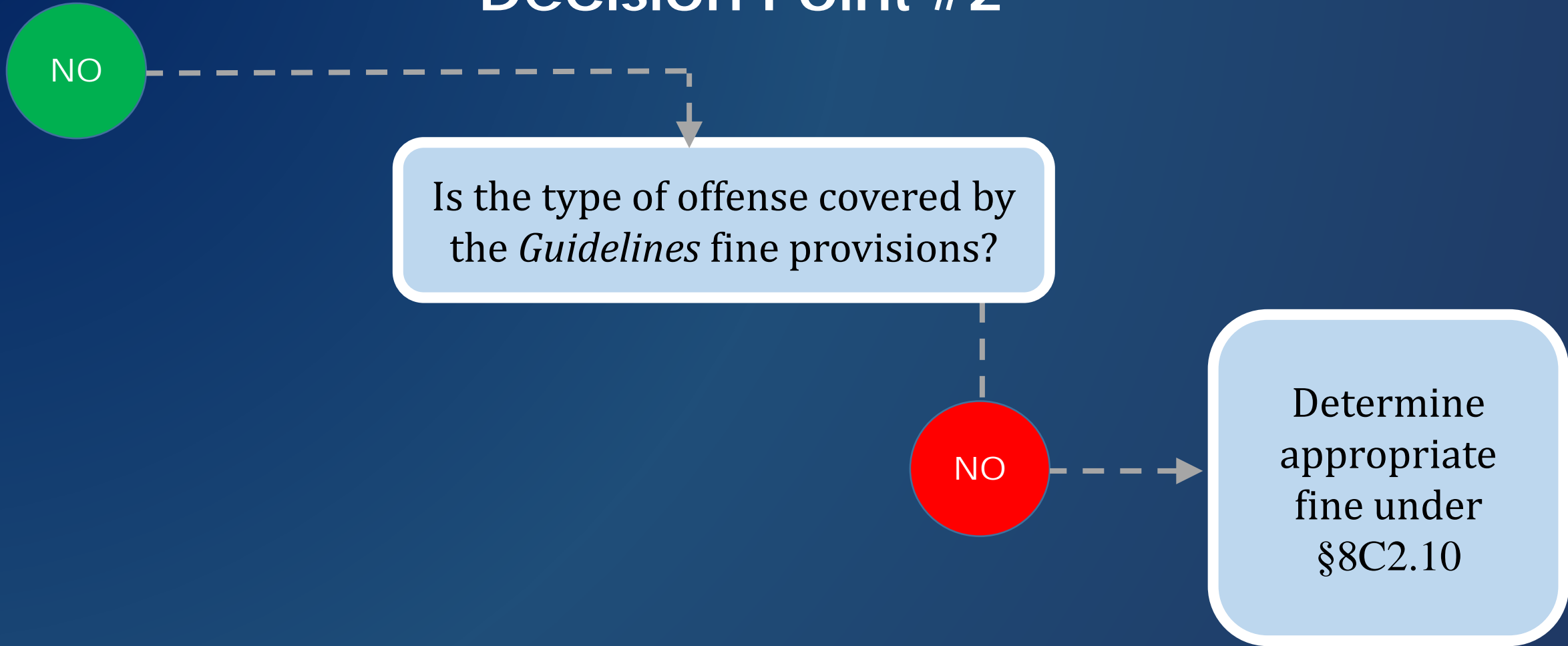
Scenario: Applicability of Fine Range Provisions

Now that we know the court does not have to determine a fine range, how does the court proceed?

- A. There is no fine.
- B. The court is free to determine an appropriate fine without limitation.
- ✓ C. The court should determine an appropriate fine based upon statutory criteria.



Organizational Fines Decision Point #2



Determining the Fine for Other Counts

§8C2.10

For any count or counts not covered under §8C2.1, the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3572 (Imposition of sentence of fine and related matters).



Organizational Fines Decision Point #2

NO

Is the type of offense covered by the *Guidelines* fine provisions?

YES

Preliminary Determination of Inability to Pay Fine (Is organization currently unable and not likely to become to pay?)

NO

Determine appropriate fine under §8C2.10



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



Organizational Fines Decision Point #3

Preliminary Determination of
Inability to Pay Fine
(Is organization currently unable and
not likely to become to pay?)

YES

No fine or reduced fine
imposed

NO

Determine Guideline Fine
Range



Step One – Determining the Fine Range

Calculate the Chapter Two Offense Level

§8C2.3

For counts covered by §8C2.1

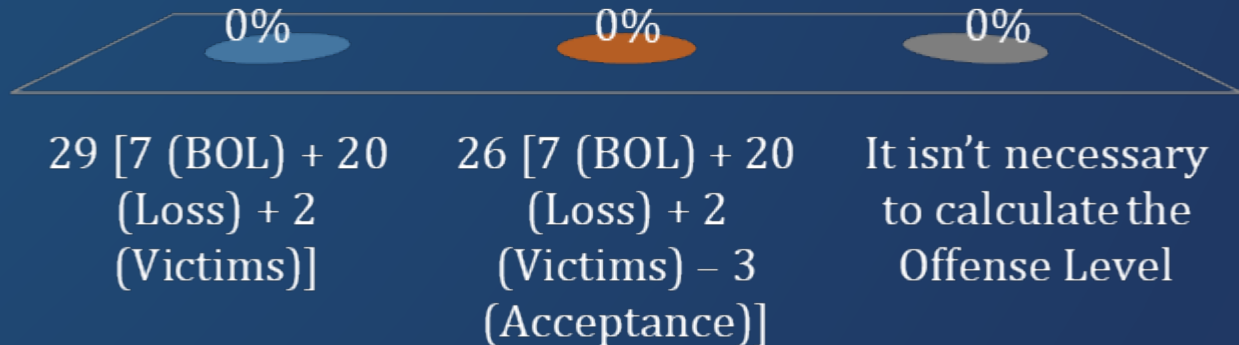
- Use the applicable Chapter Two guideline to determine the offense level (BOL and all applicable SOCs)
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level



Scenario: Determining the Fine Range

The Defendant company, a multi-million dollar business, was convicted of wire fraud (18 U.S.C. §1343) resulting in \$10M in loss to 15 victims. The government notified the court that Defendant fully cooperated and accepted responsibility. What is the offense level for purposes of calculating a fine range under the guidelines?

- ✓ A. 29 [7 (BOL) + 20 (Loss) + 2 (Victims)]
- B. 26 [7 (BOL) + 20 (Loss) + 2 (Victims) – 3 (Acceptance)]
- C. It isn't necessary to calculate the Offense Level



Step One – Determining the Fine Range

Calculate the Chapter Two 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)**



Step Two – Determining the Fine Range

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.)

(d)

OFFENSE LEVEL FINE TABLE

Offense Level	Amount
6 or less	\$8,500
7	\$15,000
8	\$15,000
9	\$25,000
10	\$35,000
11	\$50,000
12	\$70,000
13	\$100,000
14	\$150,000
15	\$200,000
16	\$300,000
17	\$450,000
18	\$600,000
19	\$850,000
20	\$1,000,000

21	\$1,500,000
22	\$2,000,000
23	\$3,000,000
24	\$3,500,000
25	\$5,000,000
26	\$6,500,000
27	\$8,500,000
28	\$10,000,000
29	\$15,000,000
30	\$20,000,000
31	\$25,000,000
32	\$30,000,000
33	\$40,000,000
34	\$50,000,000
35	\$65,000,000
36	\$80,000,000
37	\$100,000,000
38 or more	\$150,000,000.



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 took effect on November 1, 2015.
- 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.”



Step Three – Determining the Fine Range

Determine 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

Step Four – Determining the Fine Range

Minimum and Maximum Multipliers

§8C2.6

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM MULTIPLIER
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.



Step Five – Putting the Pieces Together

Guideline Fine Range

§8C2.7

= MIN. FINE
§8C2.7(A)

X MIN. MULTIPLIER
§8C2.6

X BASE FINE
§8C2.4

= MAX. MULTIPLIER
§8C2.6

X BASE FINE
MAX. FINE §8C2.4
§8C2.7(B)



Scenario – Putting the Pieces Together

Defendant A is a successful advertising agency with over \$3 million in assets and has 200 employees. The sole owner of the advertising agency (Owner) was approached by his neighbor (Neighbor) who stated that he needed “help cashing some checks.” Without providing services, Defendant A received \$10,000 checks from Neighbor, returning \$9,000 in cash. Defendant A took in over \$250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

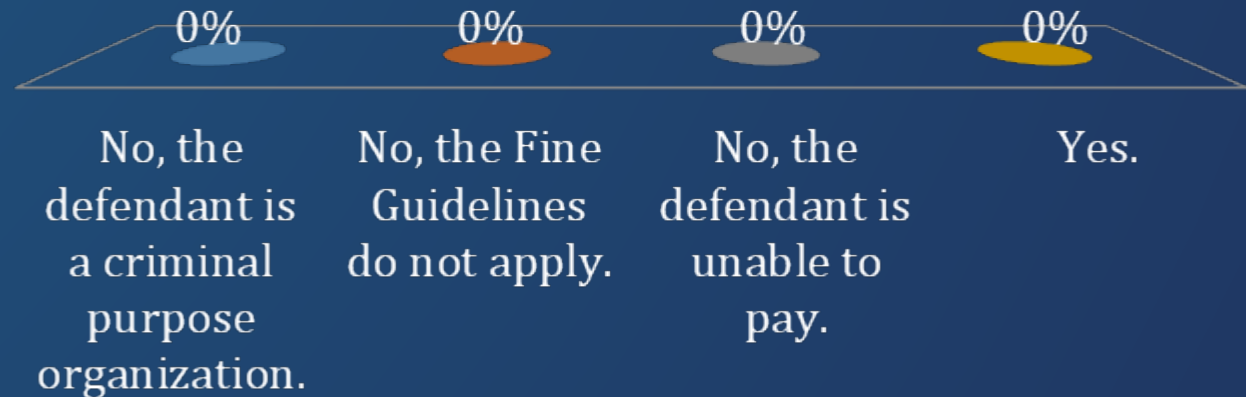
Defendant A was convicted of one count of money laundering in violation of 18 U.S.C. § 1956 (covered under USSC §2S1.1), which carries a statutory maximum fine of \$500,000. Defendant A fully cooperated and accepted responsibility.



Scenario – Putting the Pieces Together (cont.)

Is it necessary to calculate a fine range under the guidelines?

- A. No, the defendant is a criminal purpose organization.
- B. No, the Fine Guidelines do not apply.
- C. No, the defendant is unable to pay.
- ✓ D. Yes.

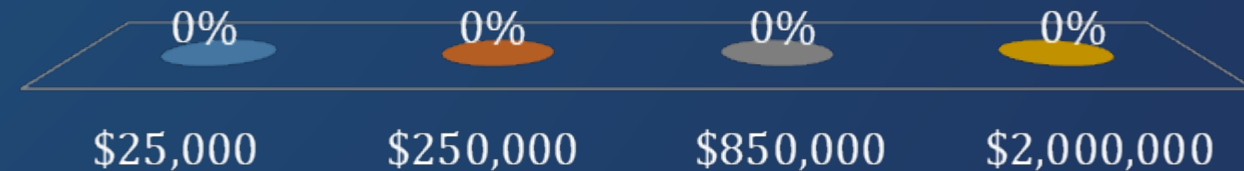


Scenario – Putting the Pieces Together (cont.)

What is Defendant A's base fine under §8C2.4?

*The total Chapter Two offense level under §2S1.1 is **22** [8 (BOL) + 12 (\$250,000 in laundered funds) + 2 (convicted under 18 U.S.C. § 1956)].*

- A. \$25,000
- B. \$250,000
- C. \$850,000
- ✓ D. \$2,000,000



Scenario – Putting the Pieces Together (cont.)

What is the Defendant's culpability score under §8C2.5?

*Hint: Owner committed the offense;
Company has 200 employees; Defendant
cooperated and Accepted Responsibility*

A. 0

B. 1

C. 5

✓ D. 6



Step Three – Determining the Fine Range

Determine 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

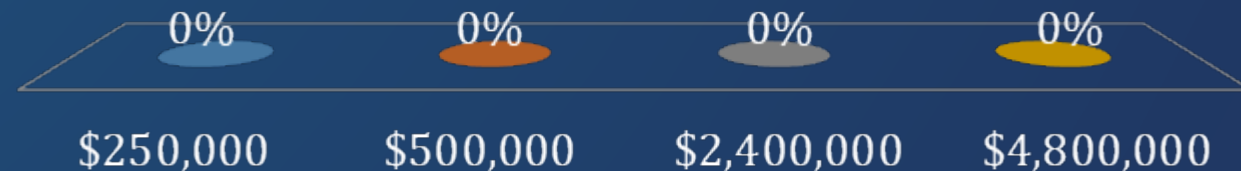
Scenario – Putting the Pieces Together (cont.)

What is the minimum of the Defendant's guideline's fine range?

Hint: Base fine is \$2,000,000

Culpability Score is 6, resulting in a minimum multiplier of 1.20 and maximum multiplier of 2.40

- A. \$250,000
- ✓ B. \$500,000
- C. \$2,400,000
- D. \$4,800,000



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



Other Guideline Provisions Relating to Calculation of Fine

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

- §8C2.8(a): identifies factors the court should consider
- §8C2.8(b): court may consider the relative importance of any factor used to determine the range

Disgorgement – §8C2.9

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





Implementing the Fine



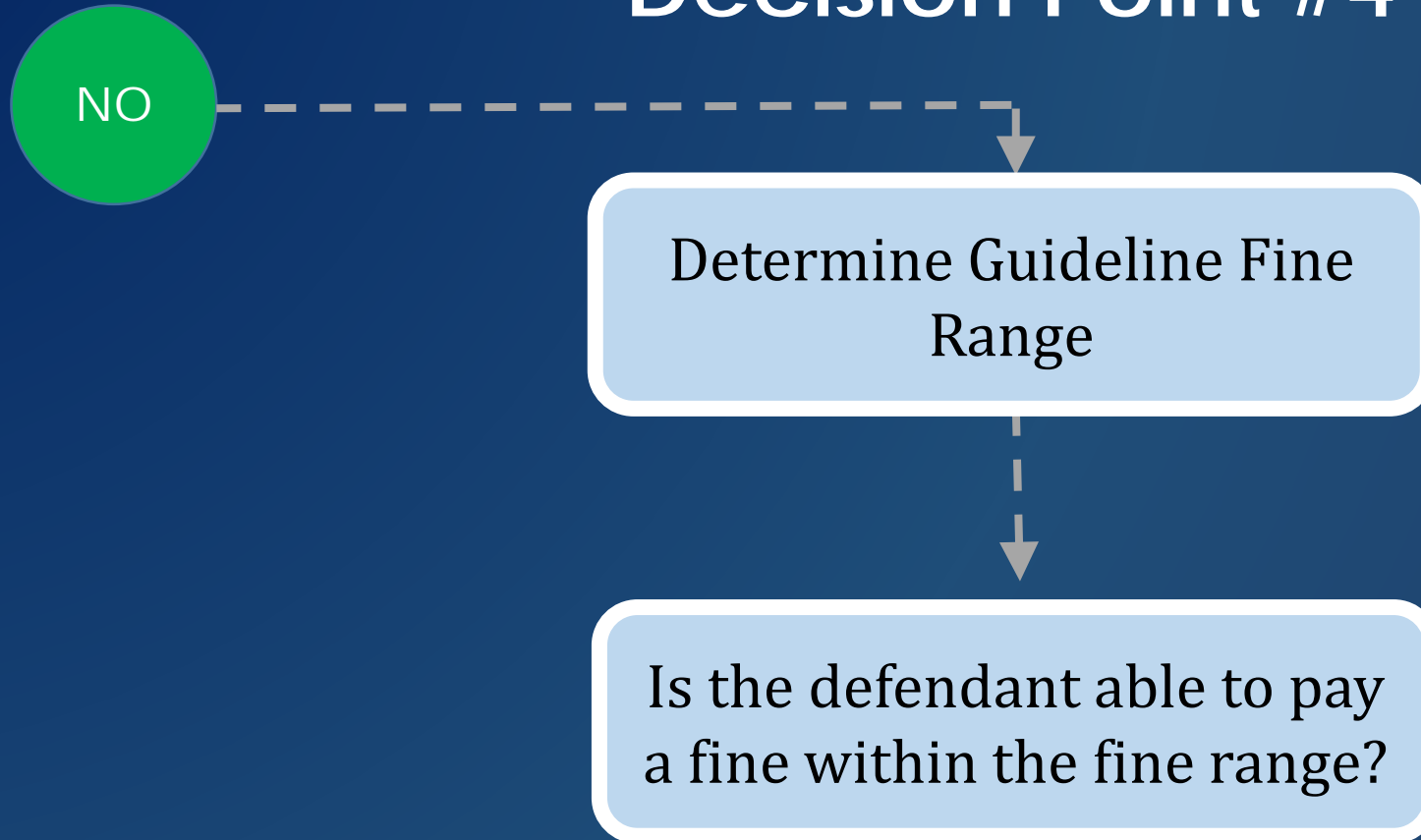
Payment of the Fine

§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



Organizational Fines Decision Point #4



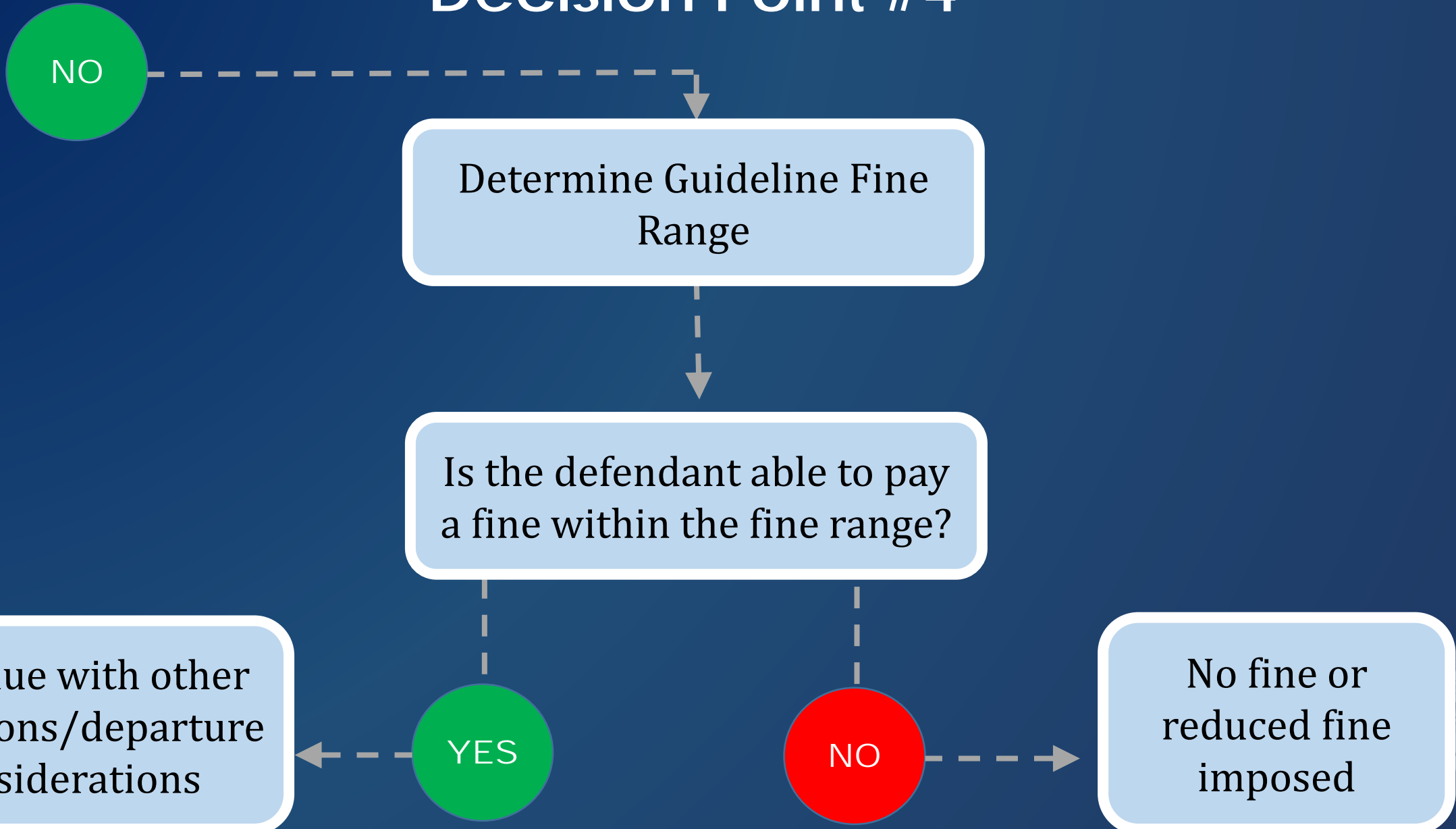
Reduction of Fine Based on Inability to Pay

§8C3.3

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



Organizational Fines Decision Point #4



Fines Paid by Owners of Closely Held Organizations

§8C3.4

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

- *“The court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct for which the organization is being sentenced.”*





Departures from the Guideline Fine Range



Upward Departure Provisions

- Substantial Assistance – §8C4.1
- Risk of Death or Bodily injury – §8C4.2
- Threat to National Security – §8C4.3
- Threat to Environment – §8C4.4
- Threat to a Market – §8C4.5
- Official Corruption – §8C4.6
- Mandatory Program to Prevent and Detect Violations of the Law – §8C4.10
- Exceptional Organizational Culpability – §8C4.11 (if culpability score > 10)



Downward Departure Provisions

- Public Entity – §8C4.7
- Members or Beneficiaries of Organization as Victims – §8C4.8
- Remedial Costs that Greatly Exceed Gain – §8C4.9
- Exceptional Organizational Culpability – §8C4.11 (if no substantial authority involved and had effective program)

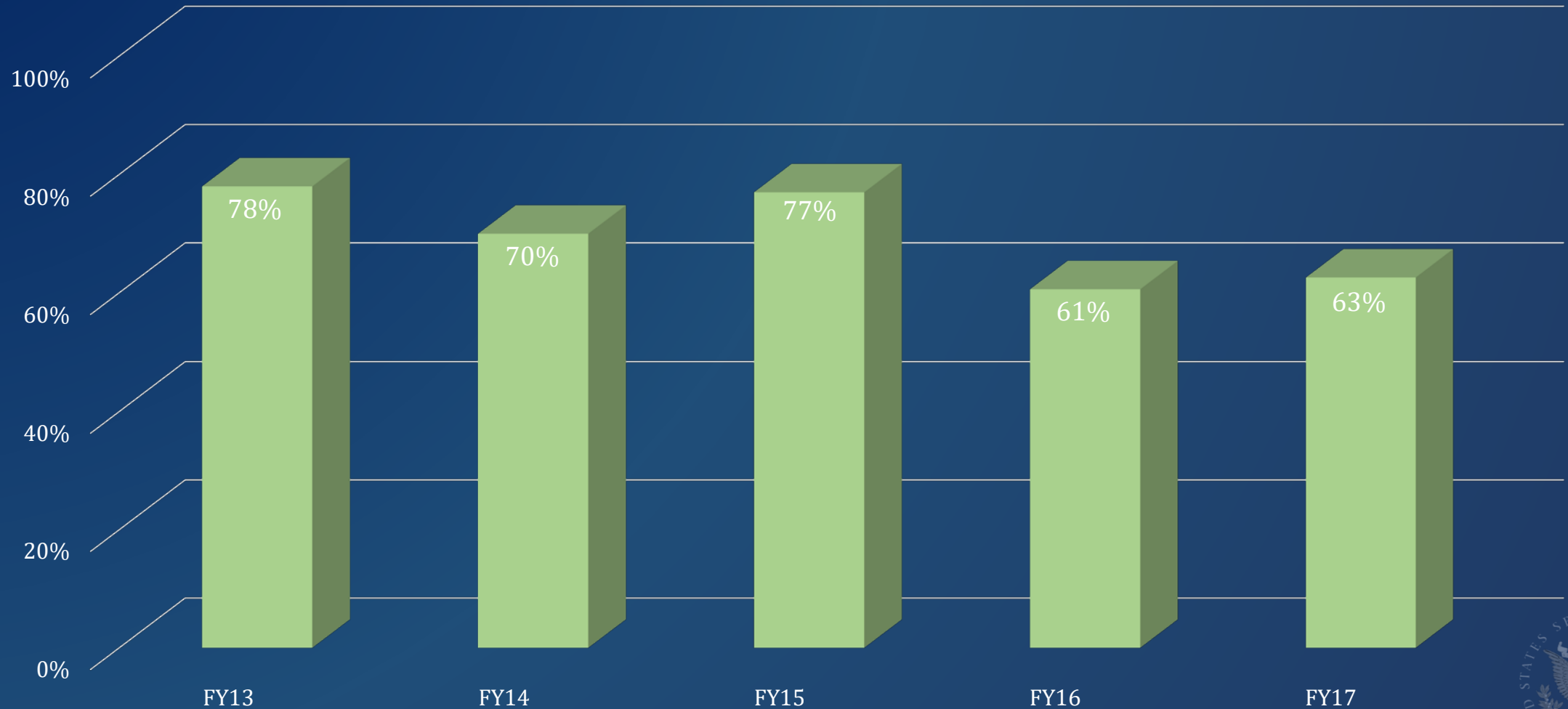




Organizational Probation



Percentage of Organizational Cases Receiving Probation Fiscal Years 2013-2017



SOURCE: United States Sentencing Commission, 2012-2016 *Sourcebooks of Federal Sentencing*

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

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



Mandatory Conditions of Probation

- §8D1.3(a): No new federal, state or local crimes
- §8D1.3(b): 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



Recommended Conditions of Probation

§8D1.4

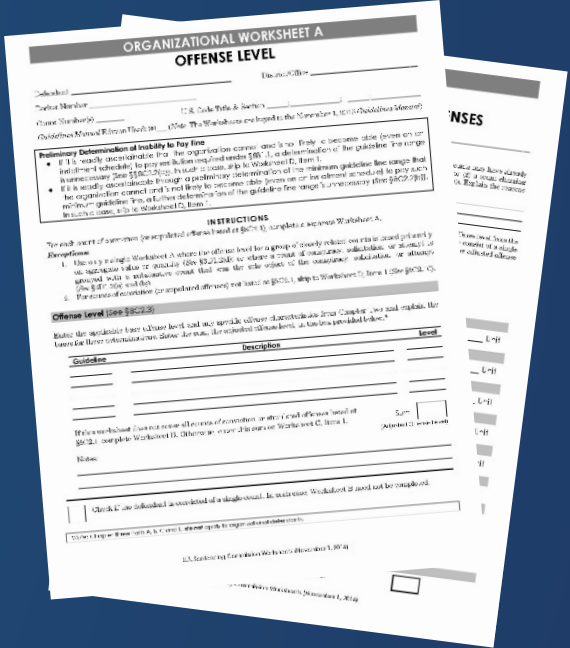
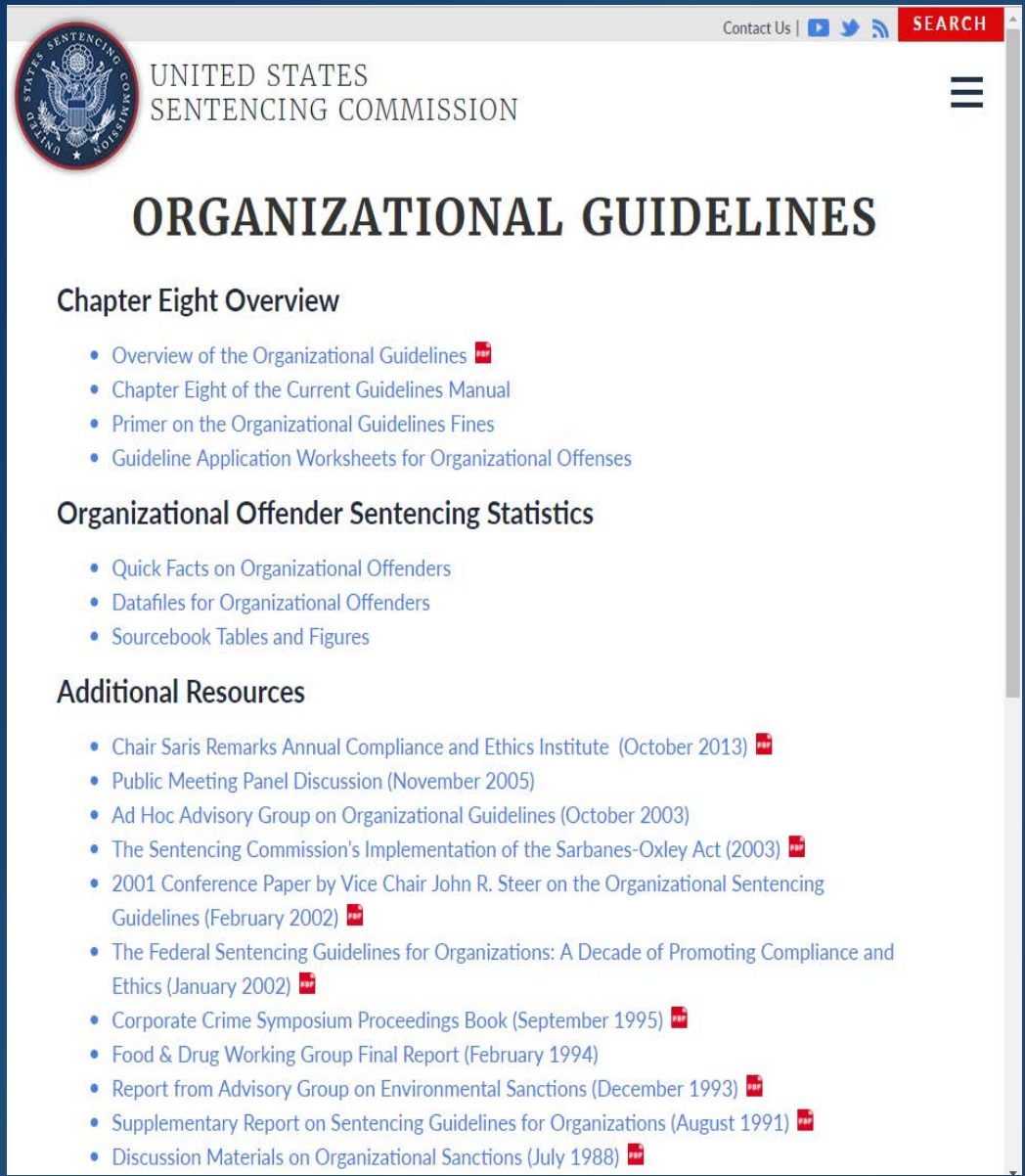
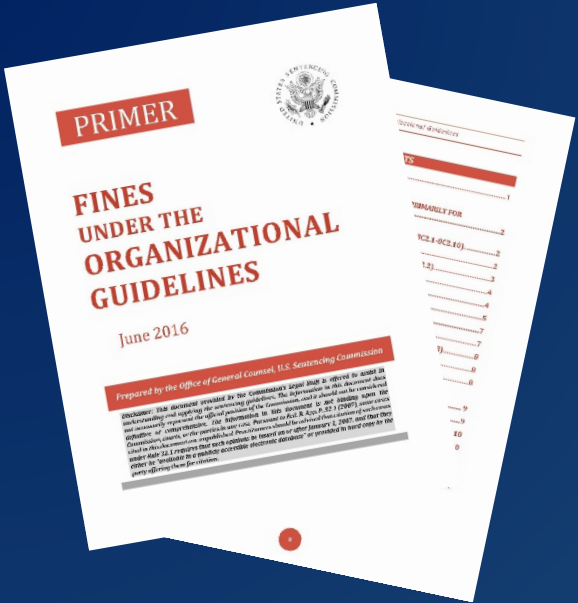
- §8D1.3(c): Other conditions reasonably related to
 - nature and circumstances of offense or history or characteristics of organization; and
 - involving only deprivation of liberty and property necessary to effect purposes of sentencing
- §8D1.4: provides a list of recommended conditions





Resources Available







Other Hypotheticals



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

- *The maximum fine authorized by statute may increase when an organization is convicted of multiple counts. See § 8C3.1, comment.*
- *If Defendant has pleaded guilty to three counts, its aggregate statutory maximum fine will be \$1,500,000*
- *Using Base fine of \$1,200,000, 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

- Company B is convicted of one count of price-fixing in a three-year conspiracy, a violation of 15 USC § 1
- Successful automotive component manufacturer that employs 150 people
- The total volume of commerce in the goods affected by the violation over the three years was \$12 million



Fact Pattern #2 (cont.)

- Legitimate business, no prior illegal activity
- Cooperated and accepted responsibility
- Assets - \$20 million. Annual net income - \$1,750,000



Fact Pattern #2 – Answer

- *Determine whether Defendant has the ability to pay restitution*
- *The base fine is \$2,400,000 (20% of \$12 volume of commerce)*
- *The culpability score = 5*
 - *Start with 5 points*
 - *+2 (more than 200 employees and high-level personnel)*
 - *-2 (cooperation and acceptance)*



Fact Pattern #2 – Answer (cont.)

- *The base fine is \$2,400,000 (20% of \$12 million volume of commerce)*
- *The culpability score = 5*
- *The minimum and maximum multipliers are 1.00 and 2.00*
- *The guideline fine range is \$2,400,000-\$4,800,000*



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.”*





Other Data



www.ussc.gov



(202) 502-4500

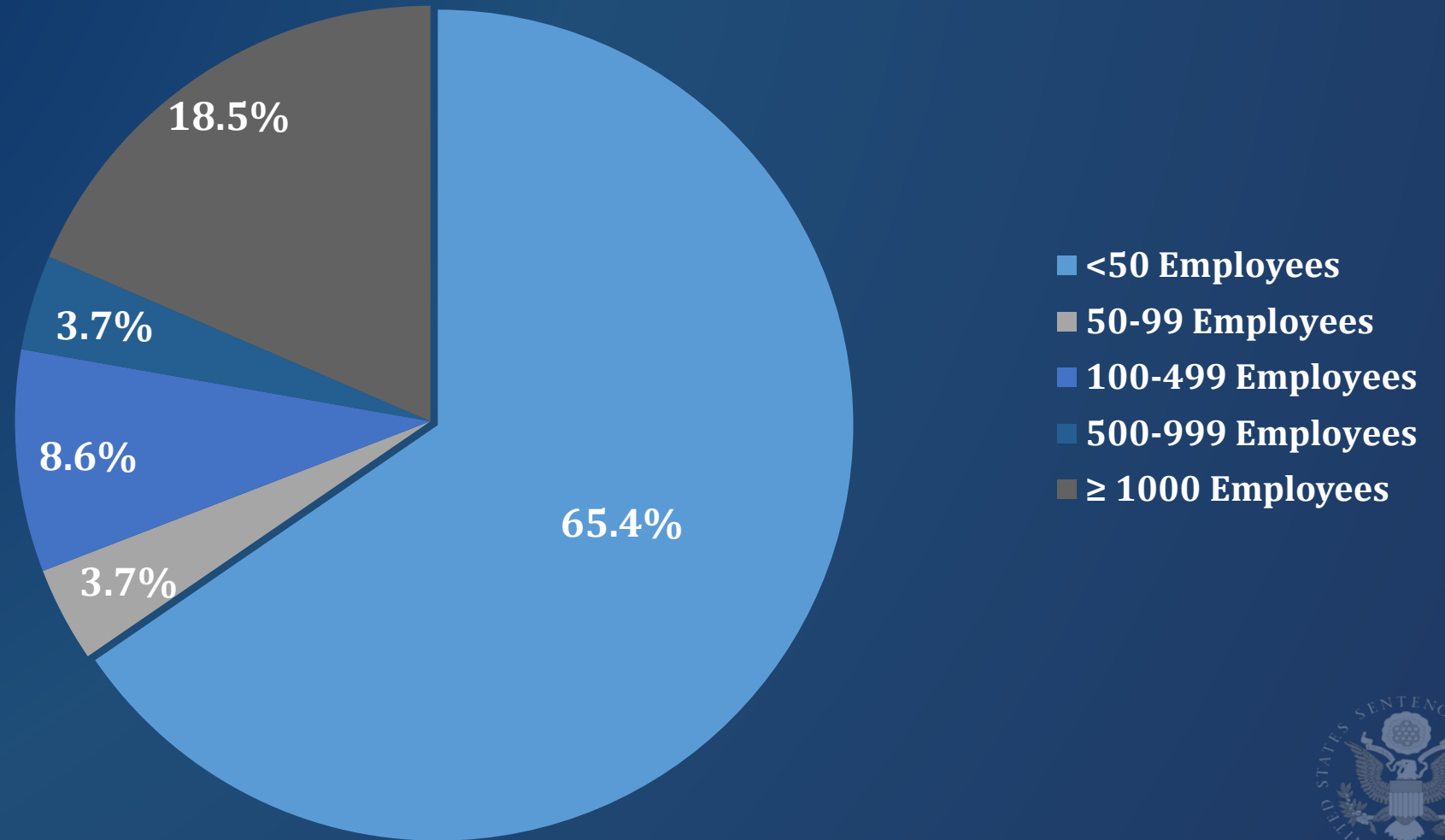


@theusscgov



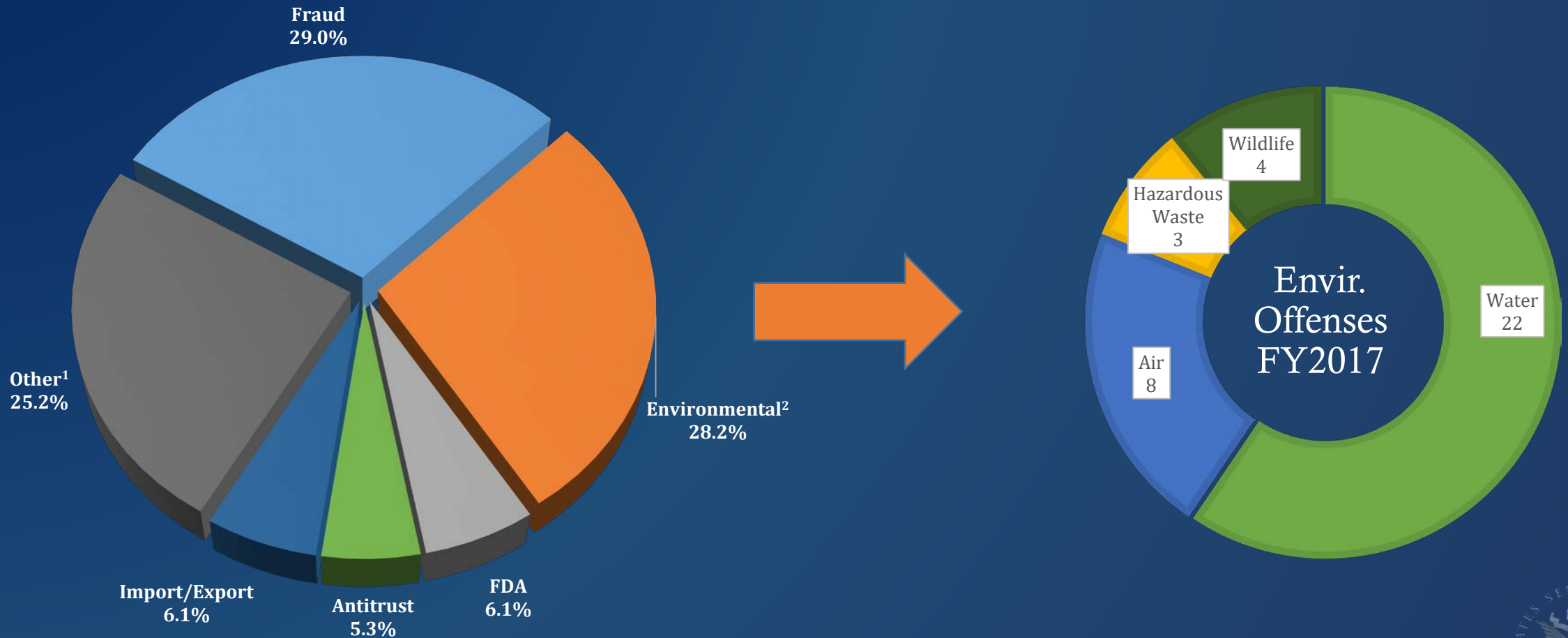
pubaffairs@ussc.gov

Size of Organizations Sentenced By Number of Employees Fiscal Year 2017



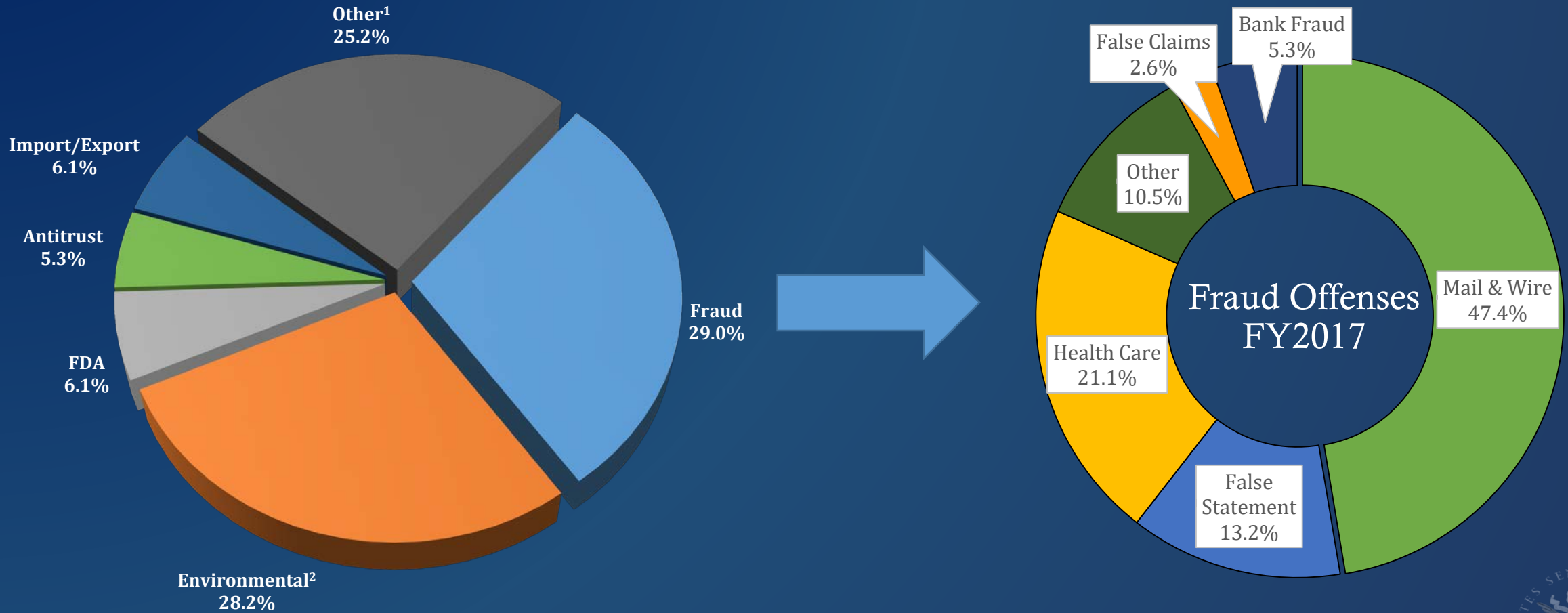
SOURCE: United States Sentencing Commission, 2017 Datafile, CORP16

Number of Environmental Organizational Cases Fiscal Years 2016



SOURCE: United States Sentencing Commission, 2017 *Sourcebook of Federal Sentencing Statistics*.

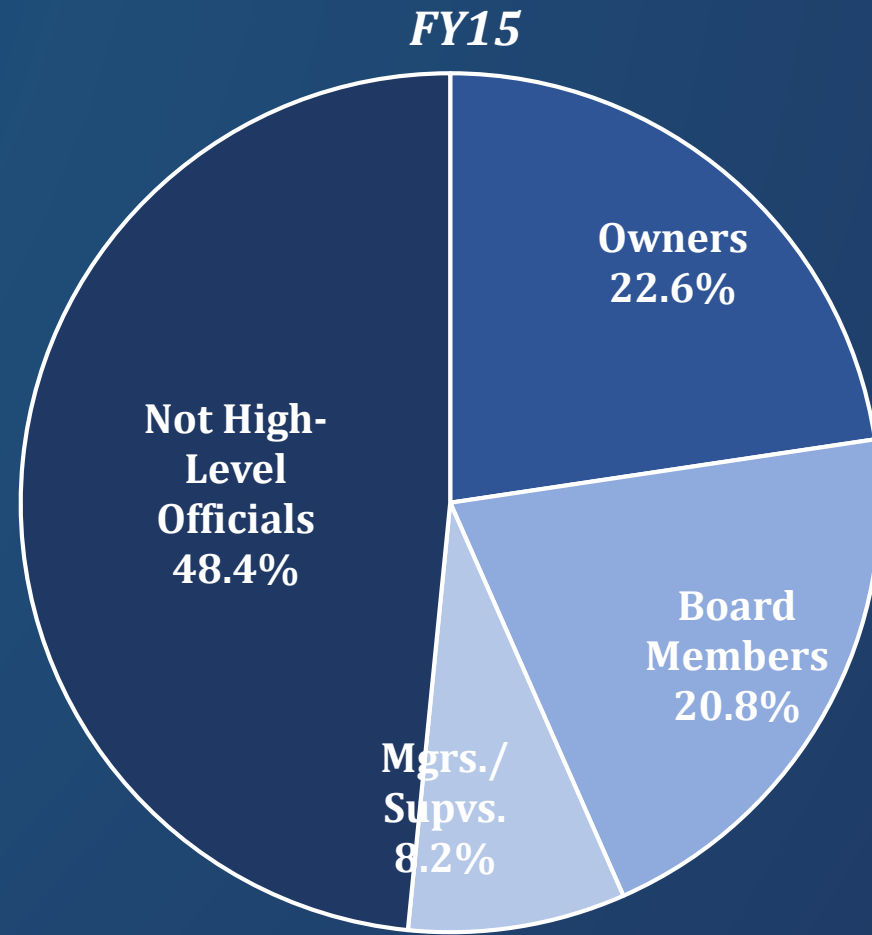
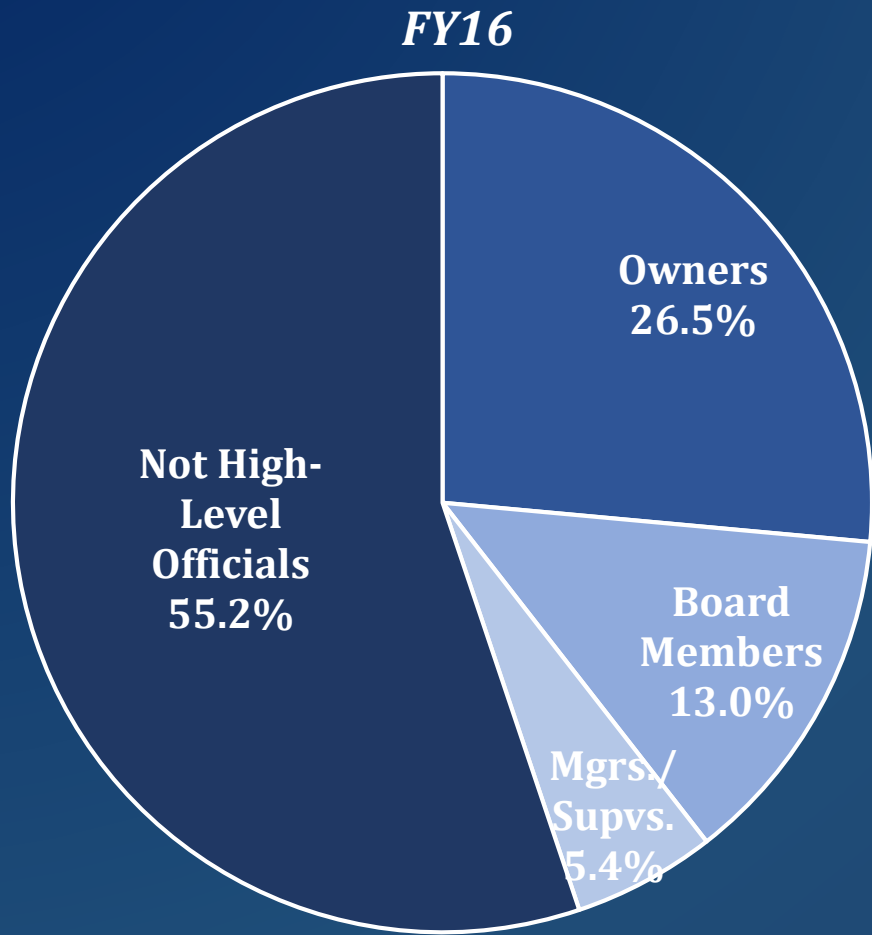
Fraud Offenses in Organizational Cases Fiscal Year 2017



SOURCE: United States Sentencing Commission, 2017 Datafile, CORP17.

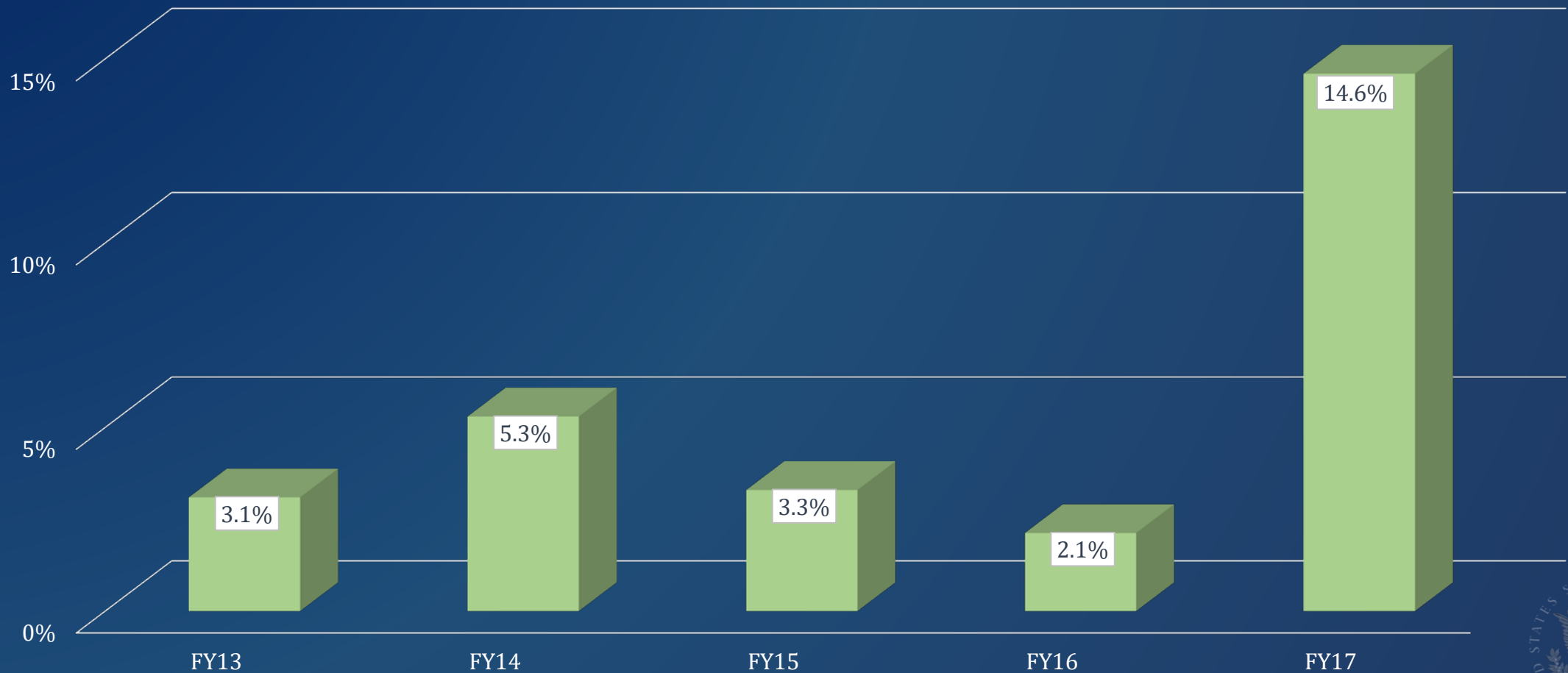


Percentage of Individual Offenders Who Were "High-Level" Officials of Co-Defendant Organizations Fiscal Years 2016-2017



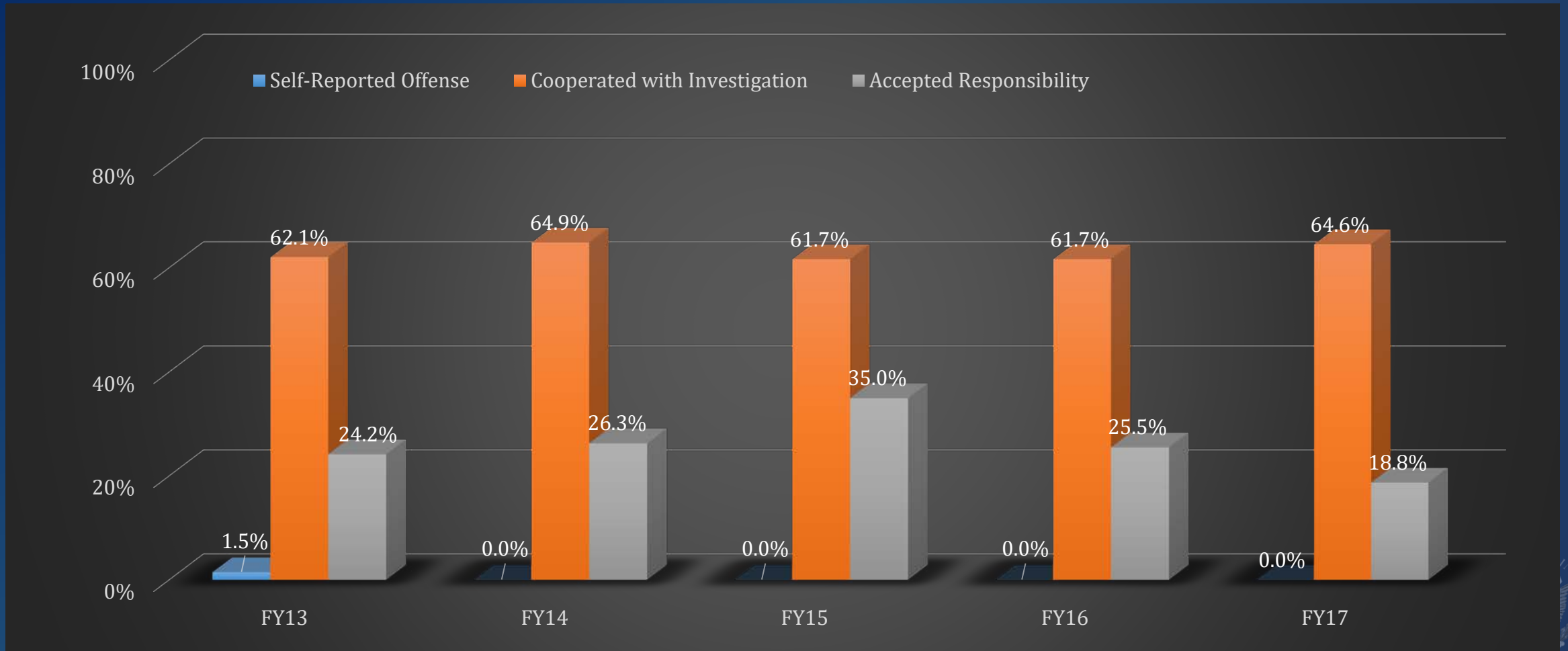
SOURCE: United States Sentencing Commission, 2016-2017 Datafiles, CORP15 and CORP16.

Percentage of Organizations Sentenced that Obstructed Justice (§8C2.5(e)) Fiscal Years 2013-2017



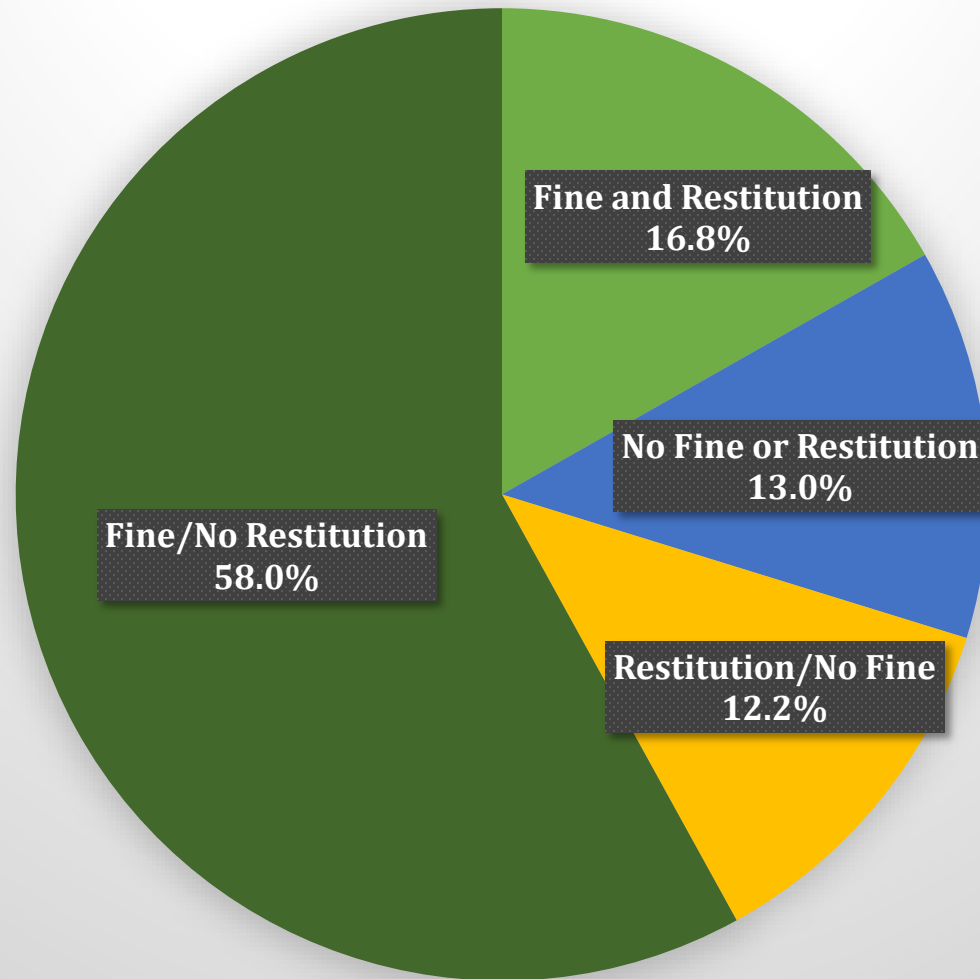
SOURCE: United States Sentencing Commission, 2013-2017 *Sourcebooks of Federal Sentencing*

Percentage of Organizational Cases Receiving Reduction in Culpability Score under §8C2.5(g) Fiscal Years 2013-2017



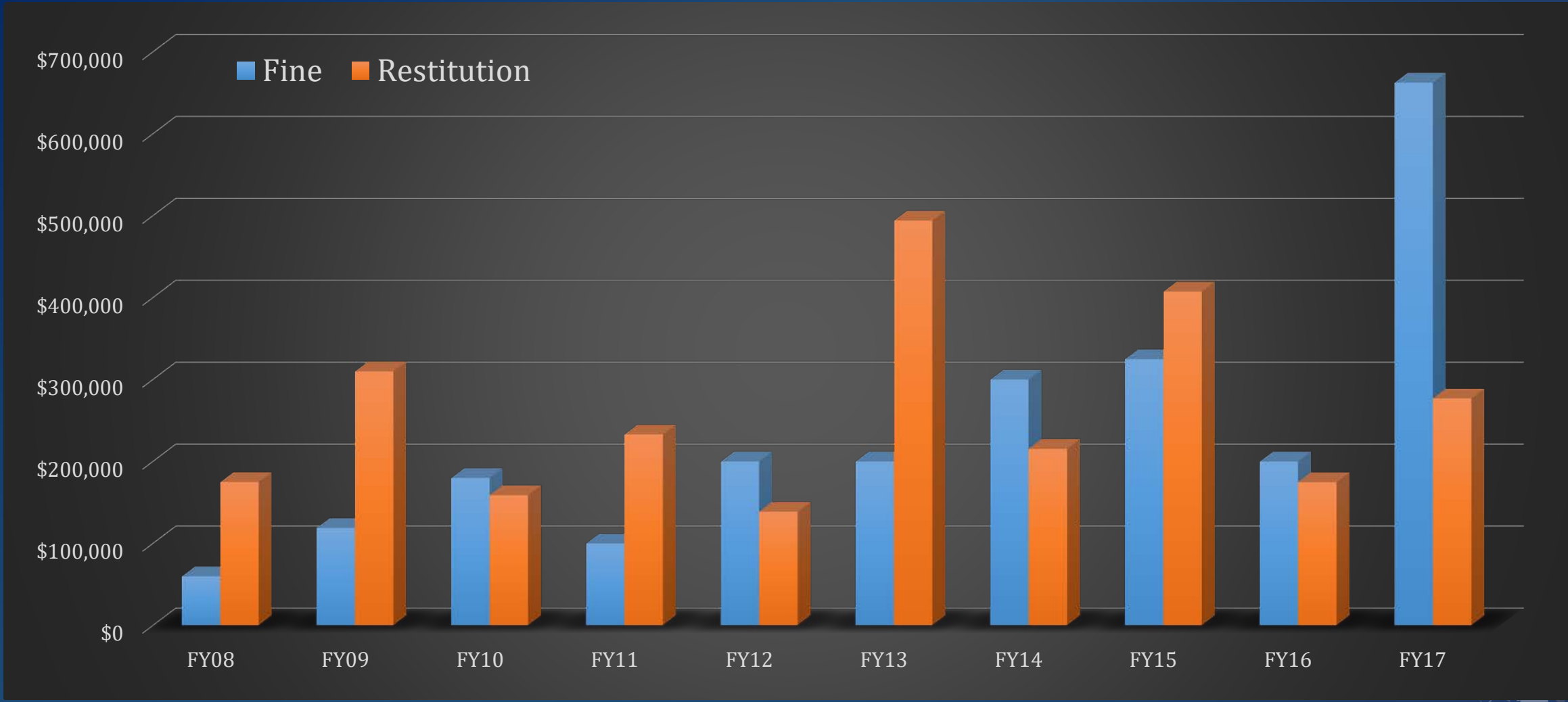
SOURCE: United States Sentencing Commission, 2013-2017 *Sourcebooks of Federal Sentencing*

Types of Monetary Sentences Fiscal Year 2017



Fine and Restitution Distribution

Fiscal Years 2008-2017



SOURCE: United States Sentencing Commission, 2008-2017 *Sourcebooks of Federal Sentencing*



Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) Fiscal Year 2017

Fines	
Environmental	\$ 2,800.0
Fraud	\$ 925.0
Fraud	\$ 710.0
Fraud	\$ 550.0
Fraud	\$ 395.0
Import/Export Violation	\$ 287.0
Drugs (not FDA)	\$ 208.0
Fraud	\$ 203.0
Bribery	\$ 94.9
Bribery	\$ 93.0

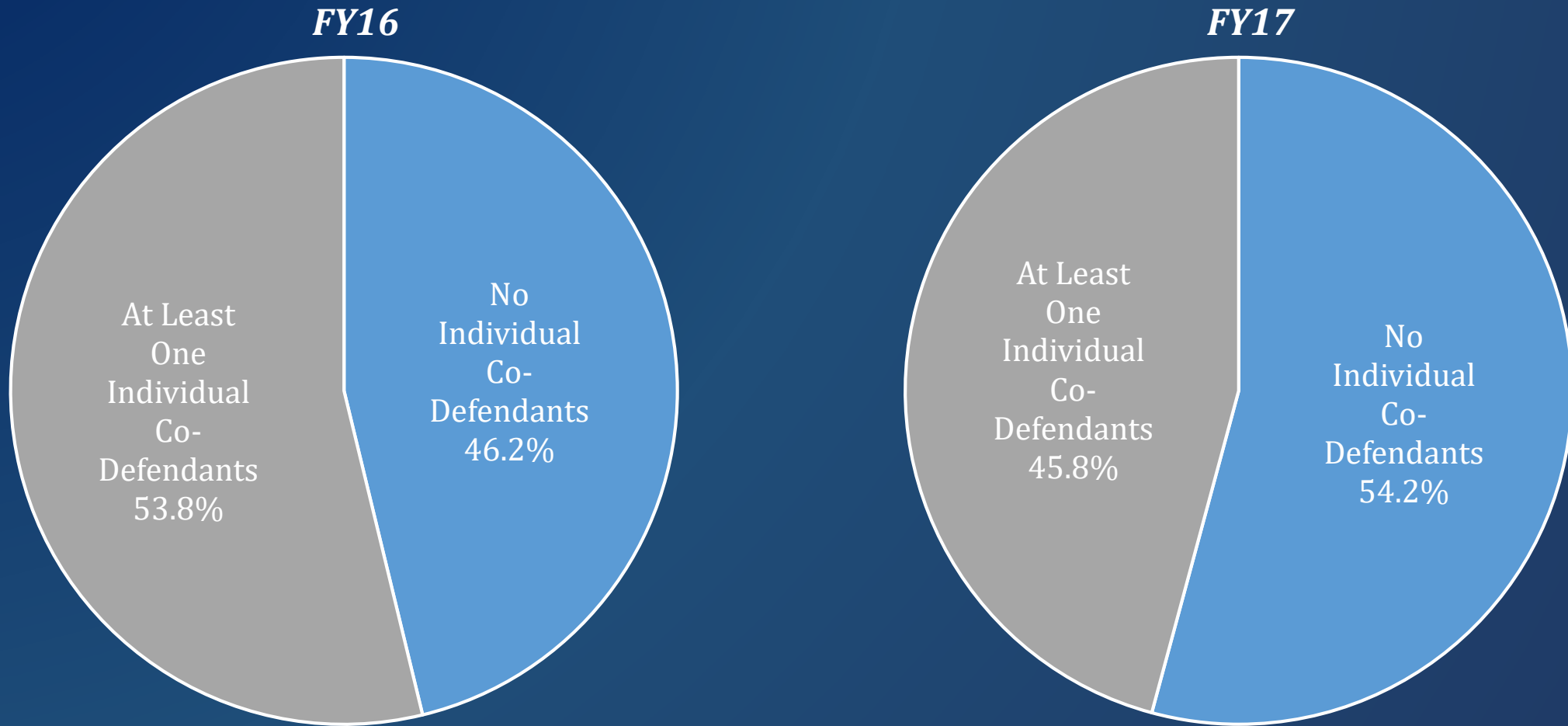
Restitution	
Fraud	\$ 975.0
Fraud	\$ 16.1
Fraud	\$ 9.0
Fraud	\$ 6.7
Fraud	\$ 3.6
Fraud	\$ 3.4
Fraud	\$ 3.2
Fraud	\$ 3.0
Fraud	\$ 2.5
Import/Export Violation	\$ 2.3

SOURCE: United States Sentencing Commission, 2017 Datafile, CORP17.



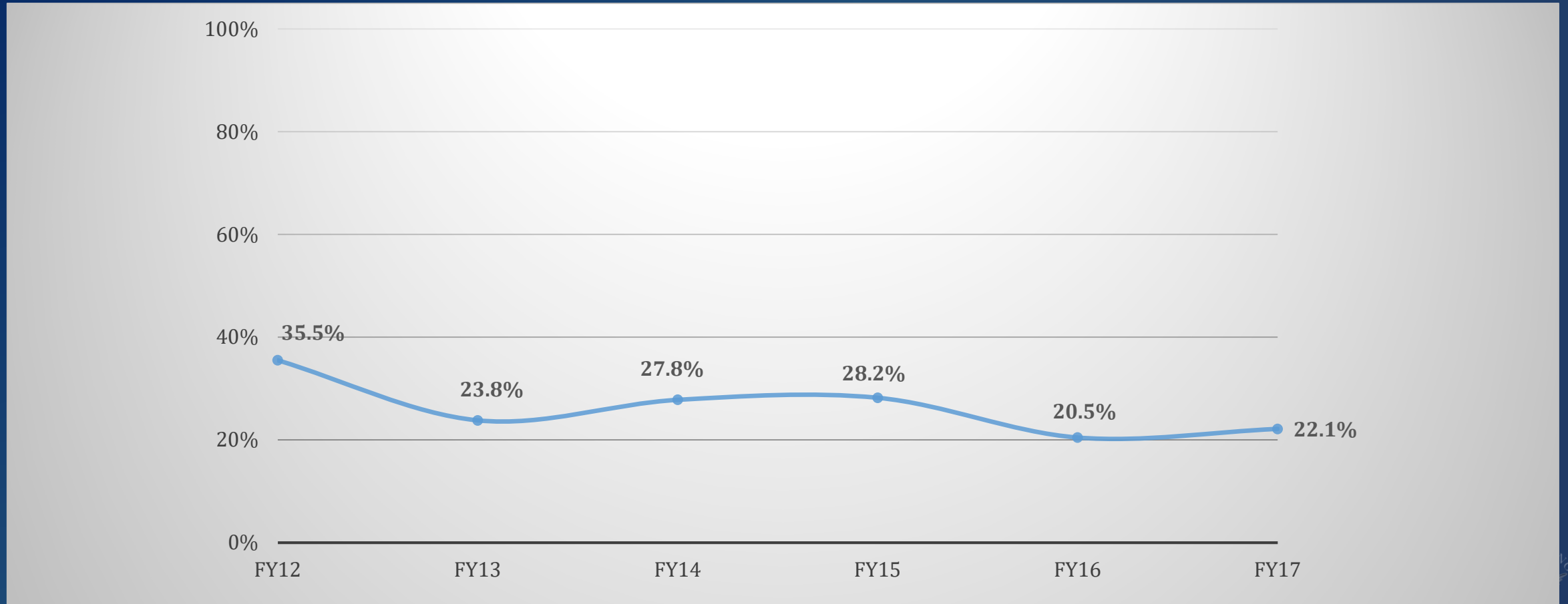
Relationship of Individual Offender To Organizational Cases

Fiscal Years 2016-2017



SOURCE: United States Sentencing Commission, 2016-2017 Datafiles, CORP16 and CORP17.

Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Years 2012-2017



SOURCE: United States Sentencing Commission, 2012-2017 *Sourcebooks of Federal Sentencing Statistics*.



ORGANIZATIONAL GUIDELINE SCENARIOS

1. Defendant A has pleaded guilty to one count of money laundering in violation of 18 U.S.C. § 1956. Defendant A is a successful advertising agency that employs 200 people. The sole owner of the advertising agency (Owner) was approached by his neighbor (Neighbor) who stated that he needed “help cashing some checks.” Neighbor proposed that he would write \$10,000 checks to Defendant A, and that Defendant A need not provide any advertising services. Instead, Neighbor asked Defendant A to return \$9,000 in cash to Neighbor and to keep the remainder for itself. Owner agreed, and this arrangement continued for several months, with Defendant A taking in over \$250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

During the period in which Defendant A was involved in the scheme, it continued to conduct its other legitimate business. There is no other evidence of illegal activity in the company’s past.

The current market value of Defendant A’s assets is approximately \$3 million. The company’s annual net income was approximately \$200,000.

Defendant A has cooperated with the investigation and Owner has written a statement accepting responsibility on behalf of the company.

The court has previously sentenced Owner to a prison term and a \$20,000 fine for this activity.

How would the company’s guidelines be calculated in this case?

- 1A. Assume the same facts as Fact Pattern 1, except Defendant A has pleaded guilty to three counts of money laundering and the crime occurred prior to November 1, 2015.

How will the guideline fine be calculated?

ORGANIZATIONAL GUIDELINE SCENARIOS

2. Defendant B has pleaded guilty to one count of price-fixing in violation of 15 U.S.C. § 1. Defendant B is a successful automotive component manufacturer that employs 150 people. Defendant B also manufactures commercial lighting products, but the violation did not involve this aspect of the business.

During a three-year period, Defendant B and three other manufacturers conspired to fix prices for taillights and other automotive components sold to customers in the United States and elsewhere. Defendant B, through its Owner, regularly communicated with competitors to agree on product pricing and pricing structures designed to limit competition and maintain high prices. Records demonstrate that the total volume of commerce affected by the conspiracy and attributable to Defendant B over the three-year period was \$12 million in automotive components.

There is no evidence of other misconduct in the company's 15-year history. The current market value of the company's assets is approximately \$20 million.

The company's annual net income is approximately \$1,750,000. The company has cooperated with the investigation and the company's president has written a statement accepting responsibility on behalf of the company.

How would the company's guidelines be calculated in this case?

3. Defendant C is a corporation that has pleaded guilty to one count of making contributions in the name of another person in violation of 2 U.S.C. § 441f. The brother of Defendant C's CEO is a candidate for congress. In an effort to help his brother's campaign, the CEO approaches fifteen employees and suggests that the corporation will give them a \$3,000 bonus in exchange for making a \$2,500 donation to the brother's campaign.

How would the company's guidelines be calculated in this case?

PRIMER



FINES UNDER THE ORGANIZATIONAL GUIDELINES

April 2017

Prepared by the Office of General Counsel, U.S. Sentencing Commission

Disclaimer: This document provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive. The information in this document is not binding upon the Commission, courts, or the parties in any case. Pursuant to Fed. R. App. P. 32.1 (2007), some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FINE CALCULATION FOR ORGANIZATION OPERATING PRIMARILY FOR CRIMINAL PURPOSE OR BY CRIMINAL MEANS (§8C1.1).....	2
III.	FINE CALCULATION FOR ALL OTHER ORGANIZATIONS (§§8C2.1-8C2.10).....	2
	A. APPLICABILITY OF FINE GUIDELINES (§8C2.1).....	2
	B. PRELIMINARY DETERMINATION OF INABILITY TO PAY FINE (§8C2.2).....	3
	C. OFFENSE LEVEL (§8C2.3).....	4
	D. BASE FINE (§8C2.4).....	4
	E. CULPABILITY SCORE (§8C2.5).....	5
	F. MAXIMUM AND MINIMUM MULTIPLIERS (§8C2.6).....	7
	G. GUIDELINE FINE RANGE - ORGANIZATION (§8C2.7).....	7
	H. DETERMINING THE FINE WITHIN THE RANGE (POLICY STATEMENT) (§8C2.8).....	8
	I. DISGORGEMENT (§8C2.9).....	8
	J. DETERMINING THE FINE FOR OTHER COUNTS (§8C2.10).....	8
IV.	IMPLEMENTING THE SENTENCE OF A FINE (§§8C3.1-8C3.4).....	9
	A. IMPOSING A FINE (§8C3.1).....	9
	B. PAYMENT OF A FINE - ORGANIZATIONS (§8C3.2).....	10
	C. REDUCTION OF FINE BASED ON INABILITY TO PAY (§8C3.3).....	10
	D. FINES PAID BY OWNERS OF CLOSELY HELD ORGANIZATIONS (§8C3.4).....	11
V.	DEPARTURES FROM THE FINE RANGE (§§8C4.1-8C4.11).....	11

I. INTRODUCTION

Chapter Eight of the *Guidelines Manual* sets forth the guidelines and policy statements that apply when the convicted defendant is an organization and provides the criteria by which organizations convicted of federal criminal offenses will be punished. These guidelines, initially promulgated by the U.S. Sentencing Commission in 1991, were developed after extensive consultation with industry representatives, defense attorneys, federal judges, prosecutors, and federal probation officers. They are “designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”¹

As noted in the Introductory Commentary, the Chapter Eight guidelines reflect several general principles relating to the sentencing of organizations. First, when the convicted defendant is an organization, the court must, whenever practicable, order the organization to remedy any harm caused by the offense.² The harm caused by the offense may be remedied through a restitution order, a remedial order, an order of probation requiring restitution or community service, or an order of notice to victims.³ Second, the court determines the appropriate fine to impose on the organization.⁴ If the organization operated primarily for a criminal purpose or primarily by criminal means, the sentencing court should set the fine sufficiently high to divest the organization of all its assets.⁵ For all other organizations, the sentencing court should base the fine range on the seriousness of the offense and the culpability of the organization.⁶ Finally, the court may order probation for an organizational defendant when it is needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of further criminal conduct.⁷

This primer focuses exclusively on the second general principle noted above — the way a sentencing court calculates the appropriate fine for an organizational defendant. This determination is made pursuant to Chapter Eight, Part C of the *Guidelines Manual*.

II. FINE CALCULATION FOR ORGANIZATION OPERATING PRIMARILY FOR

¹ See USSG, Ch.8, intro. comment.

² *Id.*

³ See USSG, Ch.8, Pt. B, intro. comment.

⁴ See USSG §8A1.2(b).

⁵ See USSG, Ch.8, intro. comment.; USSG §8C1.1.

⁶ See USSG, Ch.8, intro. comment.

⁷ *Id.*

CRIMINAL PURPOSE OR BY CRIMINAL MEANS (§8C1.1)

As noted above, in calculating the fine, the sentencing court applies §8C1.1 if, upon consideration of the offense and history and characteristics of the organization, it determines that the organization operated primarily for a criminal purpose or primarily by criminal means.⁸ Examples of an organization operating primarily for a criminal purpose include a front for a scheme that was designed to commit fraud or an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance.⁹ Examples of an organization that operates primarily by criminal means include a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste.¹⁰

In such a case, the fine is set at an amount, subject to the statutory maximum, sufficient to divest the organization of all its net assets. “Net assets” means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.¹¹ If the extent of the assets of the organization is unknown, the court is to impose the maximum fine authorized by statute, absent innocent bona fide creditors.¹² When §8C1.1 applies, Part C, Subpart 2, regarding determining the fine for all other organizations, and §8C3.4, regarding fines paid by owners of closely held organizations, do not apply.¹³

III. FINE CALCULATION FOR ALL OTHER ORGANIZATIONS (§§8C2.1-8C2.10)

Sections 8C2.1 through 8C2.10 guide the court’s determination of a fine range for those organizations that do not operate primarily for a criminal purpose or primarily by criminal means.

A. APPLICABILITY OF FINE GUIDELINES (§8C2.1)

The rules for calculating the fine range in §§8C2.2 through 8C2.9 are limited to specifically-enumerated offenses for which pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax offenses.¹⁴ The applicable Chapter Two guidelines

⁸ See USSG §§8A1.2(b)(1), 8C1.1.

⁹ See USSG §8C1.1, comment. (backg’d.).

¹⁰ *Id.*

¹¹ See USSG §8C1.1, comment. (n.1).

¹² See USSG §8C1.1, comment. (backg’d.).

¹³ See USSG §8C1.1.

¹⁴ See USSG §8C2.1.

covered by §§8C2.2 through 8C2.9 are listed in §8C2.1(a). As discussed in more detail below, in organizational cases involving offenses referenced to the enumerated Chapter Two guideline sections, the fine calculation first requires computation of the applicable Chapter Two offense level. In addition, §§8C2.2 through 8C2.9 apply to offenses sentenced pursuant to §§2E1.1, 2X1.1, 2X2.1, 2X3.1 and 2X4.1, but only with respect to those cases in which the offense level for the underlying offense is determined under one of the guideline sections in the list at §8C2.1(a).¹⁵ For example, if an organizational defendant is found guilty of aiding and abetting a fraud, the court is directed by §2X2.1 that the organization's offense level is the same level as that for the underlying offense, which in this case would be determined pursuant to §2B1.1, a guideline section listed at §8C2.1(a). Similarly, the application notes explain that the provisions of §§8C2.2 through 8C2.9 apply if the Chapter Two offense is not listed in §8C2.1, but the applicable guideline results in the determination of the offense level by use of a listed guideline.¹⁶

The organizational guidelines do not contain fine provisions for most offenses involving environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice, and perjury), or national defense. Those counts for which the applicable guideline is not listed in either §8C2.1(a) or (b) are fined pursuant to §8C2.10 (Determining the Fine for Other Counts), which is discussed below.

B. PRELIMINARY DETERMINATION OF INABILITY TO PAY FINE (§8C2.2)

The court need not make a complete determination of the guideline fine range in a case in which the organizational defendant lacks the ability to pay restitution or the minimum fine called for by §8C2.7(a).¹⁷ Where it is readily ascertainable that the organization cannot and is not likely to become able to pay the restitution required under §8B1.1, a determination of the fine range is unnecessary since, pursuant to §8C3.3 (Reduction of Fine Based on Inability to Pay), no fine would be imposed.¹⁸ Moreover, where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range that the organization cannot and is not likely to become able to pay such a minimum guideline fine, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3.¹⁹

C. OFFENSE LEVEL (§8C2.3)

¹⁵ See USSG §8C2.1(b).

¹⁶ See USSG §8C2.1, comment (n. 2).

¹⁷ See USSG §8C2.2, comment. (backg'd.).

¹⁸ See USSG §8C2.2(a).

¹⁹ See USSG §8C2.2(b).

For those counts covered by the guideline sections listed at §8C1.1, the court first determines the total offense level by calculating the base offense level and any applicable enhancements contained in the applicable Chapter Two guideline.²⁰ Where there is more than one count, the court applies the same rules from Chapter Three, Part D (Multiple Counts) that are used for individual defendants to determine the combined offense level.²¹

In determining the offense level, the court must apply the provisions from §§1B1.2 through 1B1.8, but should not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction), and E (Acceptance of Responsibility).²²

D. BASE FINE (§8C2.4)

Under §8C2.4, the court determines the base fine in one of three ways: (1) by using the fine amount from the table set forth at §8C2.4(d) that corresponds to the offense level determined under §8C2.3²³; (2) by using the pecuniary gain to the organization from the offense; or (3) by using the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly.²⁴ Whichever method results in the greatest base fine amount is applied.

In relation to the three above methods, the guidelines provide two exceptions. First, if the applicable offense guideline in Chapter Two contains a special instruction for organizational fines, the court shall apply that special instruction.²⁵ For example, the sentencing guidelines for antitrust violations and most bribery and kickback offenses include specific formulations for calculating fines for organizations.²⁶ Second, to the extent that the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, the court shall not use the pecuniary gain or loss for the determination of the base fine.²⁷

²⁰ See USSG §8C2.3(a).

²¹ See USSG §8C2.3(b).

²² See USSG §8C2.3, comment. (n.2).

²³ The offense level fine table at §8C2.4(d) lays out the fine amount associated with each offense level which, when combined with the multipliers derived from the culpability score in §8C2.5, results in the applicable guideline fine range. See USSG §§8C2.4(d), 8C2.5, 8C2.6.

²⁴ See USSG §8C2.4(a)(1)-(3), comment. (backg'd.).

²⁵ See USSG §8C2.4(b).

²⁶ See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d).

²⁷ See USSG §8C2.4(c).

In amendments that became effective on November 1, 2015, the Commission revised the fine table at §8C2.4, to account for inflationary changes since 1991, when the table was last substantially amended.²⁸ The amendment also included a special instruction providing that, for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014, rather than the new fine provisions, to account for any potential *ex post facto* problems that may result from an offender being sentenced under the current *Guidelines Manual*.²⁹

E. CULPABILITY SCORE (§8C2.5)

After calculating the base fine, the sentencing court must determine the organization’s culpability score. The court starts with a culpability score of five points and thereafter adds or subtracts points for certain aggravating and mitigating factors.³⁰

The guideline lists four aggravating factors that increase the culpability score. The first aggravating factor concerns high-level or substantial authority personnel in organizations of varying sizes who participate in, condone, or are willfully ignorant of criminal activity. The organization’s culpability score is increased by between one and five points depending on the number of employees in the organization or unit of the organization and the involvement of individuals who are either within high-level personnel or substantial authority personnel.³¹

The commentary to the guidelines defines the terms “high-level personnel” and “substantial authority personnel.” “High-level personnel” means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization, such as directors, executive officers, individuals in charge of sales, administration, or finance, and individuals with substantial ownership interests.³² “Substantial authority personnel” means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization, such as plant managers, sales managers, individuals with authority to negotiate or set price levels, or individuals authorized to negotiate or approve significant contracts.³³

²⁸ See USSG App. C, amend. 791 (effective Nov. 1, 2015).

²⁹ See *id.* See also USSG §1B1.11.

³⁰ See USSG §8C2.5(a)-(g).

³¹ See USSG §8C2.5(b)(1)-(5).

³² See USSG §8A1.2, comment. (n.3(B)).

³³ See USSG §8A1.2, comment. (n.3(C)).

The second aggravating factor involves the organization's prior history of misconduct. The court adds one or two points to the organization's culpability score if the organization committed the instant offense within a specified time after a criminal adjudication based on similar misconduct or a civil or administrative adjudication based on two or more separate instances of similar misconduct.³⁴

The third aggravating factor increases the culpability score by one or two points if the commission of the instant offense violated a judicial order or injunction, or the organization violated a condition of probation.³⁵

The fourth aggravating factor concerns obstruction of justice. Under this provision, if the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, the court adds three points to the organization's culpability score.³⁶ Similarly, this three-point enhancement also applies if the organization knew of such obstruction or impedance or attempted obstruction or impedance and failed to take reasonable steps to prevent it.³⁷

The guideline lists two mitigating factors that decrease the culpability score. The first allows the court to subtract three points from the organization's culpability score if the organization had an effective compliance and ethics program (as defined in §8B2.1) in place at the time of the offense.³⁸ This reduction should be denied, however, if the organization unreasonably delayed reporting the offense to the appropriate governmental authorities or under specified instances in which high-level or substantial authority personnel participated in, condoned, or were willfully ignorant of the offense.³⁹ It should be noted, however, that the involvement of high-level or substantial authority personnel is not an absolute bar to this reduction.⁴⁰

The second mitigating factor decreases the culpability score by five points if the organization self-reported the offense to the appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct.⁴¹ If the organization did not self-report, but

³⁴ See USSG §8C2.5(c)(1)-(2).

³⁵ See USSG §8C2.5(d)(1)-(2).

³⁶ See USSG §8C2.5(e).

³⁷ *Id.*

³⁸ See USSG §8C2.5(f)(1).

³⁹ See USSG §8C2.5(f)(2), (f)(3).

⁴⁰ See USSG §8C2.5(f)(3)(B)-(C).

⁴¹ See USSG §8C2.5(g)(1).

fully cooperated in the investigation, and accepted responsibility for its conduct, the culpability score is reduced by two points.⁴² Finally, if the organization did not self-report or cooperate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the culpability score is reduced by one point.⁴³

F. MAXIMUM AND MINIMUM MULTIPLIERS (§8C2.6)

Once the court has determined the culpability score, the court looks to the table set forth in §8C2.6 to identify the minimum and maximum multipliers that correspond to that culpability score.⁴⁴ For instance, a culpability score of 10 or more results in a minimum multiplier of 2.00 and a maximum multiplier of 4.00, while a lower culpability score of 3 results in a minimum multiplier of 0.60 and a maximum multiplier of 1.20. The maximum and minimum multipliers are then used to calculate the guideline fine range under §8C2.7. Note that a special instruction for a fine in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) sets a floor for minimum and maximum multipliers in cases covered by that guideline.⁴⁵

G. GUIDELINE FINE RANGE - ORGANIZATION (§8C2.7)

The guideline fine range is then determined by multiplying the base fine calculated under §8C2.4 by both the minimum multiplier calculated under §8C2.6, which yields the minimum of the guideline fine range, and by the maximum multiplier calculated under §8C2.6, which yields the maximum of the guideline fine range.⁴⁶ For example, if the base fine is \$85,000 and the culpability score is 5, the base fine is multiplied by 1.00 to determine the minimum fine and by 2.00 to determine the maximum fine, resulting in a guideline fine range of \$85,000 to \$170,000.

⁴² See USSG §8C2.5(g)(2).

⁴³ See USSG §8C2.5(g)(3).

⁴⁴ See USSG §8C2.6.

⁴⁵ See USSG §8C2.6, comment. (n.1).

⁴⁶ See USSG §8C2.7(a), (b).

H. DETERMINING THE FINE WITHIN THE RANGE (POLICY STATEMENT) (§8C2.8)

The policy statement at §8C2.8(a) instructs the sentencing court that, in determining the appropriate fine, the court must consider certain factors under 18 U.S.C. §§ 3553(a) and 3572(a), as well as additional factors that the Commission concluded may be relevant in determining the appropriate fine in a particular case, such as any non-pecuniary loss caused or threatened by the offense and whether the organization failed to have an effective compliance and ethics program at the time of the offense.⁴⁷ In addition, §8C2.8(b) allows a court to consider the relative importance of any factor used to determine the fine range, so that a court is able to differentiate between cases that have the same offense level but differ in seriousness or between two cases with the same aggravating factors but where the factors vary in their intensity.⁴⁸

I. DISGORGEMENT (§8C2.9)

Once the court has determined the fine pursuant to §8C2.8, it must add to that fine any gain that the organization has made from the offense that has not and will not be paid as restitution or through any other remedial measure.⁴⁹ This section typically will apply in cases where, although the organization received a gain from the offense, the offense did not result in harm to identifiable victims.⁵⁰ Examples include money laundering, obscenity, and regulatory reporting offenses.⁵¹

J. DETERMINING THE FINE FOR OTHER COUNTS (§8C2.10)

The Commission has not promulgated guidelines for determining the fines for counts not included in §8C2.1, such as environmental pollution offenses.⁵² For such counts, the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572.⁵³ In a case that has a count or counts not covered by §8C1.2 in addition to a count or counts covered by that guideline, the court is to apply the fine guidelines for the count(s) covered by the guidelines and add any additional amount to the fine, as appropriate, for the count(s) not covered.⁵⁴

⁴⁷ See USSG §8C2.8(a)(1)-(11); *see also id.*, comment. (backg'd.).

⁴⁸ See USSG §8C2.8(b); *see also id.*, comment. (n.7).

⁴⁹ See USSG §8C2.9.

⁵⁰ See USSG §8C2.9, comment. (n.1).

⁵¹ *Id.*

⁵² See USSG §8C2.10, comment. (backg'd.).

⁵³ See USSG §8C2.10.

⁵⁴ See USSG §8C2.10, comment. (backg'd.).

A. IMPOSING A FINE (§8C3.1)

Section 8C3.1 describes the interaction of the fine or fine range determined under the guidelines with the maximum fine allowed by statute and any minimum fine required by statute. Where the minimum guideline fine is greater than the maximum fine authorized by statute, the sentencing court must impose the maximum fine authorized by statute.⁵⁵ Where the maximum guideline fine is less than a minimum fine required by statute, the sentencing court must import the minimum fine required by statute.⁵⁶ When an organization is convicted of multiple counts, the maximum fine authorized may increase because the maximum fine for each count of conviction may be added together for an aggregated maximum authorized fine.⁵⁷

The Supreme Court has held that the principle set forth in *Apprendi v. New Jersey* — that the Sixth Amendment reserves to juries the determination of any fact (other than the fact of prior conviction) that increases a criminal defendant’s maximum potential sentence — applies to criminal fines levied against a corporation. See *Southern Union Co. v. United States*, 567 U.S. ___, 132 S. Ct. 2344 (June 21, 2012). Southern Union was convicted under the Resource Conservation and Recovery Act (RCRA), which provides for penalties of “a fine of not more than \$50,000 for each day of violation.” At trial, the jury returned a general verdict convicting Southern Union of violating the RCRA during the entire time period alleged in the indictment. At sentencing, the PSR calculated a maximum fine of \$38.1 million based on Southern Union violating the RCRA for each of the 762 days between September 19, 2002 and October 19, 2004. Southern Union objected, arguing that this violated *Apprendi* because the jury was not asked to determine the exact duration of the violation and only returned a general verdict listing an approximate start date of the violation. The government argued that *Apprendi* does not apply to fines.

The district court held that *Apprendi* does apply to fines, but concluded that the “content and context of the verdict all together” demonstrated that the jury did in fact find that the duration of the violation was 762 days; thus, no judicial fact-finding was necessary to establish a maximum fine of \$38.1 million. Ultimately, the district court imposed a \$6 million fine and a \$12 million “community service obligation.” The First Circuit rejected both of the district court’s findings, holding that the jury did not find a violation for each day and that *Apprendi* did not apply to criminal fines. The Supreme Court granted *certiorari* to resolve a circuit split on the question of whether *Apprendi*

⁵⁵ See USSG §8C3.1(b).

⁵⁶ See USSG §8C3.1(c).

⁵⁷ See USSG §8C3.1, comment. (backg’d).

applies to the calculation of criminal fines.

The Supreme Court explained that criminal fines, like other punishments, are penalties inflicted by the sovereign and are frequently imposed “based on reference to particular facts.” The Court found that whenever a jury must find beyond a reasonable doubt certain facts that increase maximum punishments, it is necessary to implement *Apprendi*’s “animating principle”, that is: the “preservation of the jury’s historic role as bulwark between the State and the accused at the trial for an alleged offense.” The Court also rejected the government’s argument that because fines are less onerous than incarceration, they do not trigger the Sixth Amendment.

B. PAYMENT OF A FINE - ORGANIZATIONS (§8C3.2)

For those organizations that operated primarily for a criminal purpose or primarily by criminal means, the sentencing court must order immediate payment of the fine.⁵⁸ In any other case, the court must order immediate payment unless it finds that the organization is financially unable to make immediate payment or that such payment would pose an undue burden on the organization.⁵⁹ In this case, the court shall require full payment at the earliest possible date, either by setting a date certain or by establishing an installment schedule.⁶⁰ In no event should the period provided for payment exceed five years.⁶¹

C. REDUCTION OF FINE BASED ON INABILITY TO PAY (§8C3.3)

The court must reduce the fine below that otherwise required by the guidelines to the extent that imposition of such fine would impair the organization’s ability to make restitution to its victims.⁶² The court may impose a fine below that otherwise required if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required, provided that the reduction is not more than necessary to avoid substantially jeopardizing the continued viability of the organization.⁶³

D. FINES PAID BY OWNERS OF CLOSELY HELD ORGANIZATIONS (§8C3.4)

The sentencing court may offset the fine for a closely held organization when one

⁵⁸ See USSG §8C3.2(a).

⁵⁹ See USSG §8C3.2(b).

⁶⁰ See USSG §8C3.2(b).

⁶¹ See USSG §8C3.2, comment. (n.1).

⁶² See USSG §8C3.3(a).

⁶³ See USSG §8C3.3(b).

or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct.⁶⁴ An organization is closely held, regardless of its size, when relatively few individuals own it.⁶⁵ The organizational fine is offset by an amount that reflects the percentage ownership interest of the sentenced individuals and the fine amount imposed on those individuals.⁶⁶ For example, in a case in which five individuals own an organization, each with a 20 percent interest, and three of the individuals are convicted and fined a total of \$100,000, the fine imposed upon the organization can be offset by up to 60 percent of their combined fine amounts, *i.e.*, by \$60,000.

V. DEPARTURES FROM THE FINE RANGE (§§8C4.1-8C4.11)

Subpart 4 of Part C of Chapter Eight sets forth some of the factors that may constitute grounds for departure from the applicable guideline fine range in Chapter Eight cases. This list of factors is not exhaustive. Departures may be warranted if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”⁶⁷ Accordingly, the factors that may warrant departure include:

- (1) the organization’s substantial assistance to the authorities in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other individuals (§8C4.1);
- (2) the offense resulted in death or bodily injury, or involved the foreseeable risk of death or bodily injury (§8C4.2);
- (3) the offense constituted a threat to national security (§8C4.3);
- (4) the offense presented a threat to the environment (§8C4.4);
- (5) the offense presented a risk to the integrity or continued existence of a private or public market (§8C4.5);
- (6) the organization, in connection with the offense, bribed or unlawfully

⁶⁴ See USSG §8C3.4.

⁶⁵ See USSG §8C3.4, comment. (n.1.).

⁶⁶ *Id.*

⁶⁷ See 18 U.S.C. § 3553(b); USSG Ch.8, Pt.4, intro. comment.

gave a gratuity to a public official, or attempted or conspired to do the same (§8C4.6);

- (7) the organization is a public entity (§8C4.7);
- (8) the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense (§8C4.8);
- (9) the organization has paid or has agreed to pay remedial costs that greatly exceed the gain the organization received from the offense (§8C4.9);
- (10) the organization's culpability score was reduced for having an effective compliance and ethics program, but it had implemented that program in response to a court order or administrative order, or the organization was required to have such a program, but did not (§8C4.10); and
- (11) the organization's culpability score is greater than 10 (§8C4.11).

Measuring Compliance Program Effectiveness: A Resource Guide

ISSUE DATE: MARCH 27, 2017

*HCCA-OIG Compliance Effectiveness Roundtable
Roundtable Meeting: January 17, 2017 | Washington, DC*



Measuring Compliance Program Effectiveness – A Resource Guide

HCCA-OIG Compliance Effectiveness Roundtable Roundtable Meeting: January 17, 2017 Washington DC

Introduction

On January 17, 2017, a group of compliance professionals and staff from the Department of Health and Human Services, Office of Inspector General (OIG) met to discuss ways to measure the effectiveness of compliance programs. The intent of this exercise was to provide a large number of ideas for measuring the various elements of a compliance program. Measuring compliance program effectiveness is recommended by several authorities, including the United States Sentencing Commission (see, Chapter 8 of the United States Sentencing Guidelines). This list will provide measurement options to a wide range of organizations with diverse size, operational complexity, industry sectors, resources, and compliance programs.

During the meeting on January 17, the participants broke into 4 groups of 10 attendees to discuss 2 elements of a compliance program at a time. During four sessions, every participant had a chance to suggest ideas about “what to measure” and “how to measure” with respect to all seven elements of a compliance program. We used the following categories, from the Health Care Compliance Association’s *CHC Candidate Handbook: Detailed Content Outline*, as a guide to ensure that all elements of a compliance program were covered:

Compliance Program Elements:

1. Standards, Policies, and Procedures
2. Compliance Program Administration
3. Screening and Evaluation of Employees, Physicians, Vendors and other Agents
4. Communication, Education, and Training on Compliance Issues
5. Monitoring, Auditing, and Internal Reporting Systems
6. Discipline for Non-Compliance
7. Investigations and Remedial Measures

We have listed below many individual compliance program metrics. The purpose of this list is to give health care organizations as many ideas as possible, be broad enough to help any type of organization, and let the organization choose which ones best suit its needs. This is not a “checklist” to be applied wholesale to assess a compliance program. An organization may choose to use only a small number of these in any given year. Using them all or even a large number of these is impractical and not recommended. The utility of any suggested measure listed in

this report will be dependent on the organization's individual needs. Some of these suggestions might be used frequently and others only occasionally. The frequency of use of any measurement should be based on the organization's risk areas, size, resources, industry segment, etc. Each organization's compliance program and effectiveness measurement process will be different. Some may not apply to the organization's environment at all and may not be used.

Any attempt to use this as a standard or a certification is discouraged by those who worked on this project; one size truly does not fit all.

Element 1: Standards, Policies, and Procedures

- A. Conduct periodic reviews of policies, procedures, and controls.
- B. Consult with legal resources.
- C. Verify that appropriate coding policies and procedures exist.
- D. Verify that appropriate overpayment policies and procedures exist.
- E. Integrate mission, vision, values, and ethical principles with code of conduct
- F. Maintain compliance plan and program.
- G. Assure that a nonretribution/nonretaliation policy exists.
- H. Maintain policies and procedures for internal and external compliance audits.
- I. Verify maintenance of a record retention policy.
- J. Maintain a code of conduct.
- K. Verify maintenance of:
 - 1. A conflict of interest policy
 - 2. Appropriate confidentiality policies
 - 3. Appropriate privacy policies
 - 4. Policies and procedures to address regulatory requirements (e.g., the Emergency Medical Treatment and Labor Act (EMTALA), Clinical Laboratory Improvement Amendments (CLIA), Anti-Kickback, research, labor laws, Stark law).
- L. Verify appropriate policies on interactions with other healthcare industry stakeholders (e.g., hospitals/physicians, pharma/device representatives, vendors).
- M. Assure policies and procedures address the compliance role in quality of care issues.
- N. Verify maintenance of a policy on gifts and gratuities.
- O. Verify maintenance of standards of accountability (e.g., incentives, sanctions, disciplinary policies) for employees at all levels.
- P. Maintain a Compliance Department operations manual.
- Q. Verify maintenance of policies on waivers of co-payments and deductibles.
- R. Assure governance policies related to compliance are appropriately maintained.

Source: CHC Candidate Handbook: Detailed Content Outline

Element 1: Standards, Policies, and Procedures

	What to Measure	How to Measure
	Access:	
1.1	Accessibility	<ul style="list-style-type: none"> • Review link to employee accessible website/intranet that includes the Code of Conduct • Survey - Can you readily access or reference policies and procedures? (Yes/No/Don't know) • Survey - How and where do employees actually access policies and procedures? • Test key word search (searchable) • Audit and interview staff to show policies
1.2	Actual Access	Audit how many actual "hits" on policies and procedures
1.3	Accessible language for code, standards and policies	Flesch Kincaid measuring standard – no more than 10th grade reading level
1.4	Compliance program awareness and communication	<ul style="list-style-type: none"> • Survey employees to determine the extent to which the code of conduct and other compliance communications are available to employees • Review to ensure the standards, policies, and awareness material is updated and distributed within organization's guidelines
1.5	Impaired or disabled accessibility	Review accessibility options. Look at methods and speak to individuals.
1.6	Policy communication	Communication strategy of policies
1.7	Availability of policy content	Conduct surveys and observation
	Accountability:	
1.8	Accountability	Policy Coordinator designated
1.9	Ownership and accountability of policies	Audit process of how policies get enforced by chain of command when compliance is not the final approver. Is management taking responsibility for implementing and following policies?
1.10	Routine policies and procedures	Confirm that listed owner of each policy and procedure is the actual owner.

Review/Approval Process:		
1.11	Annual review and Board approval of Compliance Plan	Audit: Review of Board minutes
1.12	Compliance documentation operations manual	Compliance or other oversight committee to review annually to ensure it is up to date.
1.13	Maintenance of policies	Check last review or revision
1.14	Number of policies reviewed and is the review timely	Process review/audit. Use checklist to ensure all basic policy elements are in place, updated consistently and reviewed/approved by appropriate parties.
1.15	Policy approvals	Checklist audit. Create list of policies, review committee and board minutes to ensure all approvals have been obtained.
1.16	Policy review process	Audit process by which policies and procedures are prepared, approved, disseminated, etc.
1.17	Process for ensuring full organizational participation in policy and procedure development	Review documentation/minutes to verify input considered and solicited for policy and procedure development and review
1.18	Process for review and approving	Check for written process
Quality:		
1.19	Are policies (and procedures) as good as industry practice	Peer reviews
1.20	Integrity of Process for developing and implementing policies and procedures	Audit policy and procedure on policy and procedures
1.21	Language and reading level of policies	Are policies written in plain language, appropriate grade reading level and written in applicable languages for organization? Policy review, Word grade level review and interviews of staff to make sure they understand.
1.22	Language translation	Audit or process review. Are policies and the code of conduct translated into appropriate languages for organization?
1.23	Usefulness	SURVEY - Do department policies and procedures assist you in doing your job effectively? (Yes/No/Don't know)

1.24	Need for policies that don't exist	Interview staff to determine if they need the certain policies to strengthen internal controls.
1.25	Policies and procedures	Request review from external experts
	Assessment:	
1.26	Assessment of all company policies	Check list of policies; which are compliance and which are business
1.27	Essential compliance policies and procedures exist	Can staff actually articulate policies and procedures; test staff
1.28	Existence of procedure to support policy	Audit for procedure to support policy
1.29	Fundamental policies and procedures in place	Have focus groups of work units/departments to determine whether they understand the policies and procedures necessary to do their jobs.
1.30	Identifiability	<ul style="list-style-type: none"> • Index of policies available and current • Numbered policies, not just titles
1.31	List of policies are applicable to employees	Supervisors to assess direct staff
1.32	Are those affected by policy given the opportunity to weigh in on policy when developed?	Focus groups and interviews of those affected by policy.
1.33	List of required policies	Create checklist to make sure minimum policies are in place and then audit against the list.
1.34	Effectiveness of policies	Effectiveness of policies based on the submission hotline calls
1.35	Policies and procedures that have been identified as part of corrective action	Process review. Conduct annual meeting with compliance and legal to look at databases and control and prioritize review to ensure implementation and ongoing compliance with policies and procedures.
1.36	Policies for high risk and operational areas	Audit
1.37	Policies, standards and procedures are based on assessed risks	Risk assessment, policy exists for each risk identified in the risk assessment (coverage of a specific risk topic)
1.38	Policy inventory to ensure no overlap and contradiction of policies	Create inventory and analyze inventory. Analyze and review past efforts. Look at various departments that might have overlapping policies.
1.39	Policy review following investigation/issue	Top policies implicated in an investigation are reviewed to determine if policy ambiguous, complex, fails to adequately safeguard issues. Validate through audit.

1.40	Routine policies and procedures are addressed and filter down.	Review department and committee agendas to ensure policies are addressed
	Code of Conduct:	
1.41	Code of Conduct	Audit: Review dates, board approvals, distribution processes, attestations, survey employees for understanding, conduct focus groups.
1.42	Compliance program awareness and communication	Survey employees to determine the extent to which they know the content of the Standards of Conduct (SOC) and how to access it.
1.43	Integrate mission, vision, values, and ethical principles with code of conduct	Compare code with mission and vision statements to see if it includes elements/statements. Check to see if code is accessible to employees
1.44	Maintenance of code of conduct	Is code written, posted for employees, documented frequency of reviews, and survey/test employees on ability to locate it
1.45	Distribution	Documentation of Code of Conduct distribution tracking and results over past two years for all employees, employed physicians, allied health professionals, independent (contracted) physicians, volunteers and vendors/contractor/consultants in the organization
1.46	Orientation	Audit to ensure all employees receive orientation to the SOC and compliance policies within 30 days of hire.
1.47	Staff understanding of code of conduct and policies and procedures	<ul style="list-style-type: none"> • Review test scores after training. • Conduct interviews.
	Updates:	
1.48	Compliance program communication of rule changes	Review periodically and at rule changes – Audit to ensure there is adequate communication to employees, including changes in policy/procedure.
1.49	New and updated policy distribution and education of appropriate staff	Process review - Does organization have formal process to make workforce aware of new policies or changes in policies?
1.50	Practices implemented after new policy	Audit practices and review committee minutes and other documentation to determine how new policies are implemented.
	Understanding:	
1.51	Understanding of Policies/Procedures	<ul style="list-style-type: none"> • Conduct surveys and/or focus groups on specific policies

		<ul style="list-style-type: none"> • Audit adherence to policy/procedure
1.52	Orientation	Ensure employees are provided instruction by knowledgeable personnel for questions/clarity
1.53	Policies reflect practice	Use policies as audit tool and then interview, observe and conduct document review to ensure policies are being followed.
1.54	Questions asked by employees	System in place to track employee questions and concerns to ensure consistent guidance. Track departments where questions come from to deploy additional education where necessary.
1.55	Understandable to board and c-suite	Test board and c-suite on location and understanding
1.56	Understandable to employees	<ul style="list-style-type: none"> • Reading comprehension test • Situational tests • Test of location
Compliance Plan:		
1.57	Maintain compliance plan and program	Review written plan or written schedule of compliance activities
1.58	Maintain compliance department operations manual	<ul style="list-style-type: none"> • Audit existence of written manual, handbook, or reference guide • Test whether the manual is current
Confidentiality Statements:		
1.59	Verify maintenance of appropriate confidentiality policies	<ul style="list-style-type: none"> • Audit procedure for obtaining confidentiality statements from employees • Audit employee files for signed confidentiality statements from employees
Enforcement:		
1.60	Compliance with policies	Conduct interviews, observation.
1.61	Policy violations	Audit policy and procedures to make sure practice consistent with policy.
1.62	Adherence to policies and procedures for cases involving patient harm and reporting to regulatory agency	Review policies and procedures and cases involving patient harm and validate proper reporting to regulatory agency

Element 2: Compliance Program Administration

- A. Maintain a compliance budget (e.g., contribute to planning, preparing, and monitoring financial resources).
- B. Report compliance program activity to the governance board/committee.
- C. Coordinate operational aspects of a compliance program with the oversight committee.
- D. Collaborate with others to institute best compliance program.
- E. Coordinate organizational efforts to maintain a compliance program.
- F. Define scope of compliance program consistent with current industry standards.
- G. Assure that the compliance oversight committee's goals and functions are outlined.
- H. Evaluate the effectiveness of the compliance program on a periodic basis.
- I. Maintain knowledge of current regulatory changes and interpretation of laws.
- J. Assure the credibility and integrity of the compliance program.
- K. Recognize the need for outside expertise.
- L. Oversee a compliance education program.
- M. Verify the organization has defined the authority of the compliance officer at a high level.
- N. Verify the governing board understands its responsibility as it relates to the compliance program and culture.
- O. Assure that the role of counsel in the compliance process has been defined.
- P. Define the responsibilities, purpose, and function for all compliance staff.
- Q. Assure staffing for the compliance program.
- R. Verify compliance risk assessments are conducted periodically.
- S. Participate in the development of internal controls and systems to mitigate risk.
- T. Incorporate relevant aspects of regulatory agencies' focus into compliance operations.
- U. Oversee integration of the compliance program into operations.
- V. Develop an annual compliance work plan.
- W. Demonstrate independence and objectivity in all aspects of compliance program.
- X. Maintain an independent reporting structure to the governing body (e.g., Board, Physician Practice Executive Committee).

Source: *CHC Candidate Handbook: Detailed Content Outline*

Element 2: Compliance Program Administration

	What to Measure	How to Measure
	Board of Directors:	
2.1	Active Board of Directors	<ul style="list-style-type: none"> Review minutes of meetings where Compliance Officer reports in-person to the Audit and Compliance Committee of the Board of Directors on a quarterly basis Conduct inventory of reports given to board and applicable committees.
2.2	Board understanding and oversight of their responsibilities	<ul style="list-style-type: none"> Review of training and responsibilities as reflected in meeting minutes and other documents (training materials, newsletters, etc.). Do minutes reflect board's understanding? Review/audit board education – how often is it conducted? Conduct interviews to assess board understanding.
2.3	Appropriate escalation to oversight body	<ul style="list-style-type: none"> Review minutes/checklist in compliance officer files
2.4	Commitment from top	<ul style="list-style-type: none"> Review compliance program resources (budget, staff). Review documentation to ensure staff, board and management are actively involved in the program. Conduct interviews of board, management and staff.
2.5	Process for escalation and accountability	Process review (document review, interviews, etc.). Is there timely reporting and resolution of matters?
	Compliance Budget:	
2.6	Appropriate oversight of budget	Review charter of governing body (Board) to verify it includes approval of compliance budget
2.7	Budget is based on an assessment of risk and program improvement/effectiveness	Is the Board's approval of the budget based on identified risks and effectiveness evaluation/program improvement?
2.8	Sufficient compliance program resources (budget, staffing)	Review budget and staffing to ensure significant risks are managed appropriately
	Compliance Committees:	

2.9	Active involvement of compliance committee members	Track percentage of attendance of each compliance committee member over the last year
2.10	Assure that the compliance oversight committee goals and functions are outlined	Review charter of committee
2.11	Committee structure	Review documentation of structure of committees as well as charters. Ensure no conflicting charters.
2.12	Compliance committee composition and attendance	Review charter and minutes to assure attendance.
2.13	Cascade administration of compliance program throughout the organization	Different operational areas give some certification/disclosure to the compliance office
2.14	Composition of Compliance Committee	Review organizational chart to validate correct composition
2.15	Effectiveness of compliance committee meetings	Keep executive report card by member qualitative/quantitative with indicators of contribution on topics
2.16	Engagement	In the last two years, have the compliance committee meetings been held in accordance with the charter?
2.17	Engagement of Directors/Managers	Review committee structure to evaluate how directors/managers are participating in Compliance Operational Committee(s) meeting includes agenda, minutes, attendance and reports from subcommittees
2.18	Executive Leadership engaged in Compliance Program	Review frequency of meetings, membership, attendance, agenda and minutes over the past year of the Compliance Executive Committee to include all members of the Senior Executive team receiving information directly from the Compliance Officer
	Accountability:	
2.19	Leadership accountability	Audit documentation and conduct interviews. Some examples might include: <ul style="list-style-type: none"> • Employee education completion rates • Demonstration of promotion of compliance (e.g., town hall meeting presentations, newsletters, etc.) • Completion of audit or review action items within established time frame
2.20	Management accountability for compliance	Process and document review and interviews. <ul style="list-style-type: none"> • Is there a mapping of operational or management responsible for championing compliance?

		<ul style="list-style-type: none"> • Is there a mapping of management responsible for key areas of compliance to ensure accountability? • Does top management support the compliance team?
	Compliance Officer:	
2.21	Competency	<ul style="list-style-type: none"> • Certification (CHC, CHPC, CHRC) • Annual evaluation, coaching, corrective action, professional development
2.22	Is the compliance officer a key stakeholder in the strategic initiatives of the organization	<ul style="list-style-type: none"> • Review participation of compliance officer in strategic planning process and due diligence processes.
2.23	Compliance department involvement in enterprise-wide initiatives/entities/strategies (e.g., involvement or penetration in joint venture initiatives and other organizational inventory)	<ul style="list-style-type: none"> • Process review, including review of organizational chart to ensure compliance captures enterprise-wide entities. • Interviews with compliance and other committees.
2.24	Compliance independence/compliance structure	<ul style="list-style-type: none"> • Does the reporting structure reflects the "express" authority required? • Audit program charters (compliance program or Audit committee)
2.25	Compliance integration	Audit to determine the extent to which compliance officer is involved in training, policy development, marketing and other operational aspects of the business
2.26	Compliance Officer reporting structure and oversight to ensure direct access to C suite and board	<ul style="list-style-type: none"> • Document review - Look at organizational chart and conduct interviews. • Review board minutes and documentation that there are regular meetings with CEO and or appropriate parties. • Ensure compliance officer has authority and is comfortable to go to board.
2.27	Compliance officer's independence/objectivity	<ul style="list-style-type: none"> • Review compliance officer's job description. Does s/he report directly to CEO, board (not CFO or Legal)? Conduct interviews, focused groups, audit. • Seating location of compliance with the business, senior teams are together, and dotted line on org chart • Interview compliance officer to see if they feel they have independence, do they document disagreements, is there executive session for audit committee. • Interview the board, review minutes, and interview the CCO • Review of written organizational structure • Verify the Compliance Officer has the independent authority to retain outside legal counsel • Review if there is screening of compliance officer material to the Board of Directors

		<ul style="list-style-type: none"> Regular executive session of the Compliance Officer with the Audit and Compliance Committee of the Board
2.28	Credibility of compliance officer	Job Description review, ongoing training of compliance officer, basic competencies, certifications, reporting structure
2.29	How much authority does the compliance officer have to start a working group to look at changes?	<ul style="list-style-type: none"> Have needed changes been made, and if not, why not? What authority does the compliance officer have and how does he or she exercise it? Where is the compliance team with regards to identifying working groups to help attack a new compliance risk?
2.30	How supported the compliance officer feels	<ul style="list-style-type: none"> Interview compliance officer; Documentation review.
2.31	Organizational perception of compliance officer and corporate compliance program	<p>Survey employees regarding:</p> <ul style="list-style-type: none"> Their perception of the compliance officer role. Whether they know who the compliance team is, how to get to them and, what to tell them. Is the compliance staff approachable? Are the compliance staff solution facilitators or looked at as the organizational police force?
2.32	Compliance problem solving and adequacy of process	Process review
	Staffing:	
2.33	Adequacy of staffing and resources	<ul style="list-style-type: none"> FTEs assigned to compliance function Review compliance matters and if they have been addressed timely. Review and ensure policies and procedures are implemented and being followed. Review documentation of reports to committee(s) and board. Assess status of work plan and any delays. Ensure documentation of risk assessment. Review documentation regarding discussions at board level regarding budget. Review benchmarking data from similar entities.
2.34	Assurance of staffing	Review qualifications of staff; ratio of compliance staff to business, compensation to the business
2.35	Adequacy of compliance staff based on risk assessment	Risk assessment considers the number and competency of staff required to address risk

Compliance Plan:		
2.36	Compliance plan assessments	<ul style="list-style-type: none"> • Document review, including compliance plan and policies. • Is there an external review conducted periodically? • What is the role of internal audit with regarding to compliance? • How does internal audit interact with compliance? • Benchmark program with similar sizes within the same industry
2.37	Compliance plan process	Audit process for development of the annual compliance plan.
2.38	Compliance organization	Assess the positioning and effectiveness of the compliance organization staff, titles, organizational chart, pay, promotion records compared to other areas within the organization
2.39	Document that establishes the authority of the program	Document review, meeting minutes for approval.
2.40	Perception of compliance program	Survey employees
Culture:		
2.41	Accountability	SURVEY - Does the compliance department have an impact on how you do your job? (Yes/No/Don't know)
2.42	Accuracy and Trust in Monitoring	SURVEY: Do you believe the information from your department is reported with a high degree of integrity and accuracy? (Yes/ No/Don't know)
2.43	Culture	Conduct cultural survey (interviews, confidential surveys, focus groups, etc.) and report findings to compliance committee and board. Review minutes to ensure report out and action plan established.
2.44	Effectiveness of compliance program in the field	Survey of field compliance people
2.45	What is company doing to drive compliance culture?	Surveys. <ul style="list-style-type: none"> • What does company incentivize? • What does the company promote and look down on? • Is compliance program tied to mission, vision, values?
2.46	Employee comments from "Rounding"	Audit the tracking of what employees report when proactively asked by compliance department (or leadership, etc.) and how this information is managed and reported.

2.47	Measuring effectiveness of executive communication on compliance	Track on-line engagement (clicks) and survey audience
Incentives:		
2.48	Aligning performance management system (promotion system) with ethics and compliance objectives	Audit criteria of promotion, bonuses and assignments
2.49	Compliance and Ethics Role/participation for developing the incentive system	Have an outside independent expert audit the incentive system and compliance officer's participation
2.50	Is incentive system consistent with compliance program	Employee Survey
Performance Evaluations:		
2.51	Proper alignment of compliance objectives with organizational performance incentives (promotions/performance appraisals/bonuses)	<ul style="list-style-type: none"> • Audit disciplinary records and performance evaluations for consistency with compliance • Audit/Review of process for performance incentives (promotions/performance appraisals/bonuses) criteria to include compliance components
2.52	"Compliance" as a performance appraisal element	<ul style="list-style-type: none"> • Audit performance appraisals. Some options include: <ul style="list-style-type: none"> ○ Acknowledgment of no disciplinary action ○ Education completion ○ Documentation of promotion of compliance • Are merit increases tied to performance? • Does completion of compliance education, promotion of compliance through words, actions or no documented disciplinary action and/or, completion of corrective action plans within the due dates play a role into the calculation of merit increase? • Compliance is part of the annual performance evaluation and HR knows how to evaluate issues for compliance
2.53	Manager performance evaluations	Managers have open door policy, communicate compliance directives/initiatives, address compliance matters and effectiveness is noted in performance evaluation.
2.54	Is compliance taken into account in promotion decisions?	Review promotion lists and documentation to support promotion. Did the individual actively promote compliance?
2.55	Organizational Retaliation	Track whistleblower promotion, bonuses, sick days, disciplinary, corrective action measures and exit interview over long term

	Risk Assessments:	
2.56	Compliance Resource knowledge and competence	Survey, focus groups and interviews
2.57	Compliance staff knowledge of current regulatory changes and laws	Document review and interviews. Review certificates of attendance at conferences/other educational events, “tools” used to keep compliance staff current, compliance budget (to support access to current regulatory changes and laws).
2.58	Monitoring of regulations that impact the organization	Document and process review, interviews. <ul style="list-style-type: none"> • Is there a policy and procedure? • Is there evidence that regulations, etc. are disseminated and implemented? • Are there designated individual(s) that monitor laws, regulations, policies that impact organization? • How do they get the information and what do they do with it to make sure it gets to the right people?
2.59	Risk Assessment Cycle	<ul style="list-style-type: none"> • Audit adherence to risk assessment cycle • Annual documented risk assessment has been communicated to oversight committee
2.60	Risk based work plan that covers compliance plan elements with board approval and regular reporting on those projects to board	Compliance Committee and board minutes review.
2.61	Work plan development based on risk assessment	Process and document review.
2.62	Prioritization of risk and consultation with applicable risk partners (i.e., legal, HR, IT, risk management, etc.)	Documentation and process review. Is there a risk based plan? How was it developed?
2.63	Exit interview	Compliance concerns that come up in exit interviews are addressed
	Compliance Work Plan:	
2.64	Compliance work plan	Audit to ensure the work plan is developed and implemented and it is followed-through and outcomes are reported to compliance committee or to governing body

2.65	Effectiveness of compliance program	Written annual work plan that includes minutes
	Legal Counsel's Role:	
2.66	Role of counsel in compliance process	Interview counsel regarding their involvement. <ul style="list-style-type: none"> • When they are brought into matters? • Where is counsel situated in relation to compliance officer on organizational chart?
2.67	Existence and adherence to policy on involvement of legal in handling matters under privilege	Review policy and sample areas that were referred to legal followed the policy
	Other:	
2.68	Job descriptions of management	Review of management job descriptions. Do managers have concrete compliance deliverables other than training and abiding by Code of Conduct?

Element 3: Screening and Evaluation of Employees, Physicians, Vendors and other Agents

- A. Assure organization has processes in place to identify and disclose conflicts of interest.
- B. Assure inclusion of compliance obligations in all job descriptions.
- C. Assure inclusion of compliance accountabilities as an element of performance evaluation.
- D. Verify background/sanction checks are conducted in accordance with applicable rules and laws (e.g., employment, promotions, credentialing).
- E. Assure compliance-sensitive exit interviews occur.
- F. Monitor government sanction lists for excluded individuals/entities (e.g., OIG, GSA, SDN, SDGT).
- G. Verify due diligence is conducted on third parties (e.g., consultants, vendors, acquisitions).
- H. Assure corrective action is taken based on background/sanction check findings.

Source: CHC Candidate Handbook: Detailed Content Outline

Element 3: Screening and Evaluation of Employees, Physicians, Vendors and other Agents

	What to Measure	How to Measure
	Accountability for screening:	
3.1	The individual(s) responsible for exclusion screening has clear accountability for the screening function.	<ul style="list-style-type: none"> Audit the job description, training material, orientation material, and annual performance evaluation of the individual(s) responsible for exclusion screening to ensure this responsibility is clearly articulated and performance is measured. Annually review/discuss the exclusion screening process individually with each person responsible for sanction check screening; review the document retention processes to ensure documentation of the screening function, response to findings, and corrective actions are adequately maintained.
	Conflict of Interest:	
3.2	Potential conflicts of interest are disclosed.	Audit the conflict of interest disclosures for completeness and the extent to which those who complete the disclosure information.
3.3	The organization conducts effective education on Conflict of Interest (COI)	<ul style="list-style-type: none"> Review training materials and interview staff to determine the effectiveness of the education. Audit completed attestations or disclosures to ensure individuals are disclosing conflicts according to education provided.
	Employee accountability:	
3.4	The extent to which employees are made aware of compliance expectations.	Conduct focused interviews with employees and audit the performance review process to ensure compliance expectations are well understood and employees are held accountable for these expectations.
3.5	Accountability for compliance is clearly articulated in employee performance evaluations.	Audit performance evaluations to ensure compliance obligations are clearly articulated and performance against these requirements is measured.
3.6	Accountability for compliance is clearly articulated in employee job descriptions.	Audit job descriptions to ensure compliance obligations are clearly articulated.

3.7	Employees are provided education regarding their compliance obligations and they understand these requirements.	<ul style="list-style-type: none"> • Audit employee education files to ensure education is being provided according to the organizations training plans and/or policies and procedures. • Review post-tests to confirm understanding. • Interview employees to confirm their understanding of their compliance obligations and responsibilities.
Employee disclosure:		
3.8	The organization has established a policy that requires prospective and current employees, and prospective and current vendors to disclose to the organization if they are or may be excluded.	<ul style="list-style-type: none"> • Audit and conduct a document review to ensure disclosure requirements are clearly articulated in the policy and disclosures are being made as required. • Conduct a policy review to ensure that that immediate reporting is a requirement for employees and a provision in vendor agreements.
Employee screening:		
3.9	All employees are screened prior to hire.	Audit human resource files to ensure documentation supports that newly hired employees were screened prior to their first day worked.
3.10	Screening considers other names/alias and States used by a prospective employee.	Review applications for each type of screening (criminal, OIG, SAM, State, SSN, etc.) and audit to determine if screening was completed against other names/states used by the prospective employee.
3.11	The organization has defined which employees, vendors, medical staff, and others will undergo criminal, financial and/or other background checks prior to hire.	<ul style="list-style-type: none"> • Perform assessment/audit to ensure the organization had identified which individuals receive criminal, financial, Social Security trace, drug screening, or other background checks. • Audit to ensure such background checks are being performed and reviewed prior to employment.
3.12	The organization has defined criteria for review of criminal, financial, and/or other background checks and hiring decision are made based on this established criteria.	Perform assessment/audit to ensure the organization has established criteria to evaluate the acceptability of a candidate based on findings of criminal, financial, or other background check(s) used by the organization.
3.13	Employees are provided education regarding the organization's screening process.	Interview employees and conduct documentation reviews to confirm that employees understand the importance of not letting licenses expire and the effect of exclusion.

3.14	The organization ensures that applicants for employment understand disclosure requirements.	Review employment applications to ensure disclosure is made to prospective employees, including exclusion and background screening requirements, and these screenings are completed.
3.15	The organization has established a policy regarding the frequency of screening.	<ul style="list-style-type: none"> • Perform a document review to ensure the frequency of screening is being done in accordance with policy. • Audit the screening process to ensure screening is being completed according to policy.
3.16	The organization has established sufficient controls in the hiring process and vendor engagement process to prevent the organization from hiring an ineligible individual or entity.	<ul style="list-style-type: none"> • Audit, perform document review, interviews staff and vendors, and conduct datamining to determine if sufficient controls are in place to prevent the organization from hiring an “ineligible” individual or entity. • Use data-mining to compare lists of new employees with due diligence lists. • Ensure the vendor master file is updated with vendors that have been screened.
3.17	The organization has established a screening program that is consistent with all laws and regulations.	Conduct a legal review and analysis of screening process to ensure it is being administered in a manner consistent with federal and state laws.
3.18	The organization has established a process to screen employees and other relevant individuals at least monthly.	Audit screening process to ensure screening of employees and other relevant individuals is being conducted at least monthly and according to policy.
3.19	The organization has established a policy and procedure which defines the screening requirements for employees, vendors, medical staff and others. The policies include description of the databases that individuals will be screened against and the frequency of screening.	<ul style="list-style-type: none"> • Conduct a document review to verify the policy and procedure has been established, is complete, and audit to ensure screening is being conducted consistent with policy. • Perform assessment/audit to ensure organization has identified which lists to check and how often each is checked and the screenings are being checked per policy. • Perform assessment/audit to ensure all relevant types of individuals and entities (employees, temps, vendors, etc.) are being screened per policy.
3.20	The organization has a process to determine when additional screening may be necessary based on findings from compliance investigations. (Relevant event (situational) screening (R.E.S.))	Conduct a review of compliance investigation files to determine if consideration for additional screening is warranted and review the results of additional screening completed as part of the investigation process (situational) when applicable

3.21	The organization has a policy and procedure which articulates the process for screening, investigation of potential “hits,” actions taken in response to a positive finding, tracking exclusions, and communication to appropriate stakeholders.	Conduct documentation review and audit to ensure screening is being completed according to policy requirements and that all process elements related to investigation, resolution, tracking, and communication are being managed according to policy requirements.
	Exit Interviews:	
3.22	Employee awareness of organization’s compliance program.	Review organization’s employee termination process such as exit interviews, surveys, and/or questionnaires to test for employee awareness of the organization’s compliance program.
3.23	Employee exit interviews are conducted and employees are asked about the compliance program and any concerns, risks, violations or failures of the compliance program.	<ul style="list-style-type: none"> Review organization’s employee termination process such as exit interviews, surveys, and/or questionnaires to ensure compliance program questions are incorporated into exit interviews and the exit interviews are reviewed and evaluated. Audit to ensure all terminated/separating employees have completed an exit interview and that compliance questions are included and evaluated.
3.24	Vendors and other 3 rd parties are interviewed at the termination of the engagement and asked about their awareness of the compliance program and any concerns, risks, violations, or failures of the compliance program.	Review organization’s vendor termination/off-boarding process such as interviews, surveys, and/or questionnaires to ensure compliance program questions are incorporated into the process and interviews/results are reviewed and evaluated.
3.25	The organization has established a policy and procedure for conducting exit interviews for employees leaving the organization. The exit interview process includes questions related to compliance obligations and any known violations of law, policies, or procedures.	Review policy and procedure to ensure the organization has an established process. Audit exit interview files to ensure interviews are being conducted according to policy. Review to ensure that any identified violations of law, policy or procedure are thoroughly investigated.
	High Risk Screening:	
3.26	The organization has established a policy identifying high risk positions in the organization that may require additional screening.	Conduct policy review to ensure high risk positions (e.g., clinicians working with children or mental health, cash handlers) are identified in policy, and the policy includes a description of any

		additional screening requirements (fingerprinting, financial background checks, etc.). Review employment and vendor files to ensure the additional screening is occurring according to policy.
	Licensure:	
3.27	The organization has a process to ensure that individuals who transfer positions within the organization are appropriately licensed and credentialed for the job they will be performing.	Audit and conduct a document review, audit to ensure a process for examination of licenses and credentials is established for employees transferring positions within the organization. Audit to confirm process is being followed and individuals transferred have appropriate license and credentials for the position they are assuming.
3.28	The organization has established a policy and procedure for licensure and certification reviews, including review upon hire, upon transfer, and during renewal periods.	Perform document review and audit to ensure a policy for verification and review of license and certification, including source verification, exists and licenses and certifications are consistently reviewed according to policy.
	Response to Exclusion:	
3.29	Appropriate action is taken in response to potential and identified exclusion	Audit to ensure refunds are initiated if required and employment, contract, or medical staff action is taken upon discovery (including vendors).
	Response to Screening:	
3.30	The organization takes action on the results of screening.	Perform a document review to ensure screening results are being evaluated and appropriate action is taken where necessary.
3.31	The organization has established a process for investigation and resolution of positive "hits."	Audit process to ensure "hits" are investigated and that false positives are resolved when there is confirmation that the individual does not match the excluded individual.
3.32	The organization has a policy and procedure in place that articulates how potential sanctions will be evaluated and resolved.	Conduct document and process review and audit recent identified sanctions to ensure the evaluation and resolution is consistent with policy.
	Vendor:	
3.33	Vendors and other 3rd parties adequately satisfy compliance obligations	Conduct audit of vendors and other 3rd parties to ensure they have documented evidence of required compliance training, orientation to the organizations Standards of Conduct, orientation to applicable compliance policies and procedures.

3.34	The organization has established a process to ensure vendor and other third party agreements are managed consistent with the terms of the agreement.	Conduct a document review and interviews to ensure there is communication between lawyers who develop the agreements and facility level personnel managing the engagement to make sure it is implemented and being managed according to the terms of the agreement.
3.35	The organization requires vendors and other third parties to certify screening has been completed as required by the agreement.	Audit to determine that vendors respond to request for certification. Review process to determine that actions taken for failure to respond or provide required certifications are consistent with the agreement. Ensure that response to certification is reviewed by an appropriate individual and communicated to facility operations. Audit to ensure that renewal decisions consider compliance with certification requirements.
3.36	The organization has established a policy outlining the compliance obligations of vendors and other third parties (including adherence to the Standards of Conduct). Vendor agreements include the right to audit the vendor to ensure compliance with their obligations.	Conduct document review and perform audits to ensure vendors meet the compliance obligations required.
3.37	The organization has established a policy prohibiting vendors that are excluded from working in the organization.	Audit exclusions to ensure policy is being adhered to.
Vendor Screening:		
3.38	Vendors and other 3 rd parties are adequately screened for exclusion.	<ul style="list-style-type: none"> • Audit vendor records and cross check to ensure the vendor is adequately screened, in accordance with agreement and/or entity requirements. • Develop checklist of criteria for vendor compliance review and audit against that list for vendor screening requirements. • Survey peer organizations to ensure the organization's vendor and 3rd party screening process is consistent with industry practice.
3.39	The organization has an effective process to review third party vendors.	<p>Audit and conduct a document review to ensure:</p> <ul style="list-style-type: none"> • Third party contracts allow for organization to review vendor files for compliance with screening requirements.

		<ul style="list-style-type: none"> • The organization has requested the third party’s policy and procedure related to vendor screening of employees. • The organization conducts reviews of third party contracts. • The organization has established a policy on how often screenings are required to be done by the third party. • The organization has established a policy requiring third parties to produce proof that they are checking their employees. • The organization has established a policy establishing which databases third parties are checking, especially regarding practitioners, including geographic specifics (state databases). • The organization has established a process for independent evaluation of what screening the vendor is supplying.
3.40	The organization has requirements, via policy or contractual terms, for screening of first-tier, downstream and related entities (contractors)	Audit to verify evidence that contractors are being screened pursuant to contractual requirements.

Element 4: Communication, Education, and Training on Compliance Issues

- A. Disseminate regulatory guidance material.
- B. Communicate compliance information throughout the organization.
- C. Assure compliance training occurs.
- D. Distill complex laws and regulations into a format employees can understand.
- E. Assure workforce staff are educated on compliance policies.
- F. Assure a mechanism exists to evaluate employee understanding of compliance responsibilities.
- G. Promote a culture of compliance throughout the organization.
- H. Encourage employees to seek guidance and clarification when in doubt.
- I. Participate in continuing education to maintain professional competence.
- J. Verify participation in ongoing compliance training programs is tracked.
- K. Assure general compliance training is conducted for all employees, physicians, vendors, and other agents.
- L. Assure risk-specific training is conducted for targeted employees.
- M. Provide HR and management with training to recognize compliance risk associated with employee misconduct.

Source: CHC Candidate Handbook: Detailed Content Outline

Element 4: Communication, Education, and Training on Compliance Issues

	What to Measure	How to Measure
	Training:	
4.1	The organization provides risk area specific training to employees designated to be in high risk positions.	<ul style="list-style-type: none"> • Audit to ensure the organization has designated the positions deemed to be high risk (coding, billing, physicians, etc.) and established training requirements for these high risk positions. • Compare risks posed by these positions against training materials to ensure specific risks are addressed. • Audit high risk training completion rates.
4.2	The organization has established a compliance training plan. The organization assures that training is completed according to the established plan. The training plan is periodically updated or refreshed.	<ul style="list-style-type: none"> • Conduct document review to ensure the training plan exists and includes required training, expected audience, topics covered, and method for deployment. • Audit sign-in sheets or other tracking tools to ensure individuals are attending required training. • Review to ensure training plan is periodically updated.
4.3	The organization defines the appropriate audience for each type of compliance training (general, issue specific, high risk, etc.).	<ul style="list-style-type: none"> • Audit job codes to ensure the correct training has been assigned. • Review job codes to ensure training, including job specific job training is being conducted according to the established training plan.
4.4	The organization offers CEU's, when appropriate, for its compliance education and training.	<ul style="list-style-type: none"> • Perform a documentation review to determine the extent to which the organization offers CEUs for compliance training. • Evaluate the effect of offering CEUs on training completion rates.
4.5	The organization has established a process, policy and/or procedure to communicate and provide training to employees on new laws, regulations, policies, and procedures.	Conduct a document review to ensure a process for communicating and training employees on new laws, regulations, policies, and procedures has been established and such communication and training is being conducted consistent with the established process.
4.6	The organization has established a policy requiring compliance training and education. The organization	<ul style="list-style-type: none"> • Conduct a document review to ensure a policy has been established and it is periodically updated.

	regularly updates the education policy and monitors compliance with training requirements.	<ul style="list-style-type: none"> • Confirm by audit that employees are completing educational requirements according to the policy.
4.7	Compliance education/information is included in all education deployed throughout organization.	Conduct a documentation review to verify that at least one compliance related topic/slide is included in every educational presentation, program, or module deployed throughout the organization.
4.8	The organization bases training for individuals who are designated to be in high-risk positions on a formal process for assessing risk and evaluating control vulnerabilities. The organization develops issue-specific training based on the results of the risk assessment and identified internal control weaknesses.	<ul style="list-style-type: none"> • Conduct a review of the process the organization has for assessing risk and evaluating control weaknesses. • Review the training plan and training materials to ensure the training addresses those issues that are of significant risk and that the organization may be vulnerable to.
4.9	The organization has created their compliance training program around job families to address specific risks identified within a job family.	<ul style="list-style-type: none"> • Audit the compliance training program to determine if training is tailored to the risks identified and associated with specific job families. • Audit to ensure training is assigned based on job families.
4.10	The organization evaluates policy and compliance failures and provides re-education to applicable staff.	<ul style="list-style-type: none"> • Audit files of known policy or compliance failures to ensure re-training is considered as part of corrective action. • Audit to ensure the re-training is completed. • Track for reoccurrences to determine the effectiveness of the re-training and employee understanding.
4.11	The organization tracks disclosure reports (hotline calls, direct contacts to the compliance department) following employee education to determine the extent to which the education was effective at raising employee awareness of specific areas of vulnerability.	<ul style="list-style-type: none"> • Monitor, audit and review disclosure tracking logs to evaluate the effect of education on disclosures. • Track how employees become aware of issues to analyze the effect training has on employee awareness and reporting.
4.12	The organization maintains documentation of all education provided.	<ul style="list-style-type: none"> • Conduct document review and audit to ensure all compliance related education is documented, including material covered, attendees, and deployment method. • Audit to ensure documentation of post-training tests is maintained to evaluate employee level of understanding.

4.13	The organizations training plan is regularly updated to address new laws and regulations.	Obtain from counsel list of new laws and regulations and audit against training plan to ensure new laws are adequately addressed.
4.14	The organization has considered the most effective method for compliance education deployment.	<ul style="list-style-type: none"> Review the training plan to ensure the organization has considered the most effective method of disseminating training to employees, medical staff, contractors, leadership, Board, and others (on-line, written, in-person, small or large group, etc.). Audit training records to determine if training has been deployed according to plan.
4.15	The organization has established a formal method for orienting new employees to the compliance program and their obligations and responsibilities.	<ul style="list-style-type: none"> Audit to ensure employees have received their compliance orientation consistent with the orientation policy. Review names, dates and materials used to orient new employees to the compliance program over the past 2 years
4.16	The organization has considered the accessibility of compliance education to individuals with disabilities or language barriers and provides education in various formats to accommodate individuals with disabilities or language barriers.	Survey employees with communication issues or disabilities to ensure the education was accessible and understandable.
4.17	Employees of the organization perceive compliance education as useful and sufficient to address the compliance requirements in their job.	Survey employees to understand their perception of compliance training usefulness and sufficiency.
4.18	The organization has established a method(s) to evaluate the effectiveness of compliance education.	<ul style="list-style-type: none"> Conduct document review to determine if the organization has established a method for evaluating the effectiveness of compliance training. Audit incident logs and hotline reports to evaluate the effect training has had on behavior.
4.19	The organization measures the effectiveness of training though the use of post-training tests or evaluations.	<ul style="list-style-type: none"> Conduct document review to evaluate the existence of post-training tests or evaluations. Review to confirm the results of post-training tests or evaluations are evaluated and tracked. Review to confirm modifications to training materials considers feedback from post-training tests or evaluations.
4.20	The organization integrates specific risks identified through the risk assessment process into compliance training.	Compare risk assessment to training plan to ensure the high risk issues identified are included in the training plan.

4.21	The organization solicits feedback from employees on compliance training needs. Employee recommendations are included in training modules disseminated.	<ul style="list-style-type: none"> • Conduct document review to ensure employees surveyed for their training/education needs and what feel they need training on. • Interview staff to assess effectiveness of training plan • Confirm that training considers employee feedback.
4.22	The organization has established a policy regarding the frequency of required compliance training.	Audit training logs to ensure compliance related training is disseminated and completed as required by policy.
4.23	The organization updates compliance training based on new policies, procedures, processes, laws, and regulations.	<ul style="list-style-type: none"> • Review education update process. • Verify issues identified through the risk assessment, issue tracking system, and other internal and external tracking systems are considered and evaluated as training programs are updated.
4.24	The organization evaluates training effectiveness.	Conduct knowledge survey 6 months after training is deployed.
	Accountability:	
4.25	The organization has established an incentive program that ties, in part, meeting compliance objectives to incentive payments and other perks.	Review performance evaluations to ensure they include compliance elements as part of performance, merit, and incentive review.
4.26	The organization has established mechanisms to ensure that employees are held accountable for their compliance obligations.	<ul style="list-style-type: none"> • Review job descriptions and performance evaluations for specific compliance metrics. • Review Standards of Conduct and other awareness information to ensure compliance obligations are clearly articulated, including the requirement to report compliance concerns.
4.27	The organization has a mechanism in place to evaluate the extent to which employees understand their compliance responsibilities.	Survey employees to test their understanding of their compliance obligations and responsibilities.
4.28	The organization holds management employees accountable for ensuring their employees understand the Standards of Conduct and compliance related responsibilities	Review department meeting minutes and conduct random staff interviews to determine if first-line managers discuss compliance obligations with their direct reports and that staff understand specific compliance requirements associated with their job.

4.29	The organization has established a policy regarding sanctions for those employees who don't complete required compliance training and sanctions employees according to the established guidelines.	<ul style="list-style-type: none"> • Document review and audit to ensure a policy exists related to sanctions for failure to complete compliance training. • Audit to ensure policy is being followed as described.
Awareness:		
4.30	Employees are aware of and understand the organization's compliance program and understand their responsibilities under the program.	Survey employees.
4.31	The organization promotes compliance through activities such as Compliance Awareness Week, Compliance Fairs, or other employee involvement activities.	Review if and how the organization engages in activities designed to promote compliance awareness.
Board:		
4.32	The organization has established specific compliance competencies for members of the Board Composition and appropriate governing committees.	Perform a document review to ensure sufficient compliance competencies exist within the Board and appropriate governing committee membership.
4.33	The organization has established a formal program to orient new Board members and senior leaders to the compliance program and their obligations and responsibilities.	<ul style="list-style-type: none"> • Conduct document review to determine if the organization has formalized a compliance orientation program for new executives and new Board members. • Conduct an audit to ensure orientation is provided as required by the orientation policy. • Review names, dates and materials used to orient new members of the Board of Directors and senior leaders to the compliance program over the past 2 years.
4.34	The organization's training plan provides for specific education that will be provided to the Board and senior executives. The plan includes the topics that will be covered, the frequency of training, includes current industry developments and resources, and provides education on their responsibilities for compliance.	Review training materials provided to the Board and senior executives and conduct personal interviews to ensure training is provided pursuant to the plan and the level of understanding of the material presented.

4.35	The organization provides senior leadership and board member compliance education and they adjust strategy and operations in response to the training and other information provided to them.	<ul style="list-style-type: none"> • Conduct a document review to determine the responses/questions posed by senior leaders and Board members after training. • Evaluate effect of training on the organization's operations and strategy. • Track questions posed by senior leaders and Board members to determine level of understanding of material presented.
	Communication:	
4.36	The organization's performance appraisals and job descriptions include the requirement for employees to promote compliance. Employees at all levels of the organization can and do articulate the compliance/ethics message. There is a requirement that managers insert compliance messages into meetings and other communications with staff.	Perform a document review, conduct employee personal file audits, and interview or survey employees to ensure the organization's compliance program, including expectations and responsibilities are formally and informally communicated to the employee population.
4.37	A compliance program communication plan is developed and implemented.	<ul style="list-style-type: none"> • Review the organization's communication plan to ensure the plan addresses key messaging for employees. • Conduct focus group discussions and survey employees on the effectiveness of this messaging.
4.38	The compliance department/staff regularly present compliance program information and updates at staff meetings, other department meetings, board meetings, town halls, and other forums.	<ul style="list-style-type: none"> • Conduct a document review to ensure the compliance department/staff regularly provide updates to the organization and is a visible presence at various meetings. • Confirm the organization documents and tracks all such presentations.
4.39	The organization requires compliance representatives to be present at every senior management and governance-level meeting.	<ul style="list-style-type: none"> • Conduct a documentation review to verify there is an expectation for compliance to be represented at all senior management and governance-level meeting. • Confirm by audit that a compliance representative has attended all such meetings.
4.40	The organization provides compliance information, training, and updates in a manner that is understandable for employees (reading level, languages, case studies, verbal communication)	<ul style="list-style-type: none"> • Survey employees to determine the effectiveness and level of understanding by employees to the material presented. • Conduct post-training evaluations. • Review and track questions and disclosures made following the dissemination of information and education.

4.41	The organization ensures there is adequate two-way communication between the compliance department staff and employees such as periodic check-ins with employees and follow-up with employees who report concerns.	<p>Survey employees to determine:</p> <ul style="list-style-type: none"> • their perception of how accessible the compliance staff is, • if they know to report concerns, and • if they believe their concerns are taken seriously and are adequately addressed.
	Competency:	
4.42	The organization has defined the competencies required for the compliance staff including requirements for certification or other specific skills/expertise.	Review job descriptions and personnel files for all compliance staff to ensure specific compliance competencies and certification requirements are designated and the staff possess the required competencies/certifications.
4.43	The organization requires all compliance staff to maintain their competency by attending appropriate educational sessions.	<ul style="list-style-type: none"> • Conduct a documentation review to verify that requirements for compliance staff education, including professional development, are established. • Audit to verify that compliance staff attend education as required. • Review compliance department budget to ensure sufficient resources are devoted to providing appropriate education (including conferences) to the compliance staff.
4.44	The organization provides focused education to compliance staff members to ensure they are competent in evaluating and investigating issues.	<ul style="list-style-type: none"> • Conduct document review to evaluate the education provided to compliance staff. • Review to ensure compliance staff being trained on conducting internal investigations, audits, performing risk assessments, vulnerability analysis, etc.
4.45	Development plan for compliance staff	Review documentation of development plan and monitor to ensure that plan requirements are completed annually or as otherwise specified in the plan
	Culture:	
4.46	The organization has established a culture of compliance.	<ul style="list-style-type: none"> • Survey all employees to determine the extent to which employees believe there is a culture of compliance in the organization and employee understanding of the compliance culture. • Review the organization’s compliance training material to determine if scenario based training and/or other interactive training methods are used to promote understanding.
	Incentives:	

4.47	The organization has established methods for rewarding and recognizing employees for compliance activities.	Review incentive, rewards, and recognitions programs to ensure successful achievement of compliance metrics are considered when recognizing and rewarding employees and leadership.
Vendors and Volunteers:		
4.48	The organization has established the training requirements for vendors.	<ul style="list-style-type: none"> • Conduct document review to ensure the organization has established training requirements for vendors. • Review files to ensure vendors have completed training as required. • Conduct site visits to review vendor employee completion of required education.
4.49	The organization has established the compliance training requirements for volunteers.	<ul style="list-style-type: none"> • Conduct document review to ensure the organization has established training requirements for volunteers. • Review files to ensure volunteers have completed training as required.

Element 5: Monitoring, Auditing, and Internal Reporting Systems

- A. Protect anonymity and confidentiality within legal and practical limits.
- B. Publicize the reporting system to all workforce members, vendors, and agents.
- C. Assure monitoring occurs for violations of laws and regulations.
- D. Conduct organizational risk assessments.
- E. Develop work plan based on risk assessment.
- F. Maintain reporting system(s) to enable employees to report any noncompliance (e.g., hotline).
- G. Respond to compliance concerns expressed by employees through internal reporting.
- H. Assure the existence of procedures for monitoring adherence to compliance policies and procedures.
- I. Conduct compliance audits.
- J. Analyze compliance audit results (e.g., track, trend, benchmark).
- K. Develop an annual compliance audit plan.
- L. Evaluate results of audits conducted by external entities.
- M. Monitor that retaliation for reporting compliance concerns has not occurred.
- N. Recognize need for attorney consultation in the auditing/monitoring process.
- O. Employ auditing methodologies that are objective and independent.
- P. Determine sampling methodology consistent with circumstances.
- Q. Assure a timely response is made to reported compliance concerns.

- R. Monitor management’s implementation of corrective action plans.
- S. Provide timely feedback to management on compliance concerns based on audit results.

Source: *CHC Candidate Handbook: Detailed Content Outline*

Element 5: Monitoring, Auditing, and Internal Reporting Systems		
	What to Measure	How to Measure
	Reporting System:	
5.1	Accessibility of reporting system	Interviews. Surveys. Ask employees and managers if the reporting system is accessible to them. Is it available in languages that are most spoken in the organization?
5.2	Adherence to 60-day overpayment rule	Review incident tracker; ensure days to open or days to close do not exceed that timeframe. Track efforts to identify; status benchmarks specific days to completion.
5.3	Trust in the system	Survey - Do you feel you can freely report ethics and compliance issues without fear of retaliation from managers? (Yes/No/Don't Know).
5.4	Reporting and Investigation Process	Review external benchmarking reports (# of calls, time it takes to close cases, anonymous, etc.).
5.5	Reporting system – compliance response to reporters	Document review. Focused groups and speaking with employees about hotline. <ul style="list-style-type: none"> • Are calls made through reporting system responsive to reporters? • Are policies followed regarding the response to reports received? • Are reports responded to on regular intervals and updated appropriately?
5.6	Reporting System: Hotline/Direct contacts	Document review, audit. <ul style="list-style-type: none"> • Are hotline calls or matters brought to the attention of the compliance department (direct contacts) categorized, trended, and reported to the compliance committee and board level committee? • Are there tracking, trending and reporting of how these matters have been resolved?
5.7	Reporting to compliance (hotline, report to the compliance officers, etc.)	Reports reflect communication methods (call, anonymous, email, direct, etc.)?

5.8	Thoroughness of investigation files	Review 5 investigation files for summary of issue, interviews conducted and summary of interviews, investigation summary and results/conclusion and corrective action (as applicable).
5.9	Time to respond to incident report	Review date reported, date responded, date investigation closed.
5.10	Promotion of reporting system	Documentation review. Interviews, visual walk-throughs. <ul style="list-style-type: none"> • Are hotline posters hanging in conspicuous areas? • Interview staff – do they know how to report? • Audit use of reporting system (how frequently is it used)? Consider internal or external reporting benchmarks.
5.11	Published reporting system	Survey. <ul style="list-style-type: none"> • Is there a hotline, compliance officer? • How to report? • How to find information?
5.12	Demonstration of a formal compliance program	Document review. Is there identification of prioritization of key compliance indicators; reporting and escalating to compliance oversight committee?
5.13	Documentation to support resolution of reported matters.	Audit. Document review.
5.14	Effectiveness of compliance department	Document review, surveys, interviews, focus groups. <ul style="list-style-type: none"> • Is there a report card on associates' comfort level? • Do they know who to go to with concerns? • Do they know whom to trust? • Is there follow-through? • What is the trust and integrity around members of compliance department?
5.15	Discipline for non-compliance	Document review, interviews. Monitor to ensure discipline policies are followed.
5.16	Effectiveness of Follow-up to Compliance Concerns	Interview/survey caller for satisfaction with follow-up of concern.
5.17	Culture Survey	Document review, assessment of responses. Do culture surveys include questions such as: <ul style="list-style-type: none"> • Do you know how to report concerns? • Are you willing to report concerns?

		<ul style="list-style-type: none"> Do you trust that concerns will be addressed fairly when reported?
5.18	Awareness and effectiveness of internal reporting system	Review system use. Look to make sure employees, vendors, contractors can report; gauge the level of retaliation; individual comfort of reporting systems; survey. Conduct interviews.
5.19	Awareness of the discipline	Survey.
5.20	Hotline reporting system/vendor	Monitor. <ul style="list-style-type: none"> Are test calls of the system conducted? Are the calls answered? If external vendor, are they following the organization's documented notification protocol?
5.21	Internal reporting from business partners, contractors, etc.	Contract review and interviews. <ul style="list-style-type: none"> Is compliance department aware of the contracts with business partners, contractors, etc.? Is there an inventory of partners? Do they know how to contact compliance department with issues?
5.22	Investigation resolution and timeliness	Documentation review. <ul style="list-style-type: none"> Are reports closed timely? Are there completion notes and dates matters and submitted to board?
5.23	Presence of Internal Reporting System	Review policies and procedures and mechanisms for internal reporting. Are matters being reported according to policy? What should be reported up in regards to compliance? Check to see if it has been reported up appropriately.
5.24	Process of how a concern is handled	Review documentation that reflects this process; audit case files to demonstrate this decision process was followed. Is it a management issue, legal issue, other? Is there a triage tree?
5.25	Subordinate conduct	Interviews. Document reviews. Does organization measure whether line managers are monitoring the conduct of their subordinates?
5.26	Written escalation process	Documentation review. Is there a written procedure to determine at what point a matter must be reported to the board, committee, or government agency?
	Risk Assessments:	
5.27	Risk Assessment	Documentation/process review. <ul style="list-style-type: none"> Is there a documented enterprise-wide risk assessment?

		<ul style="list-style-type: none"> • What is the work plan creation process? • Is internal audit included? • Is a fraud risk assessment conducted? • Is this information used as a basis for creating the auditing and monitoring plan or work plan?
5.28	Risk Assessment Process	<p>Process map of risk assessment process.</p> <ul style="list-style-type: none"> • Who participates? • How are topics prioritized? • What is the process? • How are mitigation steps determined? • Is education provided? • How are the results reported?
5.29	Risk based work/audit plan	Document review. Is the compliance work/audit plan based on a documented risk assessment and is it risk based?
5.30	Follow-up to Risk Assessment	Review process for findings of risk assessment and whether implemented; audit or monitor implementation; audit and monitor as necessary after implementation to mitigate risk (closing the loop).
5.31	Frequency of risk assessment, scope and coverage and tools used for risk assessment	Audit the risk assessment process for these areas.
5.32	Information flow from business units to compliance department for the risk assessment process	Interviews.
5.33	Internal audit department's relationship with compliance department	<p>Document review, interviews.</p> <ul style="list-style-type: none"> • Is risk assessment utilized to create annual audit plan? • Who participates in the risk assessment? • Are there routine interactions between compliance and internal audit? • How many internal audit hours are designated for compliance related work? • Or, how are audits delegated to internal audit or compliance after risk assessment is completed?
5.34	Is auditing and monitoring based on risk areas identified in risk assessment process	Review risk assessment process and what audits and monitoring are on work plans.

5.35	Monitoring effectiveness	Document review. Is the monitoring plan linked to risk assessments to make sure highest risk areas are covered?
5.36	Participation of business leadership in risk resolution	Verify that risk reporting is going to business leadership; routine inclusion of risks at compliance committee; assessment of effective follow-up when risk resolution is off-track.
Monitoring and Auditing Work Plan:		
5.37	Method to create audit plan	Document/process review. <ul style="list-style-type: none"> • What internally and externally are used to create the risk based plan? • Is a review of submitted corrective action plans included in the review and planning process?
5.38	Audit and monitoring based on risk assessment	Document review comparison of audit/monitoring plan.
5.39	Approval process of work plans	Review minutes of Board and Compliance Committee meetings.
5.40	Auditing and monitoring process	Document and process review. How is annual work plan developed? Who is responsible for it?
5.41	Are there sufficient audits conducted?	Documentation review. Look at audit plan, including “ad hoc” audits that were unplanned, but conducted in response to a matter.
5.42	Audit inventory	Document review. Is there an inventory of all audits being conducted either by internal staff or external consultants in the organization?
5.43	Compliance department role in establishing audit plan	Review of audit plan and process to ensure compliance is key stakeholder and part of the process.
5.44	Defined process to hire outside experts to conduct audit/investigation and review	Review policy and procedures and interview decision makers on the process and criteria to trigger the hiring of outside experts to conduct audit/investigation and review.
5.45	Completion rate for compliance work plan	Audit or document review. <ul style="list-style-type: none"> • Were the items on the work plan completed by the due date? • If not, do compliance committee and board level committee minutes reflect discussion about this? • If work plan was changed, is there compliance committee and board committee documentation to support this?

5.46	Periodic reviews of monitoring and auditing plan	Document review. Is monitoring and auditing plan reviewed periodically at the compliance committee and board level committee to make sure it is still fit for purpose and focused on high-risk areas for the organization?
5.47	Random auditing is conducted to identify unknown risks	Portion of the audit plan is based on random selection.
5.48	Effectiveness of gift policy and procedure	Survey on gift policy awareness and audit gift registry or system for compliance with P&P.
Audit Process:		
5.49	The need for the advice of counsel related to audits	Review of referral process to track attorney referral. Is organization tracking that attorney is consulted when audit findings note issues?
5.50	Validate the organization is conducting audits	Process review.
5.51	Audit results and actions in response to audit is reported to the governing body	Review of minutes.
5.52	Audit results are part of performance reports and/or incentives	Documentation review.
5.53	Authority to initiate audit	Document review. Interviews. Audit. <ul style="list-style-type: none"> • Is there documentation outlining who is authorized to initiate an audit, including the engagement of outside consultants? • How is this done? • How thorough is it?
5.54	Audit process	Process review. Documentation review. Are audits defined with issue, scope, objectives, and resources?
5.55	Accountability	Create audit reports for compliance audits identifying purpose, scope, sample selection (if applicable), findings, conclusion, and recommendations.
5.56	Audit benchmarks	Audit of audits for benchmarking - Are the audit findings actionable?
5.57	Compliance audit results	Process review and document review. <ul style="list-style-type: none"> • Are audit results being analyzed, tracked, trended and reported? • For example, how often are education or policies and procedure changes needed? • Is management (not compliance) responsible for corrective action plans?

		<ul style="list-style-type: none"> Is compliance monitoring corrective action plans to completion and then conducting follow-up audits to ensure the actions remain in place?
5.58	Meaningfulness of audits	Review of audit tool.
5.59	Report results	Documentation review. <ul style="list-style-type: none"> How is resolution of deficiency documented? How does the department document? How does the department track what was accomplished (metric: spreadsheet - database)?
5.60	Reporting of audit results	Process review. Documentation review. <ul style="list-style-type: none"> Are audit results are reported to operations? Compliance Committee? Governing body?
Corrective Action Plans:		
5.61	Depth and breadth of root cause analysis	Audit and interview process to determine if proper depth and breadth of root cause of concern and proper incorporation into corrective action plan.
5.62	Accountability of corrective action	Review agendas, minutes and reports to compliance committee on corrective action plans.
5.63	Action plans in response to an audit finding	Audit of audits to ensure action plans are documented.
5.64	Are identified refunds tracked, documented and returned timely?	Audit and review of documentation to ensure check went out.
5.65	Audit and investigation trending	Validation reviews of corrective action plans. Are audit and investigation findings tracked for trends? Root cause analysis? Fix for entire system?
5.66	Corrective Action Plans	Document review. Audit. <ul style="list-style-type: none"> Is there a documented follow up process to make sure management has completed items in corrective action plans? Were the corrective actions successful in correcting the deficiency? Are follow up audits conducted to ensure corrective actions do not lapse?
5.67	Reporting of untimely corrective actions	Validation audits/follow-up audits. If there are un-timely corrective actions, are they reported to the compliance committee and governing body?
5.68	Timely corrective actions (new safeguards/controls)	Audit to ensure audits have corrective action documented in a timely fashion.

	Auditors:	
5.69	Auditing the auditors	Hire third party to audit auditors or individual contributors; validate audit results.
5.70	Auditors develop audit instructions	Document review. Are there guidelines in place?
5.71	Auditors skill set and competency to audit the issue	Review audit work product, personnel files, etc.
5.72	Independence	Audit for Independence - Review to ensure no vested interest in outcomes, meet independence requirement as defined by yellow book.
5.73	Process to evaluate auditor skill set to ensure the right audit resources are selected (internal audit, outside auditor, etc.)	Review of auditor background and skill set.
5.74	Standardization of audit process - auditors approach audits in the same way	Audit review to monitor for consistency.
	Non-Retaliation:	
5.75	Monitoring for retaliation	Exit interviews/employee surveys.
5.76	Retaliation	Surveys, focus groups, individual questioning, exit interviews.
	Vendor oversight:	
5.77	Vendor oversight	<ul style="list-style-type: none"> Review vendor certifications; track consequences for vendors not adhering to compliance program. Ensure all vendor contracts include consistent compliance language.

Element 6: Discipline for Non-Compliance

- A. Recommend disciplinary action when noncompliance is substantiated.
- B. Promote discipline proportionate to violation.
- C. Promote discipline consistent with policies and procedures.
- D. Verify that discipline is enforced consistently throughout all levels of the organization.
- E. Monitor for consistent documentation of disciplinary action.
- F. Recommend action for individuals and entities that have been excluded from government programs.
- G. Verify that compliance-related violations are addressed in disciplinary policies.
- H. Coordinate with management that timely disciplinary action is taken.
- I. Verify that disciplinary action is reported to regulatory body when required.

Source: *CHC Candidate Handbook: Detailed Content Outline*

Element 6: Discipline for Non-Compliance		
	What to Measure	How to Measure
	Consistency:	
6.1	Fairness and consistency in disciplinary process	Sample – audit. <ul style="list-style-type: none"> • Is the disciplinary action policy consistently followed? • Does the compliance committee review and measure fairness and consistency in policy application? • Audit discipline personnel files – consider creating predefined discipline matrices and audit against these. • Interview on perception of discipline applied, survey on perception. • Is disciplinary action in proportion to matter? • Is there consistency for similar matters?
6.2	Approach to determining type of disciplinary action	Review of P&P. <ul style="list-style-type: none"> • Auditing/testing to determine whether there is a common approach to analyzing the discipline aspect of resolution. • Are there steps embedded into protocol?

6.3	Compliance officer input into disciplinary action decisions	Interview CCO, outcomes review, and audit. Are compliance officer's recommendations taken seriously?
6.4	Decision-making parties	<ul style="list-style-type: none"> • Audit personnel files. • Policy review. • Is there a disciplinary action committee approach to review results of investigation and previous actions and to make decisions? • Are the appropriate parties (e.g. Legal, HR, Compliance, etc.) part of discipline action decision-making process?
6.5	Thoroughness of disciplinary P&P	Review criteria of including compliance violations and well-defined sanctions for consistent application of disciplinary policies.
6.6	Timeliness of disciplinary action	HR audit of files. Is timely discipline and action carried out?
	Awareness:	
6.7	Understanding	Survey - Is poor performance on compliance responsibilities grounds for disciplinary action?
6.8	Accuracy	Verifying that person completed the compliance expectations that were attested to.
6.9	Compliance goals	Documentation review. Is there consideration of compliance activities in daily activities? Review performance evaluations- Were goals accomplished?
6.10	Compliance incentives	Process review; interviews of leadership and staff interviews. What is the role of compliance when it is implemented?
6.11	Incentive policy	<p>Document review, interviews, and focus groups.</p> <ul style="list-style-type: none"> • Does the organization distribute badges for centers, or departments for participation in compliance training? • Are there contests for compliance training and publishing of test scores?
6.12	Distinction between disciplinary action and non-retaliation	Interviews, reviews of policies, etc. Assess the effectiveness of the organizational distinction between discipline and non-retaliation and make sure there are appropriate protections regarding non-retaliation.

6.13	Education to ensure employees know expectations	Audit communications regarding expectations and discipline possible. Compare policy and Standards of Conduct to ensure they are clear regarding disciplinary action.
6.14	Employee awareness of disciplinary action policy	Interviews, surveys, etc. Do employees understand there are discipline consequences for non-compliance?
6.15	Employee, vendor, contractor knowledge of code of conduct and their compliance responsibilities	Audit documentation. <ul style="list-style-type: none"> Do employees, vendors, and contractors know their responsibilities regarding code of conduct? Do they sign annual attestations?
6.16	Transparency regarding lessons learned	Document review. Are the lessons learned from disciplinary action conveyed and used as an educational tool for organization?
6.17	Culture	Survey - Do you feel employees who engage in improper work-related activities will be caught?
6.18	Non-retaliation for good faith reporting	Review demotions, terminations and conduct employee surveys.
6.19	Proactive education on violation and discipline	Review policy and procedure and education and training
6.20	Recognition and appreciation	Focus groups, interviews. <ul style="list-style-type: none"> Are there recognition and appreciation programs that do not include incentivizing with money? For example, are there newsletters, reports to governing body, website announcements to recognize those for exhibiting compliance and ethical behaviors and actions?
	Documentation:	
6.21	Discipline transparency	Documentation review. Are high-level results from disciplinary action published (e.g., # of terminations, # of counseling, # of suspensions, and # of corrective action plans)?
6.22	Oversight	Review minutes for number of disciplinary actions for compliance and HIPAA violations in last year reported to the Compliance Committee (dashboard)
6.23	Adequate documentation	Review/audit disciplinary files for supporting documentation of disciplinary action.
6.24	Compliance in business plans	Document, process review. <ul style="list-style-type: none"> Is there a leadership scorecard that includes compliance metrics? Are there compliance incentives built into business plans?

6.25	Notification of licensing boards	HR file audit - before issue is closed, is documentation present and included in tracking system?
6.26	Policy	Document review. Audit. Is there a documented policy addressing discipline for non-compliance?
6.27	Policy exceptions	File review of exceptions. Are exceptions tracked, documented, and evaluated? Who gets to make the decision regarding exceptions? Is this process documented?
6.28	Reporting to regulatory authorities	Audit. Document review. <ul style="list-style-type: none"> • Look at criteria for reporting and timeliness achieved. • Audit cases and track. • Ensure timely reporting to regulatory authorities of potential violations and discipline to demonstrate organization's commitment to compliance.
6.29	Scope and inclusion of disciplinary action pertaining to the culture	Investigate breadth of discipline and inclusion, audit disciplinary files, and conduct interview. Does discipline include those who know about it and didn't report it or caused it to happen but did not actually do it?
6.30	Scope of disciplinary action	Audit to verify - Are there disciplinary actions/consequences for not reporting?
6.31	System allows for documentation of compliance issues	Document/System review. Does HR system have mechanism for recording and tracking compliance offenses?
	Promotion Criteria:	
6.32	Promotion Criteria	Review if compliance considerations were included in promotion process and criteria.
6.33	Senior executive performance reviews	Process, document review. <ul style="list-style-type: none"> • Before promotion, does compliance conduct interview to identify or discuss compliance issues? • Does head of compliance participate in the reviews of senior executives? • Is there talk about compliance initiatives with regards to senior executive performance reviews?
6.34	Performance reviews	Document review. <ul style="list-style-type: none"> • Is there recognition of compliance efforts in performance reviews? • Is compliance built into the performance evaluation for rewarding employees and disciplinary action?

Element 7: Investigations and Remedial Measures

- A. Communicate noncompliance through appropriate channels.
- B. Assure development of corrective action plans in response to noncompliance.
- C. Monitor the effectiveness of corrective action plans in response to noncompliance.
- D. Assure remedial efforts are implemented to reduce risk.
- E. Cooperate with government inquiries and investigations.
- F. Investigate matters related to noncompliance in a fair, objective, and discrete manner.
- G. Assure records are maintained on compliance investigations.
- H. Participate in negotiation with regulatory agencies.
- I. Assure that overpayments to payers are refunded in a timely manner.
- J. Collaborate with legal counsel regarding voluntary disclosures.
- K. Coordinate investigations to preserve privileges, as applicable.
- L. Facilitate independent investigations when necessary.
- M. Recommend modification of corrective action plans.
- N. Recognize need for subject matter experts.
- O. Assure documents relevant to an investigation are preserved.
- P. Assure investigation personnel have the necessary skill sets.
- Q. Institute immediate measures as necessary to mitigate ongoing harm.
- R. Recommend measures to address substantiated incidence of retaliation.

Source: *CHC Candidate Handbook: Detailed Content Outline*

Element 7: Investigations and Remedial Measures

	What to Measure	How to Measure
	<i>Guidelines for Conducting an Investigation:</i>	
7.1	The organization has guidelines established to ensure thorough, credible, and complete investigations are done in a consistent manner	Review guidelines, policy and procedure and/or protocol on conducting an investigation.
7.2	Effectiveness of investigative process	<p>Review process for common steps to embed into a protocol. Conduct a baseline review to understand what the mandatory parts of the investigation framework are and what may change due to situation or circumstance.</p> <ul style="list-style-type: none"> • Is the overall investigation process driven by a policy and procedure, subject matter resource involvement, objective reviewer? • Is the process transparent (not everything placed under attorney client privilege)? • Is there a documented investigations process or procedure? • Are investigations being conducted consistent with written procedures? • Is there something that triggers a sentinel event, immediate reporting, the need for external consultants or attorneys? • What is the approval process? • What are timelines with regards to 60-day rule? • Is there a centralized process for keeping up with all investigations in process? • How much flexibility due to situation or circumstances is appropriate and how much needs to be controlled? • Next year, is the process tightened up going forward?
7.3	Individual accountability as part of investigative plan.	<p>Audit. Document review. Interviews.</p> <ul style="list-style-type: none"> • Is there a baseline investigative plan that outlines <u>communication plan</u> for interviewing current or prior employees? • Does the investigative process include special attention to individual accountability? • Is there investigative mapping and outline to ask questions about who may be in the loop so compliance can be sure they are not part of reporting group? • Are there appropriate protections for people being interviewed and the representation of organization?

		<ul style="list-style-type: none"> Is there documentation that the individual is not given assurances that there are no repercussions for him/her?
7.4	Type of documentation required for remedial measures and investigation	Review policies and procedures on record retention and types of documentation
Content of Investigation Files:		
7.5	Assure records are maintained on investigation	<p>Audit to ask:</p> <ul style="list-style-type: none"> Is there a policy and procedure for documentation that needs to be maintained? Do investigative files match the policy requirements (determine what should be in the attorney file versus the investigation file)?
7.6	Quality of the documentation	Assess whether the who, what, when and how is answered in every investigation; sample log entries
7.7	Assure documents relevant to an investigation are preserved	Read written policy and procedure for investigation records; read investigation files of HR, compliance, and/or legal to confirm compliance with retention period
Quality and Consistency of Investigations:		
7.8	Quality and effectiveness of investigations	<p>Audit investigations to look at:</p> <ul style="list-style-type: none"> quality of questions asked and content considered, involved parties, and report out of findings; did they involve the appropriate parts of the organization; are they broad enough; and did they use internal or external auditors?
7.9	Thoroughness, timeliness and consistency of investigation process among investigators	Audit investigation files
7.10	Triage process	<ul style="list-style-type: none"> Audit process to review whether allegations were appropriately and timely handled Dry run, test, mock report
7.11	Consistency of Investigations	Multiple anonymous (mock) reports on different issues to test process

7.12	Credibility of investigation and remediation process to third parties	Demonstrating it by mock presentation (devil's advocate) - role playing what a regulator might ask regarding the investigation and remediation process.
<i>Tracking and Trending Investigations</i>		
7.13	Investigation categorization process and trending	Documentation review and audit tracking system. Are investigations being categorized so they can be tracked, trended and reported to compliance committee, senior management and board?
7.14	Retaining documentation of investigations in records management system (tracking, trending, review)	Review of documentation in system
7.15	Documenting when issue is substantiated or not and reporting/trending	Review reports/process
7.16	Compliance log (log and track investigations)	<ul style="list-style-type: none"> • Does a log exist; • Does it have investigations and actions taken; and • Are there supporting files for each entry so that they can be reported on (HR, Billing) to report the trends?
<i>Escalation of Investigations</i>		
7.17	Ensure adequate and timely escalation of investigation outcomes	Audit sample of investigation files
7.18	Significant investigations are reported to the governing body	Review board minutes, review policies related to board reporting requirements.
7.19	Investigation reporting to senior leadership and board	Document review, interviews. Are investigations being reported to senior leadership and the board?
<i>Communication of Investigation Outcomes</i>		
7.20	The appropriate communication of the investigation outcomes (education)	<ul style="list-style-type: none"> • Conduct an assessment at the conclusion of an investigation of additional communication to the organization for organizational learning and culture of compliance • Document review of meeting minutes and/or interim reports. Were investigations results reported to senior leadership and board? How were the results communicated?

		<ul style="list-style-type: none"> Review how results of internal investigations are shared with the organization's governing body, leadership and relevant departments.
7.21	Culture	Survey for whether employees believe that management and/or the compliance officer follows up on reports of compliance concerns and takes appropriate action whenever necessary? (Yes/No/Don't know)
7.22	Perception of investigation results by employees and stakeholders	Focus groups or survey of employees
7.23	Communicate noncompliance through appropriate channels	Read workgroup meeting minutes or emails to determine distribution list includes appropriate individuals (stakeholders, decision makers)
	<i>Training of Investigators</i>	
7.24	Staff who conduct internal investigations have the education necessary to conduct investigations	Peer review on similar organizations. Review of certifications and education provided.
7.25	Number of employees with appropriate certifications that are conducting investigations	Review list of investigators and their certifications
7.26	Investigators have the skill set	Interview investigators and look at work product for facts
7.27	Training/competency of investigators	<ul style="list-style-type: none"> Evaluate training transcripts, train them on investigation techniques; Review the type of training anyone conducting investigations has received over the past 2 years
	<i>Professionalism and Competency of investigators</i>	
7.28	Ensuring investigators are conducting investigation in professional and respectful manner	Interview subjects
7.29	Professionalism and effectiveness of investigators	Conduct and observe mock interviews
7.30	Strength and credibility of investigation process	Role play of investigation process
7.31	Investigate matters in a fair matter, objective and discreet manner	Peer benchmarking to evaluate: <ul style="list-style-type: none"> the time it should take to conduct an investigation;

		<ul style="list-style-type: none"> • what peers do to make sure investigations occur discreetly and timely
	<i>Independence of investigator</i>	
7.32	Objectivity of investigator	Interviews by external source with goal to ensure no internal organizational pressure on the investigators that is improper.
7.33	Assessing uniformity of using outside contractors and experts in the investigation process	Review policies and procedures and audit files for compliance
7.34	Independence and Objectivity of Investigation	Review policies and procedures, survey employee perception, quality control process, etc.
7.35	Independence of investigation (no intimidation is occurring)	Work product and interviews; quality of process (avoid reporting structure conflicts of interest; direct-report)
	<i>Involvement of Legal Counsel</i>	
7.36	Coordinating investigations to protect privilege when necessary	Audit against policies and procedures to determine appropriate attachment of privilege
7.37	Collaborating with legal	<ul style="list-style-type: none"> • Look at work product to determine quality; • Ensure compliance leads the investigation (unless investigation is being conducted under privilege); • Interview compliance officer and legal counsel to determine the level of collaboration.
	<i>Timeliness of Response</i>	
7.38	Are immediate actions taken immediately	Audit investigation outcomes to see if timely
7.39	Compliance officer authority	Interviews, document reviews. If concern is raised and it is harmful, management needs ability to react immediately even if it is before investigation is complete. Does the compliance officer have the ability and authority to stop an action (e.g., billing)?
7.40	Time to investigation closure	<ul style="list-style-type: none"> • Track timeliness against benchmark established by organization; • Documentation review. Is length to close investigations being documented, tracked, trended and reported?

		<ul style="list-style-type: none"> Are resolution actions (e.g., education, new policy/procedure, corrective action plan, disclosure, repayment, etc.) being documented, tracked, trended and reported?
7.41	Timely processing of refunds, self-disclosures	Audit, monitor, document review of investigations that resulted in refunds, disclosures to ensure they were processed in a timely fashion.
7.42	Self-Disclosure guidelines	Document review, interviews. <ul style="list-style-type: none"> Are there written guidelines for self-disclosures? Do they address members impacted, information to be shared with regulators?
<i>Corrective Action Plans / Remedial Measures</i>		
7.43	Business leaders are accountable for follow-up to investigations	<ul style="list-style-type: none"> Verification that investigative report is shared with those responsible for follow-up. Closure reports are provided to Compliance Committee. Audit post investigation to ensure resolution is maintained.
7.44	Effectiveness of corrective actions	Documentation review of corrective actions timeframes met, issues closed out, effective resolution.
7.45	Structure	Review how corrective action plans are created
7.46	Validate that corrective action plans are appropriate, implemented and effective	Review 3 corrective action plans to ensure identified all issues and conduct validation visits
7.47	Accountability	<ul style="list-style-type: none"> Review how corrective action plans are tracked; Review how corrective action plans are reported to Compliance Executive Committee
7.48	Ensure remedial measure for like findings are consistently implemented	Audit
7.49	Measuring sufficiency of corrective action plans that are developed	Sample cases that were substantiated and review the corresponding corrective action plans to ensure they respond to issues identified in internal and external audits and investigations
7.50	Remedial actions - Appropriate remedial action occurred	Review investigation documentation, PowerPoint, training attestation is in the file.

7.51	Ensure remedial efforts are established to reduce risk	Based on the outcome of the investigation; deficiency was fixed, evidence it was fixed, there are other items to review (ex. Charge master) look at the downstream impact - employees, systemic issues (beyond disciplinary action)
Root cause analysis		
7.52	Conduct root cause analysis to determine if findings need to be addressed in other parts of the organization	Audit documentation
7.53	Resolution of investigations	Audit. Was root cause resolved?
7.54	Accountability/Structure	Obtain a list of ad hoc committees formed around specific compliance issue over the last 2 years
Adherence to non-retaliation policy		
7.55	Monitoring how the reporter feels about having reported	Interview
7.56	Ensure confidentiality of investigation process	Survey or focused groups, interview participants in investigations
7.57	Exit interview process queries for retaliation	Review of exit interview process
7.58	Culture: Retaliation	Surveys, interviews, exit interviews. <ul style="list-style-type: none"> • Is there a policy statement in new employee orientation? • Are there communications? • Do employees know how to report potential instances? • Does the organization conduct culture surveys? • Is there a policy statement regarding no obstruction of investigation?
7.59	Adherence to non-retaliation policy	Survey participates in investigation to determine if they felt or feared retaliation
7.60	Substantiated retaliation	Audit
Government Inquiries/Investigations		

7.61	Cooperate with government inquiries/investigations	<ul style="list-style-type: none"> • Audit credit received for cooperation; • Read records that contain government correspondence with entity. Review and confirm appropriate responses were submitted on or before requested date.
7.62	Strategic relationship with regulators	<p>Interviews.</p> <ul style="list-style-type: none"> • Is there a focused approach to building relationships with regulators? • Does staff seek out regulators at conferences, etc. to build relationships?
7.63	Mock presentations	<p>Documentation review. Interviews.</p> <ul style="list-style-type: none"> • Does the organization conduct mock presentations (e.g., in-house attorney “acts” as government entity?) • Compliance presents a discipline part of compliance program to in-house attorney for his/her review and comment.)
Monitoring Results		
7.64	Validation that investigations are complete	<ul style="list-style-type: none"> • Auditing, documentation review, interviews after investigations are complete. • Is there a documented (3-6-9 months) timing interval to assess whether “action has traction?” • Is there a process to go back and prioritize or verify that plans or work units are following through on recommended actions?
7.65	Review of investigations in future work planning	<ul style="list-style-type: none"> • Documentation review. • Is there an analysis of investigations to help inform future work plans?
7.66	Long term effectiveness of remedial measures	Audit - one year of remedial measures where active monitoring ended 6 months prior to validate that remediation still in place
7.67	How larger lessons can be conveyed to the organization	CO could review annually the reports to the board or broader communications to the entire organization; review education on trends and themes.
Awareness of Investigation Process		
7.68	Education on investigations process	<ul style="list-style-type: none"> • Audit, monitor training records and educational content. • Is training regarding the investigations process provided at hire and ongoing so employees know what to expect regarding the investigations process?
7.69	Strategic relationship with risk partners (i.e., Legal, HR, risk management, etc.)	Interview risk partners to determine interaction, involvement, knowledge.

Contract Provisions regarding Investigations		
7.70	Third party and non-employed clinician contracts to ensure they have an obligation to cooperate in investigations.	<ul style="list-style-type: none"> • Contract review. • Inventory of agreements with 3rd parties and non-employed clinicians to make sure they understand their obligation to cooperate with investigations.
7.71	Inventory of requirements in contracts	Audit. Document review. Are there standard terms that must be included in contracts? A template can be used to ensure all requirements are in contracts.

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

Introduction

The Principles of Federal Prosecution of Business Organizations in the United States Attorney’s Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporate entity, determining whether to bring charges, and negotiating plea or other agreements. These factors, commonly known as the “Filip Factors,” include “the existence and effectiveness of the corporation’s pre-existing compliance program” and the corporation’s remedial efforts “to implement an effective corporate compliance program or to improve an existing one.”

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation that triggers the application of the Filip Factors, the Fraud Section does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company’s risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case.

There are, however, common questions that we may ask in making an individualized determination. This document provides some important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program. The topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.

Many of the topics below also appear in the United States Attorney’s Manual (“USAM”), in the United States Sentencing Guidelines (“USSG”), in Fraud Section corporate resolution agreements, in A Resource Guide to the U.S. Foreign Corrupt Practices Act (“FCPA Guide”) published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), in the Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development (“OECD”) Council on February 18, 2010, and in the Anti-Corruption Ethics and Compliance Handbook for Business (“OECD Handbook”) published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank.

Sample Topics and Questions

1. Analysis and Remediation of Underlying Misconduct

- Root Cause Analysis** – What is the company’s root cause analysis of the misconduct at issue? What systemic issues were identified? Who in the company was involved in making the analysis?
- Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues? What is the company’s analysis of why such opportunities were missed?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

- Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

2. Senior and Middle Management¹

- Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question? What concrete actions have they taken to demonstrate leadership in the company’s compliance and remediation efforts? How does the company monitor its senior leadership’s behavior? How has senior leadership modelled proper behavior to subordinates?
- Shared Commitment** – What specific actions have senior leaders and other stakeholders (*e.g.*, business and operational managers, Finance, Procurement, Legal, Human Resources) taken to demonstrate their commitment to compliance, including their remediation efforts? How is information shared among different components of the company?
- Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

3. Autonomy and Resources²

- Compliance Role** – Was compliance involved in training and decisions relevant to the misconduct? Did the compliance or relevant control functions (*e.g.*, Legal, Finance, or Audit) ever raise a concern in the area where the misconduct occurred?
- Stature** – How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company’s strategic and operational decisions?
- Experience and Qualifications** – Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

- Autonomy** – Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors? How often do they meet with the board of directors? Are members of the senior management present for these meetings? Who reviewed the performance of the compliance function and what was the review process? Who has determined compensation/bonuses/raises/hiring/termination of compliance officers? Do the compliance and relevant control personnel in the field have reporting lines to headquarters? If not, how has the company ensured their independence?
- Empowerment** – Have there been specific instances where compliance raised concerns or objections in the area in which the wrongdoing occurred? How has the company responded to such compliance concerns? Have there been specific transactions or deals that were stopped, modified, or more closely examined as a result of compliance concerns?
- Funding and Resources** – How have decisions been made about the allocation of personnel and resources for the compliance and relevant control functions in light of the company's risk profile? Have there been times when requests for resources by the compliance and relevant control functions have been denied? If so, how have those decisions been made?
- Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? What has been the rationale for doing so? Who has been involved in the decision to outsource? How has that process been managed (including who oversaw and/or liaised with the external firm/consultant)? What access level does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

4. Policies and Procedures³

a. Design and Accessibility

- Designing Compliance Policies and Procedures** – What has been the company's process for designing and implementing new policies and procedures? Who has been involved in the design of policies and procedures? Have business units/divisions been consulted prior to rolling them out?
- Applicable Policies and Procedures** – Has the company had policies and procedures that prohibited the misconduct? How has the company assessed whether these policies and procedures have been effectively implemented? How have the functions that had ownership of these policies and procedures been held accountable for supervisory oversight?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

- Gatekeepers** – Has there been clear guidance and/or training for the key gatekeepers (*e.g.*, the persons who issue payments or review approvals) in the control processes relevant to the misconduct? What has been the process for them to raise concerns?
- Accessibility** – How has the company communicated the policies and procedures relevant to the misconduct to relevant employees and third parties? How has the company evaluated the usefulness of these policies and procedures?

b. **Operational Integration**

- Responsibility for Integration** – Who has been responsible for integrating policies and procedures? With whom have they consulted (*e.g.*, officers, business segments)? How have they been rolled out (*e.g.*, do compliance personnel assess whether employees understand the policies)?
- Controls** – What controls failed or were absent that would have detected or prevented the misconduct? Are they there now?
- Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?
- Approval/Certification Process** – How have those with approval authority or certification responsibilities in the processes relevant to the misconduct known what to look for, and when and how to escalate concerns? What steps have been taken to remedy any failures identified in this process?
- Vendor Management** – If vendors had been involved in the misconduct, what was the process for vendor selection and did the vendor in question go through that process? See further questions below under Item 10, “Third Party Management.”

5. **Risk Assessment**⁴

- Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faced?
- Information Gathering and Analysis** – What information or metrics has the company collected and used to help detect the type of misconduct in question? How has the information or metrics informed the company’s compliance program?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

- Manifested Risks** – How has the company’s risk assessment process accounted for manifested risks?

6. Training and Communications⁵

- Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees that addressed the risks in the area where the misconduct occurred? What analysis has the company undertaken to determine who should be trained and on what subjects?
- Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the intended audience? How has the company measured the effectiveness of the training?
- Communications about Misconduct** – What has senior management done to let employees know the company’s position on the misconduct that occurred? What communications have there been generally when an employee is terminated for failure to comply with the company’s policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?
- Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

7. Confidential Reporting and Investigation⁶

- Effectiveness of the Reporting Mechanism** – How has the company collected, analyzed, and used information from its reporting mechanisms? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?
- Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?
- Response to Investigations** – Has the company’s investigation been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

8. Incentives and Disciplinary Measures⁷

- Accountability** – What disciplinary actions did the company take in response to the misconduct and when did they occur? Were managers held accountable for misconduct that occurred under their supervision? Did the company’s response consider disciplinary actions for supervisors’ failure in oversight? What is the company’s record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the type(s) of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?
- Human Resources Process** – Who participated in making disciplinary decisions for the type of misconduct at issue?
- Consistent Application** – Have the disciplinary actions and incentives been fairly and consistently applied across the organization?
- Incentive System** – How has the company incentivized compliance and ethical behavior? How has the company considered the potential negative compliance implications of its incentives and rewards? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied) as a result of compliance and ethics considerations?

9. Continuous Improvement, Periodic Testing and Review⁸

- Internal Audit** – What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often has internal audit generally conducted assessments in high-risk areas?
- Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct, including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties? How are the results reported and action items tracked? What control testing has the company generally undertaken?
- Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

10. Third Party Management⁹

- Risk-Based and Integrated Processes** – How has the company’s third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?
- Appropriate Controls** – What was the business rationale for the use of the third parties in question? What mechanisms have existed to ensure that the contract terms specifically described the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?
- Management of Relationships** – How has the company considered and analyzed the third party’s incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them? How has the company incentivized compliance and ethical behavior by third parties?
- Real Actions and Consequences** – Were red flags identified from the due diligence of the third parties involved in the misconduct and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues? How has the company monitored these actions (*e.g.*, ensuring that the vendor is not used again in case of termination)?

11. Mergers and Acquisitions (M&A)¹⁰

- Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What has been the M&A due diligence process generally?
- Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?
- Process Connecting Due Diligence to Implementation** – What has been the company’s process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company’s process for implementing compliance policies and procedures at new entities?

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

¹ USSG § 8B2.1(b)(3); FCPA Guide, p.57; USAM 9-28.800 Comment; OECD Handbook, C.1, p.16 *et seq.*

² USSG § 8B2.1(2)(B)-(C); FCPA Guide, p.58; USAM 9-28.800 Comment; OECD Handbook, C.3, p. 23 *et seq.*

³ USSG § 8B2.1(b)(1); FCPA Guide, pp.57-58; OECD Handbook, C.4 and C.5, p.27 *et seq.*

⁴ USSG § 8B2.1(b)(5)(7) and (c); USAM 9-28.800 Comment; OECD Handbook, B, p.10 *et seq.*

⁵ USSG § 8B2.1(b)(4); FCPA Guide p. 59; USAM 9-28.800 Comment; OECD Handbook, C.8, p. 54 *et seq.*

⁶ USSG § 8B2.1(b)(5)(C); FCPA Guide, p. 61; OECD Handbook, C.10, p.60 *et seq.*

⁷ USSG § 8B2.1(b)(6); FCPA Guide, pp.59-60; USAM 9-28.800 Comment; OECD Handbook, C.11, p. 68 *et seq.*

⁸ USSG § 8B2.1(b)(5)(A)(B); FCPA Guide, pp.61-62; USAM 9-28.800 Comment; OECD Handbook, C.12, pp.72 *et seq.*

⁹ FCPA Guide, p.60-66; OECD Handbook, C.6, pp.38 *et seq.*

¹⁰ FCPA Guide, p.62.

The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs

By **Ketanji Brown Jackson and Kathleen Cooper Grilli**¹

On November 1, 1991, the Federal Sentencing Guidelines for Organizations (found in Chapter Eight of the *Guidelines Manual*) went into effect. The United States Sentencing Commission (hereinafter referred to as the Commission) promulgated the original set of organizational guidelines after several years of study, and the organizational guidelines have been amended comprehensively only twice in their 26-year history.²

This paper traces the historical development of the organizational guidelines, with particular emphasis on the development of organizational sentencing policy relating to effective compliance and ethics programs. The “carrot and stick” philosophy that undergirds the organizational guidelines rests on the realization that corporations can, and should, be incentivized to self-police, and with respect to compliance and ethics, the organizational guidelines have ushered in an unprecedented era of corporate responsibility. Moreover, over time, compliance programs have had an impact that extends well beyond the criminal justice arena. A fundamental understanding of the historical development of the organizational guidelines not only provides a foundation for the consideration of future changes to those guidelines, it also aids organizations in the adoption of standards for effective compliance and ethics programs.

Part I of this paper provides a brief discussion of the events leading to the creation of the Commission and its statutory mandates from Congress. Parts II, III, and IV document three distinct stages in the Commission’s efforts to promulgate the initial set of organizational guidelines. Part V discusses the events leading to the comprehensive guideline changes made to Chapter Eight in 2004, including the elevation of the criteria for an effective compliance and ethics program from the commentary into a separate guideline. Part VI discusses the next set of comprehensive changes made in 2010. Finally, Part VII summarizes the organizational guidelines’ impact outside the criminal justice arena.

¹ **Judge Ketanji Brown Jackson, Esq.** is a United States District Judge for the District of Columbia and the former Vice Chair of the United States Sentencing Commission. **Kathleen Cooper Grilli, Esq.** is General Counsel of the United States Sentencing Commission (hereinafter referred to as the Commission). The views expressed herein are the authors’ own and do not necessarily represent the official position of the Commission. The authors gratefully acknowledge the assistance of Linda Baltrusch, James Strawley, Tobias Dorsey, and Jessica Warnement. Any Commission materials cited herein are available to the public according to the terms of the Commission’s public access policy. See https://www.uscg.gov/Publications/19891213_Public_Access_Documents_Data.pdf.

² See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); amend. 744 (eff. Nov. 1, 2010).

I. Enactment of the Sentencing Reform Act and Creation of the Commission

The Commission authored the original organizational guidelines amidst calls for general sentencing reform and in the wake of significant statutory changes regarding the manner in which federal judges sentence defendants in criminal cases. Prior to the Sentencing Reform Act of 1984,³ federal district court judges possessed almost unlimited authority to fashion a sentence within a broad statutorily prescribed range. In each case, sentencing was limited only by the statutory minimum and maximum, and each individual district court judge exercised discretion to determine “the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”⁴ Because each judge was “left to apply his own notions of the purposes of sentencing,” sentences for similar criminal conduct varied dramatically, and it was widely believed that the federal sentencing system exhibited “an unjustifiably wide range of sentences [for] offenders convicted of similar crimes.”⁵

The Sentencing Reform Act of 1984 (hereinafter referred to as the Act), which was the culmination of lengthy bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities that unregulated sentencing had created.⁶ To this end, as part of the Act, Congress created the Commission as an independent agency within the judicial branch of the federal government and tasked it with the responsibility of developing federal sentencing policy.⁷ By statute, the Commission is comprised of seven voting members (including the Chair) that the President appoints “by and with the advice and consent of the Senate.”⁸ The Act provides that “[a]t least three of the [Commission’s] members shall be Federal judges” and that no more than four members of the Commission can be members of the same political party.⁹ Moreover, the Attorney General (or his

³ Chapter II, *Comprehensive Crime Control Act of 1984*, Pub. L. 98–473, Title II (Oct. 12, 1984).

⁴ U.S. Sent’g Comm’n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, at 9 (1991).

⁵ S. Rep. No. 97-307, at 955 (1981); *See also* S. Rep. No. 97-307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence); H.R. Rep. No. 98-1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

⁶ *See* S. Rep. No. 97-307 (1981); H.R. Rep. No. 98-1017 (1984); 28 U.S.C. §§ 991(b)(1)(B), 994(f).

⁷ The purposes of sentencing were set forth in the Act and served as the Commission’s North Star. Congress expressly determined that federal sentencing should be tailored:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2).

⁸ *See* 28 U.S.C. § 991(a).

⁹ *See id.*

designee)¹⁰ and the Chair of the United States Parole Commission¹¹ are designated as *ex officio* non-voting members of the Commission.

In addition to establishing the Commission itself, the Act directed the Commission to promulgate guidelines that federal judges would use for selecting sentences within the prescribed statutory range.¹² The statutory purposes of the Commission, among others, are to establish sentencing policies and practices for the Federal criminal justice system that—

- (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
- (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
- (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.¹³

Although enactment of the Act appears to have been largely motivated by concerns about disparities in the sentencing of *individual* defendants, the Act also made changes that impacted the sentencing of organizations.¹⁴ The Act specified that an organization may be sentenced to a term of probation or a fine, or a combination of these sanctions,¹⁵ and required that “[a]t least one of such sentences must be imposed.”¹⁶ Additionally, the Act made clear that an organization could “be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.”¹⁷

The Senate report accompanying the Act explained Congress’s intent regarding the sentencing of organizations. It stated that “[c]urrent law . . . rarely distinguishes between individuals and organizations for sentencing purposes[; t]hus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations.”¹⁸ The report also noted concerns that white collar criminals

¹⁰ *See id.*

¹¹ *See* Pub. L. 98-473, § 235(5) (Oct. 12, 1984), as amended by Pub. L. 112-44, § 2 (Oct. 21, 2011).

¹² *See* 28 U.S.C. §§ 991, 994, and 995(a)(1).

¹³ *See* 28 U.S.C. § 991(b)(1).

¹⁴ For purposes of Title 18, United States Code, the term “organization” means “a person other than an individual.” *See* 18 U.S.C. § 18.

¹⁵ 18 U.S.C. § 3551(c).

¹⁶ *See* S. Rep. No. 98-225, at 68 (1984).

¹⁷ *See id.*; 18 U.S.C. §§ 3551(c), 3554–56.

¹⁸ *See* S. Rep. No. 98-225, at 66–7 (1984).

were being sentenced to minimal fines, creating “the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.”¹⁹

In its statutory direction to the Commission, Congress placed no limitations on the Commission’s authority to act in the arena of organizational sentencing. Indeed, Congress expected that the Commission would “include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing.”²⁰

II. The Commission’s Early Efforts to Develop Organizational Sentencing Policy

1986 Public Hearing on Organizational Sanctions

Although the primary focus of the Commission’s early work was the development of guidelines to be used in sentencing individual offenders, the Commission nevertheless included consideration of appropriate organizational sanctions in its deliberations. On June 10, 1986, one year after the appointment of the first members of the Commission, the Commission held a public hearing devoted exclusively to consideration of organizational sanctions.²¹ Witnesses included representatives from the Department of Justice and the American Bar Association, corporate defense attorneys specializing in tax and antitrust offenses, and a law professor.²² The institution of compliance programs was not the subject of this hearing. Rather, the testimony at the hearing “focus[ed] on the sanctions available and appropriate for the corporation, business, union or other organization convicted of a federal crime.”²³ Notably, the witnesses recognized the significance of “tone from the top,” and many specifically asserted that criminal misconduct manifested itself in organizations where “[the upper management] created an atmosphere in which they encouraged this type of behavior, and they absolutely looked the other way when it was going on.”²⁴

Witnesses raised the subject of compliance programs only in the context of the role of probation as an organizational sanction. Several witnesses mentioned the institution of compliance programs as a condition of probation for an organization convicted of an antitrust violation.²⁵ Another expressed his “tremendous respect” for antitrust compliance programs and the belief that such programs have an impact on deterring future violations.²⁶ No one yet expressed the view that compliance programs

¹⁹ *See id.* at 76.

²⁰ *See id.* at 169.

²¹ *See* Notice of Hearing, 51 Fed. Reg. 19918 (June 3, 1986).

²² For a complete list of the witnesses, *see* U.S. Sent’g Comm’n, *Supplementary Report On Sentencing Guidelines For Organizations*, App. B (Aug. 1991).

²³ 51 Fed. Reg. 19918. A transcript of the hearing is on file with the Commission.

²⁴ *See* Testimony of Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice, to the Commission, at 62 (June 10, 1986) (on behalf of the U.S. Department of Justice).

²⁵ *See, e.g.*, Testimony of William M. Brodsky, American Bar Association, to the Commission, at 30 (June 10, 1986); Testimony of Mark Crane, Corporate Defense Attorney, Antitrust, to the Commission, at 77 (June 10, 1986).

²⁶ *See* Testimony of John C. Coffee, Jr., Columbia University School of Law, to the Commission, at 90 (June 10, 1986). Professor Coffee did not offer any details about the elements of an antitrust compliance program.

should be adopted as a prospective means of preventing criminal misconduct by organizations. Nor did anyone identify the presence of a pre-existing compliance program as a factor to consider in mitigation of punishment.

Following the June 1986 hearing, the Commission continued to receive and consider public comment about the guidelines generally, including organizational sanctions. The Commission also established advisory and working groups to assist in the development of sentencing guidelines.²⁷ The Commission invited representatives of each group to participate in working sessions with commissioners and staff to examine early drafts of guidelines and air many of the important issues facing the Commission. In addition, the Commission received written comments and critiques from the members of these groups.²⁸

The Commission obtained feedback about the guidelines as a whole—including organizational sanctions—from other sources as well. The Commission solicited information from federal agencies about the specific nature and number of offenses occurring within their areas of responsibility.²⁹ Commissioners and staff traveled across the country to obtain information relevant to development of the guidelines and also to give presentations regarding the efforts of the Commission.³⁰ For example, commission representatives met with United States probation officers at ten regional seminars and district-wide staff meetings. Through these meetings, the Commission received input and advice from officers in the majority of federal judicial districts.³¹

The Commission also conducted regular meetings about guideline development, which were open to the public. “Although most of the work involved in drafting the preliminary guidelines necessarily was accomplished in informal working groups, the Commission . . . used its meetings to set an overall agenda and direction for the development of the guidelines, as well as to discuss, revise, and approve working group drafts.”³² The Commission established a research program to assist in the development of the guidelines, including organizational sanctions, and the research staff collected detailed information on past sentencing and correctional practices and conducted empirical research. In addition, the research staff reviewed criminal justice research and advised the Commission about the application of scientific theory and knowledge to sentencing practices.³³

²⁷ These groups included United States Attorneys, state district attorneys, federal probation officers, defense attorneys, researchers, and federal judges. *See Preliminary Draft of Sentencing Guidelines for United States Courts*, 51 Fed. Reg. 35080, 35082 (Oct. 1, 1986). The work of these advisory groups was not limited to organizational sanctions. For a discussion of those advisory groups focused exclusively on organizational sanctions, *see* U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

²⁸ *See* 51 Fed. Reg. at 35082 .

²⁹ The Department of Justice, the Department of the Treasury, the Departments of Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, the Postal Service, and the Securities and Exchange Commission provided information to the Commission. *Id.* at 35083.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 35082–83.

³³ *Id.* at 35083.

Commission staff also visited a number of states and communities in which a variety of sentencing options other than imprisonment were being used. The Commission studied the fine collection and community service programs of a number of state probation departments. Moreover, “[i]n its efforts to establish reasonable and collectable fines and to determine an offender’s likelihood and ability to pay fines, Commission staff met with officials of several banking and financial institutions.”³⁴

1986 Release of the Preliminary Draft

On October 1, 1986, the Commission published in the Federal Register the *Preliminary Draft of the Sentencing Guidelines*.³⁵ In the *Preliminary Draft*, which contained guidelines for the sentencing of individual defendants, the Commission specifically requested “comment on the appropriate sentencing of organizational offenders.” The Commission identified for public comment “key questions it has yet to resolve in this area.” The first was the “appropriate role of fines as organizational sanctions.” The Commission noted the competing concerns raised by two of the statutory purposes of sentencing: just punishment and deterrence.³⁶ Just punishment concerns might compel imposition of a fine based on a percentage of the organization’s wealth or income, thereby possibly leading to different fine amounts for organizations of differing sizes and income who committed similar offenses. By contrast, deterrence concerns might result in a fine being calculated based upon the injury resulting from the criminal offense and the difficulty in discovering the crime. The Commission sought public comments on “whether its approach to fines should emphasize the organization’s culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection.”³⁷ The Commission also asked for the public to comment on how the “size of an organization” should be considered in sentencing.³⁸

The second key question raised in the Commission’s early deliberations about organizational sanctions related to the proper use of a term of probation as part of an organizational sentence. The Commission sought public input on the circumstances justifying the use of a term of probation in lieu

³⁴ *Id.*

³⁵ *Id.* at 35080. The draft presented “an approach currently being considered by the U.S. Sentencing Commission in developing guidelines and policy statements for use by the federal courts in determining the sentences to be imposed in criminal cases.” *Id.* The Commission made clear that “[t]he preliminary draft published for public comment seeks to accomplish several goals. The first is to focus public attention on a proposed format, a possible structure and suggested sentencing ranges. The format, structure, and suggested terms of imprisonment will all be reconsidered by the Commission before the final draft is written in light of further deliberation, continued empirical research, and the receipt of written and oral comment.”

“The publication also highlights a series of difficult policy issues that remain unresolved. The Commission underscores these policy issues for public comment because their resolution will determine, to a great extent, the final guidelines.” *Id.* at 35081.

³⁶ The Commission grappled with the “differing perceptions of the purposes of criminal punishment” as it drafted both the individual and organizational guidelines. See U.S. Sent’g Comm’n, Guidelines Manual, Ch.1, Pt.A, intro. comment. (Nov. 2016). The Commission ultimately resolved the philosophical dilemma by “dr[awing] especially strong guidance” from the statutory purposes of sentencing set out in 18 U.S.C. § 3553. U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, at 5 (Aug. 1991).

³⁷ 51 Fed. Reg. at 35128.

³⁸ That term is used in 18 U.S.C. § 3572(a)(8).

of a fine and those justifying imposition of both types of sanctions. The Commission also identified the mandatory and discretionary conditions of probation authorized by statute,³⁹ and it sought comment about the types of probation conditions that might be imposed on an organization and the circumstances justifying their imposition. The early list of possible conditions of probation did not specifically include development of a compliance program; rather, the identified conditions included “the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization’s misdeeds and subsequent corrective action.”⁴⁰

The *Preliminary Draft* then laid out two possible approaches to the development of organizational sanctions based on the just punishment and deterrence philosophies. The just punishment approach emphasized an organization’s culpability⁴¹ and its ability to pay a fine, while the deterrence approach focused on the harmfulness of an organization’s conduct and the likelihood of detection of the crime. Although neither approach specifically identified the existence of a compliance program as a possible mitigating factor to be considered in fashioning punishment, each seemed to recognize that steps taken by an organization in response to a criminal offense might lead to mitigation of punishment. For example, the just punishment approach provided that adjustments to the established offense value could be made if “the organization took steps to discipline responsible employees prior to indictment.”⁴² The deterrence approach also permitted for the lowering of any applicable fine if “the organization notified authorities immediately upon learning of the crime,” and if “the responsible employees had been identified and punished.”⁴³

The complexity of the subject matter and tight deadlines imposed by the Act⁴⁴ led the Commission to decide “in 1986 to defer the drafting of organizational guidelines for offenses . . . until after it had developed and implemented the first iteration of guidelines for individual defendants.”⁴⁵ Although

³⁹ The mandatory conditions of probation that court must impose on an organizational offender are: (1) the organization must not commit another federal, state, or local crime while on probation; and (2) the organization must either pay a fine, make restitution, or perform community service. See 18 U.S.C. § 3563(a). The only mandatory condition imposed upon probationers convicted of a misdemeanor or an infraction is the requirement that they commit no further crimes while on probation. Discretionary conditions of probation are listed in 18 U.S.C. § 3563(b).

⁴⁰ 51 Fed. Reg. at 35128–29.

⁴¹ Culpability would be measured by factors, such as “whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees or whether the organization took steps to discipline responsible employees prior to indictment.” *Id.* at 35129.

⁴² *Id.* at 35128.

⁴³ *Id.* at 35129.

⁴⁴ The Commission was required to deliver the first set of guidelines for individual defendants to Congress by April, 1987. See Pub L. 98-473, § 235 (Oct. 12, 1984), as amended by Pub. L. 99-217 (Dec. 26, 1985) (“[T]he United States Sentencing Commission shall submit the initial sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within 30 months of the [date of enactment of this Act].”).

⁴⁵ U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, at 1 (Aug. 1991). The one exception was offenses involving antitrust violations. Section 2R1.1 of the initial guidelines included a special

the public discussion of organizational sanctions ceased until 1988, the Commission continued to work behind the scenes on the issue, by “conducting empirical research and analysis on organizational sentencing practices.”⁴⁶

III. The Commission’s Renewed Focus on Organizational Sentencing Policy

On April 13, 1987, the Commission submitted the initial Sentencing Guidelines and Policy Statements for individual defendants to Congress.⁴⁷ In early 1988, the Commission once again turned its attention to corporate sanctions. The Commission “generally agreed that the staff should collect data and report on areas of difficulty,” and that those reports “should include public comment, actual cases and background law.”⁴⁸ The Commission directed the staff not to present revised guideline proposals “until an adequate amount of information has been collected,”⁴⁹ and in the following months, the Commission decided to devote additional time to the consideration of the theories and principles underlying a staff draft proposal. The Commission ultimately decided to release the proposals regarding organizational sanctions to the public and to set hearings on the proposals. Thereafter, Commission staff continued developing a staff working paper on sentencing policy for organizations, a report on current organizational sentencing practices, and a simplified proposal for organizational guidelines. In addition, one commissioner was working to develop an alternative proposal for probation, with the assistance of a law professor with an expertise in corporate governance.⁵⁰

Public Release of Discussion Materials on Organizational Sanctions

The Commission continued its consideration of an internal working draft of guidelines for organizational defendants in the summer of 1988.⁵¹ The Commission also debated “the appropriate length of the guidelines for organizational defendants.”⁵²

instruction for computing fines for organizations. See USSG §2R1.1 (Nov. 1987) (“The fine range for an organization is from 20% to 50% of the volume of commerce, but not less than \$100,000.”).

⁴⁶ U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, at 1 (Aug. 1991). Notably, when conducting its early research, the Commission considered the existence of a compliance program to be a relevant factor in evaluating organizational sanctions, but it classified a compliance program as effective based on only two criteria: if “1) high-level management was not involved in the offense; and 2) the organization did not obstruct justice during the investigation.” *Id.* at D-7.

⁴⁷ See U.S. Sent’g Comm’n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, at i (June 18, 1987).

⁴⁸ See U.S. Sent’g Comm’n, Public Meeting Minutes (Jan. 5, 1988) (on file with the Commission).

⁴⁹ *Id.*

⁵⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (May 19, 1988) (on file with the Commission).

⁵¹ See U.S. Sent’g Comm’n, Public Meeting Minutes (June 13, 1988) (on file with the Commission) (reflecting the Commission’s agreement to review the staff’s newest draft and make comments and suggestions thereon).

⁵² *Id.*

In July 1988, the Commission publicly released the *Discussion Materials on Organizational Sanctions* “to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes.”⁵³ The Commission explained that it had not yet had a detailed discussion of any particular approach to the sentencing of organizations, including those suggested by the materials, nor had it arrived at any agreement upon a particular approach. Rather, the Commission intended to “provide a vehicle for stimulating the broadest range of public input” with the release of these materials.⁵⁴ The Commission noted that its work had “benefitted greatly from extensive public input” up to that point, and it “look[ed] forward to a continuation of that tradition as the Commission move[d] ahead with its deliberations on the important subject of organizational sanctions.”⁵⁵ The discussion materials included a discussion draft of sentencing guidelines and policy statements for organizations, a draft proposal on standards for organizational probation, a preliminary report to the Commission on sentencing of organizations in the federal courts from 1984-1987, and a Commission staff working paper on criminal sentencing policy for organizations.

Approaches to Organizational Sentences Set Forth in the Discussion Materials on Organizational Sanctions

The discussion draft of sentencing guidelines and policy statements for organizations computed applicable fines based upon the “offense loss” (or total harm) caused by the offense multiplied by the “offense multiple,” which was intended to approximate the “difficulty of detecting and punishing the offender.”⁵⁶ Although this approach did not identify the existence of a compliance program as a mitigating factor to reduce the monetary sanction, the “reasonable, good faith efforts by the organization’s management to prevent an occurrence of the type of offense involved” was an offense characteristic that would decrease the “offense multiple.”⁵⁷

Unlike the Preliminary Draft of the Guidelines released in 1986, the discussion draft included a compliance plan as a condition of probation. Development of a compliance plan was a required condition of probation for certain felony offenses if “the senior management of the organization participated in or encouraged the offenses,” and “the organization or its senior management had a criminal history of one or more felony convictions of the same or similar type” and “the organization was unlikely to avoid a recurrence of the criminal conduct despite imposition of a fine.”⁵⁸ In such an

⁵³ See Introductory Letter from the Commission, U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions* (July 1988). See also Notice of Public Hearings on Organizational Sanctions and Request for Public Comment on Discussion Materials, 53 Fed. Reg.32815 (Aug. 26, 1988). Working groups of scholars and experts from various government agencies helped shape these materials. See U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

⁵⁴ See Introductory Letter from the Commission, U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions* (July 1988).

⁵⁵ *Id.*

⁵⁶ See “Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations,” U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions*, Pt. I, at 8.2 (July 1988).

⁵⁷ *Id.* at 8.27.

⁵⁸ *Id.* at 8.43, 8.46.

instance, the organization would be required “to develop and submit for approval by the court a plan for avoiding a recurrence of the type of felony offense or offenses of which it was convicted in the instant case or appearing in the criminal history of the organization or its senior management.”⁵⁹ Thus, to a limited extent, this discussion draft recognized compliance programs as a possible measure to prevent additional criminal misconduct by organizations. However, the draft also suggested that such preventative probation “must be approached with caution” and that the court should determine that “the preventative benefits of the sentence outweigh the obvious costs of judicial oversight of private business operations.”⁶⁰

The draft proposal on standards for organizational probation suggested that probation should be used “to minimize the prospect of a repetition of the same or similar criminal behavior.”⁶¹ In advocating for this role for probation, the drafters recognized that the organization, rather than the court, would be better positioned to identify the necessary internal controls to prevent criminal behavior. They explained that:

The central aim of these guidelines is to improve the corporation’s own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed.⁶²

This draft proposal authorized imposition of a term of probation in several instances, including where the “management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely.”⁶³ If probation was imposed under such circumstances, this approach also provided that, as a special condition of probation, the court could order the organization to develop a compliance plan. That plan might require:

- (A) The conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;
- (B) The appointment of independent counsel or the use, if available, of a special committee of independent directors;
- (C) The hiring and use of special consultants;

⁵⁹ *Id.* at 8.46.

⁶⁰ *Id.* at 8.5.

⁶¹ See John C. Coffee, Jr., Richard Gruner, and Christopher Stone, “Draft Proposal on Standards for Organizational Probation,” U.S. Sent’g Comm’n, Discussion Materials on Organizational Sanctions, Pt. II, at 4 (July 1988).

⁶² *Id.* at 7.

⁶³ *Id.* at 10.

- (D) The adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;
- (E) The designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offenses;
- (F) The revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including board of directors.⁶⁴

This draft proposal also required that any proposed compliance plan identify “the names of the organizational officers responsible for its preparation and describe the investigation or other procedures employed in its development.”⁶⁵ The plan should also “be signed by the chief executive, the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate [its terms] to all organizational members whose conduct is affected thereby.”⁶⁶ Finally, the plan should be presented to the board of directors.⁶⁷

The Commission’s staff working paper on criminal sentencing policy for organizations recognized that internal organizational controls on employee behavior are crucial because of the unique nature of the organizational crime (which involves a principal-agent relationship).⁶⁸ Thus, the paper maintained that the penalty system needed to “provide organizations with incentives for compliance expenditures.”⁶⁹ Accordingly, the paper put forward the premise that “[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts.”⁷⁰

⁶⁴ *Id.* at 24–25.

⁶⁵ *Id.* at 35.

⁶⁶ *Id.* at 35–36.

⁶⁷ *Id.* at 36.

⁶⁸ Under U.S. law, a corporation can be held criminally responsible for the illegal conduct of its employees. Corporate criminal responsibility arises when an employee or agent commits a crime while acting within the scope of his employment. See generally Sarah Kelly-Kilgore & Emily M. Smith, Corporate Criminal Liability, 48 Am. Crim. L. Rev. 421, 422 (2011) (“The nature of incorporeal legal entities requires courts to look to employees of the corporation as a means of imputing intent, or mens rea, as well as the guilty act, or actus reus, to the corporation). Because an organization can be held liable even for actions undertaken without management’s knowledge or participation, an organization has an inherent incentive to monitor and prevent corporate wrongdoing. To be effective, the organizational sentencing policy needed to further incentivize self-policing by rewarding such efforts.

⁶⁹ See Jeffrey A. Parker, “Staff Working Paper on Criminal Sentencing Policy for Organizations” (May 1988), U.S. Sent’g Comm’n, Discussion Materials on Organizational Sanctions, Pt. IV, at 9 (July 1988).

⁷⁰ *Id.*

1988 Public Hearings on Organizational Sanctions

Following the public release of the *Discussion Materials*, the Commission conducted two public hearings. The first was held on October 11, 1988 in New York City.⁷¹ At the hearing, the Commission announced that it was in “the very preliminary stages of debating, working out, and discussing the appropriate approach to organizational sanctions, and that [it] intend[ed] to follow the same process . . . [as] in the past and that is to receive as much public input as is possible on each issue we must resolve before we promulgate the guideline for organizations and submit them to Congress.”⁷² The witnesses at the hearing included representatives from the President’s Council of Economic Advisors, staff from the Securities and Exchange Commission, academics, and others.⁷³

During this hearing, an underlying theme developed through the witnesses’ testimony: the importance of internal corporate monitoring as a means of deterring organizational crime. One witness opined that “there is a strong argument for prosecuting a corporation because the organization can best monitor its own agents than can the state, at lower cost.”⁷⁴ Others agreed that internal corporate monitoring could be an effective means to prevent criminal behavior by employees.⁷⁵ Yet another agreed that internal controls were important because “deterrence in a corporate environment comes more from making the environment at the top one that calls out for law enforcement rather than, as in some corporations recently, creating an atmosphere where low-level employees feel that it would be welcome by its higher-ups to cheat or bribe or get extra percentage points by kiting money, things of that sort.”⁷⁶

The Commission continued the public discussion about the development of guidelines for sentencing organizations with another public hearing in Pasadena, California on December 2, 1988.⁷⁷ The witnesses at this hearing represented a broad spectrum of stakeholders interested in organizational sentencing policy, including federal and state agencies, probation officers, academics, the corporate sector, and special interest groups.⁷⁸ Compliance programs in the context of probation continued to

⁷¹ See Notice of Public Hearing on Organizational Sanctions, 53 Fed. Reg. 35407 (Sept. 13, 1988).

⁷² See Opening Statement of William Wilkins, Chair, at 2 (Oct. 11, 1988). A transcript of the hearing is on file with the Commission.

⁷³ For a complete list of the witnesses, see U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, App. B (Aug. 1991).

⁷⁴ See Testimony of John Coffee, Jr., Columbia University School of Law, to the Commission, at 161 (Oct. 11, 1988).

⁷⁵ See Testimony of Thomas Moore, President’s Council of Economic Advisors, to the Commission, at 16 (Oct. 11, 1988); Testimony of Samuel J. Buffone at 70–71 (Oct. 11, 1988); Testimony of Professor Jonathan Baker, Dartmouth University, to the Commission, at 245 (Oct. 11, 1988).

⁷⁶ See Testimony of Samuel J. Buffone, Asbill, Junkin, Myers & Buffone, to the Commission, at 69 (Oct. 11, 1988).

⁷⁷ See Notice of Public Hearing on Organizational Sanctions and Request for Public Comment on Discussion Materials, 53 Fed. Reg. 41644 (Oct. 24, 1988).

⁷⁸ For a complete list of the witnesses, see U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, App. B (Aug. 1991).

be a topic of discussion at this hearing.⁷⁹ For the most part, the witnesses favored involving the organization in the development of a compliance plan. At least one expressed doubts, however, about the utility of such involvement: “[o]ne of the central aims of the guidelines is to encourage voluntary compliance and you indicate it is anticipated that the corporation will normally take a leading role in proposing the conditions and internal controls that should be imposed. In my opinion, this is an overly optimistic view.”⁸⁰

This hearing marked the first public discussion of compliance programs as a factor that should be considered in mitigation of punishment. One witness suggested that in considering sentences “there should be taken into account the extent to which a corporation through its internal governance processes has taken on the responsibility at the highest level to forestall criminal activity.”⁸¹ This witness also talked about creating “a value system within the corporation that says it is more important to stop criminal activity than it is to maximize profits.”⁸² The commissioners’ comments and follow up questions in response to this testimony indicated considerable interest in these ideas.⁸³ Another witness agreed that there should be a difference in the sanction for a corporation who instituted a compliance program with internal audits and internal accounting procedures that were state of the art, conducted surprise audits and inspections to ensure that the procedures were followed, and had no reason to believe that they were not, compared to the sanction for a corporation that did none of those things.⁸⁴ This witness also thought that penalties should distinguish between a situation where an employee covered his criminal activity to avoid discipline versus one where the employee acted pursuant to company policy and practice.⁸⁵

Another witness agreed with the notion that having instituted a compliance program should be recognized in the sentencing process, and he testified that such recognition would provide an incentive for organizations to adopt compliance programs.⁸⁶ This witness’s written statement went even further, providing a framework for analyzing the key objectives and elements of a compliance program (factors that would render such a program *effective* and thus, in his view, worthy of mitigation credit). He laid out four program objectives: (1) regular, timely and uniform reporting

⁷⁹ See Testimony of Jan Chatten-Brown, Special Assistant to the District Attorney, Los Angeles County, to the Commission, at 43 (Dec. 2, 1988); Testimony of Christopher Stone, University of Southern California Law Center, to the Commission, at 100 (Dec. 2, 1988). A transcript of the hearing is on file with the Commission.

⁸⁰ See Testimony of Robert M. Latta, Chief U.S. Probation Officer, Central District of California, to the Commission, at 60 (Dec. 2, 1988).

⁸¹ See Testimony of Robert A.G. Monks, President, Institutional Shareholders Services, to the Commission, at 71 (Dec. 2, 1988).

⁸² *Id.* at 74.

⁸³ See U.S. Sent’g Comm’n, Transcript of Public Hearing on Organizational Sanctions, Pasadena, CA at 73, 83–91 (Dec. 2, 1988) (on file with the Commission). See, e.g., Statement by Hon. William W. Wilkins, Jr., at 73 (“The points you make are very interesting.”); Statement by Hon. Stephen G. Breyer, at 83 (“[I]t’s a very interesting proposal, and I think perhaps practical.”); Statement by Commissioner Helen G. Corrothers, at 83 (“I think the idea is a marvelous one, and I would like to encourage you and do anything I can to help promote it, too.”).

⁸⁴ See Testimony of Charles B. Renfrew, President, Chevron, to the Commission, at 166 (Dec. 2, 1988).

⁸⁵ *Id.* at 150–51.

⁸⁶ See Testimony of Jerome Wilkenfeld, Health, Environmental & Safety Department, Occidental Petroleum, to the Commission, at 172 (Dec. 2, 1988).

from the operating line through senior management to the board of directors; (2) prompt identification and resolution of environmental issues; (3) establishment of preventive programs and procedures; and (4) identification of developing issues or trends.⁸⁷

Public Comment and Working Group Materials

The Commission continued to receive public comment on the issue of compliance programs in the months following publication of the *Discussion Materials*. One of the witnesses from the December 2, 1988 public hearing submitted two proposals for incorporating “affirmative governance” factors into the guidelines:

[The first] would entitle a convicted corporation to a one-level reduction in the applicable fine range for having had an affirmative governance program and internal controls in place at the time of the criminal conduct at issue. The second proposal would permit the court to impose strict conditions of probation on a corporation whose criminal conduct was found to have been encouraged or facilitated by the lack of a compliance program and internal controls.⁸⁸

Additional public comment agreed with the idea that corporate compliance efforts should operate to mitigate punishment.⁸⁹ At least one commentator contended that “[s]ubstantial mitigation should be provided for a corporation that has a meaningful compliance program.”⁹⁰ Others suggested that probation should be readily available as a sentencing option in cases where “a corporate culture . . . encourages the maximization of profits through the payment of bonuses without establishing legally

⁸⁷ See Written Statement of Jerome Wilkenfeld to the Commission at 2 (Dec. 2, 1988) (on file with the Commission). In addition, the key elements of an effective program were identified as: a computerized information and issue management system; a facility assessment program; an internal planning document and timetable; a capital expenditure review system and a legislative and regulatory action program. *Id.*

⁸⁸ See Letter from Robert A.G. Monks, President, Institutional Shareholders Services to Hon. William W. Wilkins, Jr., App. B (Feb. 22, 1989) (on file with the Commission).

⁸⁹ See Letter from John D. Ong, Chairman, Business Roundtable Antitrust and Government Regulation Task Force, to the Commission (Nov. 30, 1988); Preliminary Comments of General Electric Company on the United States Sentencing Commission’s Proposed Organizational Sanctions (Sept. 11, 1989) (on file with the Commission) (stating that the Commission “should, in the end, encourage and reward good corporate governance, not penalize or ignore it.”).

⁹⁰ See Preliminary Comments of General Electric Company on the United States Sentencing Commission’s Proposed Organizational Sanctions, at 12 (Sept. 11, 1989) (on file with the Commission). General Electric Company’s comments also identified three steps toward developing a meaningful compliance program: “[develop] company policies defining and discussing the standards, rules and procedures to be followed by employees,” “communicate [policy] to its employees through training, publication or other effective means,” and have “internal audits, disciplinary mechanisms and some other effective means to report possible wrongdoing, such as ombudspersons or hotlines.” *Id.*

acceptable guidelines for obtaining such profits,”⁹¹ and that such probation should include a requirement to institute a system of “management controls” designed to promote high standards.⁹²

Late in 1988, the Commission formed a working group of private defense attorneys “to develop for the Commission’s consideration a set of practical principles for sentencing organizations.”⁹³ This attorney working group met biweekly and attended commission meetings and briefings.⁹⁴ In May of 1989, the attorney working group “submitted to the Commission its ‘*Recommendations Regarding Criminal Penalties for Organizations*.’”⁹⁵ The working group asserted that “organizational sanctions should serve dual purposes”: “to punish for violations of societal norms” and to “serve a deterrence purpose . . . [by] provid[ing] incentives for organizations to take optimal steps to prevent crimes.”⁹⁶ As a result, the working group identified a number of factors that should ameliorate the criminal fine amount, including “if an organization maintained and enforced effective policies and practices reasonably designed to prevent crimes and if the illegal conduct was unknown (and reasonably unknown) by high-level management.”⁹⁷

The 1989 Draft of Proposed Organizational Guidelines

The Commission’s work on organizational sanctions continued throughout 1989. The Commission received several briefings from the Department of Justice⁹⁸ and its internal staff working group.⁹⁹

⁹¹ See Letter from Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight, Department of Defense, to Paul K. Martin, Communications Director, Commission, at 4 (Dec. 29, 1988) (on file with the Commission).

⁹² The management controls were described as a written code of business ethics and conduct and an ethics training program for all employees; periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of government contracting; a mechanism, such as a hotline, by which employees may report suspected instance of improper conduct, and instructions that encourage employees to make such reports; internal and/or external audits, as appropriate; disciplinary action for improper conduct; timely reporting to appropriate government official of any suspected or possible violations of law in connection with government contracts or other irregularities in connection with such contracts; and full cooperation with any government agencies responsible for either investigation or corrective actions.

⁹³ See U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, at 2 (Aug. 1991).

⁹⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Dec. 13, 1988) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (May 23, 1989) (on file with the Commission).

⁹⁵ See U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, at 2 (Aug. 1991).

⁹⁶ See Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission, at 2 (May 19, 1989) (on file with the Commission). Notably, the group recommended that the Commission limit itself to the promulgation of “flexible policy statements rather than rigid and binding guidelines.” *Id.* at 4.

⁹⁷ *Id.* at 3. Other reductions suggested by the Working Group included steps taken by the organization “to discipline the responsible individuals” and to “make it easier for the criminal justice system to identify and punish responsible individuals,” or “if an organization takes appropriate steps to prevent a recurrence of similar offenses.” *Id.*

⁹⁸ See U.S. Sent’g Comm’n, Public Meeting Minutes (Dec. 13, 1988) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (June 27, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (July, 11, 1989) (on file with the Commission).

⁹⁹ See U.S. Sent’g Comm’n, Public Meeting Minutes (June 14, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (June 26, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public

Informed by these briefings, public comment, and its empirical research, the Commission continued to debate the underlying principles while generating another draft of proposed guidelines for organizations.¹⁰⁰ In October, the Commission unanimously agreed to “distribute the revised organizational sanctions draft to judges and other interested parties” and to publish the draft in the Federal Register with a minimum of sixty days for public comment.¹⁰¹

On November 8, 1989, the Commission published the proposed guidelines, policy statements, and accompanying commentary and requested public comment “on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”¹⁰² The Federal Register notice indicated that the Commission was considering the submission of these amendments to Congress on or before May 1, 1990, and explained that the proposal was “the culmination of an extended period of analysis, consultation, and public comment.”¹⁰³ The proposed guidelines were “presented as a new chapter to the *United States Sentencing Commission Guidelines Manual: Chapter Eight—Sentencing of Organizations*” and included two options for the guideline section that would determine the guideline fine range for most organizational defendants (§8C2.1).¹⁰⁴

“Option I would base the guideline fine range on the greater of loss, gain, or an amount specified based upon the applicable offense level, with percentage adjustments based upon applicable aggravating or mitigating factors.”¹⁰⁵ Option I also provided for specified fine reductions for compliance efforts under one of the following two circumstances. “If the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense,” then the sentencing judge was directed to “subtract 20%” of the previously determined fine amount.” Alternatively, the proposed guideline required the judge to “subtract 10%” “[i]f the organization has taken substantial steps to prevent a recurrence of similar offenses, such as, implementing appropriate monitoring procedures or disciplining any officer, director, employee, or

Meeting Minutes (July 10, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (July 18, 1989) (on file with the Commission).

¹⁰⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (June 26 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (July 18, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (July 25, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 1 (Aug. 1, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 22, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Sept. 12, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Sept. 26, 1989) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Oct. 19, 1989) (on file with the Commission).

¹⁰¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2–3 (Oct. 19, 1989) (on file with the Commission).

¹⁰² See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary and Request for Public Comment, 54 Fed. Reg. 47056 (Nov. 8, 1989) (hereinafter referred to as the 1989 Draft of Proposed Organizational Guidelines).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

agent of the organization responsible for the offense.”¹⁰⁶ Option I did not include any commentary defining the types of policies or procedures that would qualify for these reductions.

Option II proposed that the guideline fine range be based “entirely upon the applicable offense level, with offense level adjustments based upon applicable aggravating or mitigating factors.”¹⁰⁷ Option II provided for fine reductions based upon the same two compliance effort criteria set out for Option I, with the judge directed to “subtract 1 level” in either event.¹⁰⁸ Option II also did not include any commentary defining the types of policies or procedures that would qualify for these reductions. The Commission noted that “the two options may result in substantially different fine levels” and encouraged commentators “to evaluate and comment upon these two options or to suggest an alternative.”¹⁰⁹

Similar to provisions in the earlier discussion materials, the 1989 *Draft of Proposed Organizational Guidelines* also mentioned compliance programs in the context of conditions of probation. One proposed guideline required a sentence of probation if the offense occurred after “the organization or a member of its high-level management had a criminal conviction within the previous five years for [similar mis]conduct” or “the offense indicated a significant problem with the organization’s policies or procedures for preventing crimes.”¹¹⁰ The proposed guideline also stated that problems with the organization’s policies and procedures might be evidenced by “(A) high-level management involvement in, or encouragement or countenance of, the offense; (B) inadequate internal accounting or monitoring controls; or (C) a sustained or pervasive pattern of criminal behavior.”¹¹¹

If the court decided to impose a term of probation under such circumstances, then the proposed guideline recommended that the court impose special conditions requiring the organization to “develop and submit for approval by the court a compliance plan for avoiding a recurrence of the criminal behavior for which it was convicted,”¹¹² and upon approval of such compliance plan, to “notify its employees and shareholders of the criminal behavior and the compliance plan.”¹¹³ The proposed guideline authorized the court to “employ appropriate experts to assess the efficacy of a submitted plan, if necessary,” and required approval of “any plan that appears reasonably calculated to avoid recurrence of the criminal behavior.”¹¹⁴ The proposed guideline further provided that “[t]he organization shall not be required to adopt any compliance measure unless such measure is

¹⁰⁶ *Id.* at 47059.

¹⁰⁷ *Id.* at 47056.

¹⁰⁸ *Id.* at 47060.

¹⁰⁹ *Id.* at 47056. The difference between the two options is best illustrated by an example. Assuming an offense level of 27, the fine range under Option I would be \$2,000,000–\$3,000,000. This fine range would be reduced by 20% if the organization had a compliance program, resulting in a fine range of \$1,600,000–\$2,400,000. By contrast, under Option II, the existence of a program would lead to a one-level reduction in the offense level of 27. The resulting offense level of 26 would yield a fine range of \$80,000,000–\$170,000,000.

¹¹⁰ *Id.* at 47062.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 47062–63.

¹¹⁴ *Id.* at 47062.

reasonably necessary to avoid a recurrence of the type of criminal behavior involved in the offense.”¹¹⁵ This proposed guideline did not include any commentary identifying the elements of an effective compliance program.

February 14, 1990 Public Hearing

The Commission continued to seek public input to inform the development of the organizational sentencing guidelines. On February 14, 1990, the Commission conducted a public hearing on “the proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”¹¹⁶ Seventeen witnesses, with a diversity of backgrounds and interests, testified before the Commission about organizational sentencing policy.¹¹⁷ Among the special interest groups represented were the National Association of Manufacturers, the American Corporate Counsel Association, the U.S. Chamber of Commerce, and the American Bar Association. Representatives from several federal agencies, academics, and the general counsels of various private businesses also appeared. The chair of the Commission’s attorney working group presented testimony on behalf of the working group.

The testimony covered many topics, including compliance programs. Many witnesses urged the Commission to postpone issuing organizational guidelines, and instead issue non-binding policy statements.¹¹⁸ At least one described probation as a “death sentence” for small to medium organizations.¹¹⁹ Nevertheless, even witnesses opposing the issuance of organizational guidelines expressed the opinion that organizational sanctions should account for corporate compliance programs by providing for a substantial decrease in the fine amount imposed on an organization with an effective compliance program.¹²⁰ One witness thought that by striking the proper balance in the guidelines to account for such programs, the Commission could incentivize corporations to develop

¹¹⁵ *Id.*

¹¹⁶ See Notice of Public Hearing, 55 Fed. Reg. 4045 (Feb. 6, 1990). A transcript of the hearing is on file with the Commission.

¹¹⁷ For a complete list of the witnesses, see U.S. Sent’g Comm’n, Supplementary Report on Sentencing Guidelines for Organizations, App. B (Aug. 1991).

¹¹⁸ See, e.g., Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990); Joseph E. diGenova, Defense Attorney Advisory Group on Organizational Sanctions, to the Commission, at 71 (Feb. 14, 1990); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Counsel Association), to the Commission, at 164 (Feb. 14, 1990). At the time, guidelines issued by the Commission were binding on the courts pursuant to 18 U.S.C. § 3553(b). By contrast, the courts were only required to “consider” the Commission’s policy statements. See 18 U.S.C. § 3553(a)(5).

¹¹⁹ See Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990).

¹²⁰ See Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 38 (Feb. 14, 1990) (“A substantial program should receive a substantial reduction in fines”); Joseph E. diGenova, Attorney Working Group on Organizational Sanctions, to the Commission, at 86 (Feb. 14, 1990) (stating that the guidelines should account for compliance programs); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Counsel Association), to the Commission, at 170–71 (Feb. 14, 1990) (arguing that the guidelines should provide for more than a 20% reduction in the applicable fine amount for aggressive compliance programs).

meaningful compliance programs.¹²¹ He reasoned that “corporations themselves are probably better equipped to deal with wrongdoing if in fact they have the proper incentives to do so.”¹²² The testimony also touched on various elements that should be included in a successful compliance program, such as the audit function, an ombudsman or other program to protect employees who report corporation wrongdoing, support of upper management¹²³ and managers to monitor and execute the program.¹²⁴

Immediately following the February 14, 1990 public hearing, the Commission conducted a business meeting and discussed the organizational guidelines.¹²⁵ Members of the attorney working group were present and expressed their views and concerns about organizational sanctions. “The Commission questioned the working group on how to structure the guidelines to provide incentives for corporations to cooperate.”¹²⁶ After hearing the group’s views, the chair of the Commission announced that the “first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality,” and suggested that “the Commission investigate the possibility of beginning with a presumptively high fine range and work downward to zero for a ‘good citizen’ corporation.”¹²⁷ The Commission then came to the consensus that “staff should develop draft guidelines to reflect self-policing through economic incentives as a possible alternative to the current options.”¹²⁸

Unforeseen Delay in Implementation of Organizational Guidelines

Throughout the 1989-90 amendment cycle, the Commission had publicly indicated that it would likely deliver the organizational guidelines, policy statements and accompanying commentary to

¹²¹ See Testimony of Frank H. Menaker, Jr., Vice President, General Counsel, Martin Marietta Corporation, to the Commission, at 114 (Feb. 14, 1990).

¹²² *Id.*

¹²³ *Id.* at 116–17, 120; Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Counsel Association), to the Commission, at 171 (Feb. 14, 1990).

¹²⁴ See Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Counsel Association), to the Commission, at 171 (Feb. 14, 1990).

¹²⁵ See U.S. Sent’g Comm’n, Public Meeting Minutes (Feb. 15, 1990) (on file with the Commission).

¹²⁶ *Id.*

¹²⁷ *Id.* In the 1989 Draft, the fine amounts in the fine table started relatively low, at either \$250 or \$500, respectively. See 54 Fed. Reg. at 47058, 47060. By contrast, in the draft proposed guidelines released in 1990, the starting fines were higher (the three published options started at \$3300, \$4150 or \$5000). See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46603 (Nov. 5, 1990). The Attorney Working Group also advocated for use of a high presumptive fine. See Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission, at 3 (May 19, 1989) (on file with the Commission).

¹²⁸ *Id.*

Congress by May 1, 1990,¹²⁹ and it diligently worked toward that deadline.¹³⁰ Ultimately, however, a series of unrelated events transpired to derail the planned delivery of the organizational guidelines.

First, two of the seven original commissioners resigned before the end of their terms.¹³¹ Additionally, the four-year term of a third expired in October of 1989.¹³² Consequently, as of November of 1989, the Commission had only four voting members remaining and, by statute, all four had to vote in favor of any guidelines submitted to Congress.¹³³ Nevertheless, the Commission continued to work on the organizational guidelines, as evidenced by release of the draft guidelines in November, 1989 and the public hearing held in February of 1990.

Shortly after the February public hearing, representatives of the Business Round Table publicly urged the Commission to “take more time to consider the draft guidelines because of the potential impact on the corporate sector” and to adopt policy statements instead of binding guidelines.¹³⁴ In addition to these public statements to the Commission, members of the Business Round Table were allegedly exerting pressure behind the scenes to delay implementation of the organizational guidelines.¹³⁵

The Commission met on April 10, 1990, to vote on new amendments to the *Guidelines Manual*, including the potential inclusion of organizational guidelines. No new commissioners had been confirmed by the Senate at that point, leaving only four commissioners to promulgate the organizational guidelines if the May 1, 1990, delivery to Congress was to be met. At the April 10 meeting, one of the four voting commissioners, Judge George E. MacKinnon, announced that he

¹²⁹ See, e.g., 54 Fed. Reg. 47056; 55 Fed. Reg. 4045.

¹³⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 26, 1989) (outlining the process for delivery of the organizational guidelines, which included “adoption of guidelines for presentation to Congress in the spring.”) (on file with the Commission).

¹³¹ See Former Commissioner Information, available on the Commission’s website at https://www.ussc.gov/About_the_Commission/About_the_Commissioners/Former_Commissioners.cfm. Commissioner Paul Robinson resigned on February 1, 1988, and Commissioner Michael K. Block resigned on September 1, 1989. Their terms ended October 31, 1989.

¹³² See *id.* Judge (later Justice) Stephen G. Breyer’s term expired in October, 1989.

¹³³ See 28 U.S.C. § 994(a); see also Rule 2.2 of the Commission’s Rules of Practice and Procedure (“Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting.”).

¹³⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Feb. 27, 1990) (on file with the Commission). The Commission received much public comment urging it to refrain from promulgating guidelines for organizations, and suggesting that the Commission had no statutory authority to do so. For further discussion of this issue, see Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future*, 71 Wash. U. L. Q. 205, 212–14 (Summer, 1993).

¹³⁵ See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 101st Cong. 173 (May 24, 1990) (Opening statement of Hon. John Conyers, Jr.).

would “not vote to adopt organizational sanction guidelines during this amendment cycle.”¹³⁶ Judge MacKinnon explained this decision as follows:

The issuance of Organizational Sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies on our seven member Commission. I expressed this concern some weeks ago to representatives of the Department of Justice and had hoped that the vacancies would be filled by now. However, this has not occurred.

Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during this current amendment cycle.¹³⁷

After the May 1 deadline passed, the Subcommittee on Criminal Justice of the Judiciary Committee of the House of Representatives conducted an oversight hearing regarding guidelines for organizations. At the hearing, several congressmen made statements evidencing their support for promulgation of organizational guidelines. For example, the chairman of the subcommittee conducting the hearing stated that “[t]he evidence of corporate fraud and abuse that continues to [mount] in the S&L industry most notably in the last several months, makes the establishment of new sentencing guidelines imperative.”¹³⁸ Another congressman echoed these concerns, noting that when the “Sentencing Reform Act was passed a number of years ago, the intent of Congress was to send a message that corporate criminality would be attacked more vigorously than it ever [w]as before;” however, events that had transpired in the preceding months, including the Commission’s decision not to promulgate organizational guidelines, “[raise] the appearance of the Justice Department caving in to the big business demands at the expense of Congress’ clear mandate to issue guidelines that bring corporate criminals to justice.”¹³⁹

Judge William W. Wilkins, Jr., a judge on Fourth Circuit Court of Appeals and then chairman of the Commission, testified on behalf of the Commission at the hearing. He reported that the President had nominated three individuals to fill the vacancies on the Commission.¹⁴⁰ He briefed the subcommittee on the work that the Commission had already undertaken to develop the organizational guidelines.¹⁴¹

¹³⁶ See U.S. Sent’g Comm’n, Public Meeting Minutes (April 10 and 11, 1990) (on file with the Commission).

¹³⁷ *Id.* The Commission is required to deliver guideline amendments to Congress no later than May 1, in order for such guideline amendments to take effect by November 1, see 28 U.S.C., § 994(p), and their promulgation requires an “affirmative vote of at least four members of the Commission.” See 28 U.S.C., § 994(a). In light of Judge McKinnon’s announcement, the chair did not call for a vote at the April 10, 1990 meeting. See U.S. Sent’g Comm’n, Public Meeting Minutes (April 10 and 11, 1990, on file with the Commission).

¹³⁸ See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 101st Cong. 172 (May 24, 1990) (opening statement of Hon. Charles E. Schumer).

¹³⁹ *Id.* at 173 (Opening statement of Hon. John Conyers, Jr.).

¹⁴⁰ *Id.* at 174 (Testimony of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

¹⁴¹ *Id.* at 175.

He also reported that there was “general agreement among the four Commissioners who have been debating and working on this area on many of the issues that have to be resolved.”¹⁴² According to his testimony, the issues upon which there was agreement included that the individual actors responsible for the criminal act should be prosecuted and sentenced along with the organization, that criminal purpose organizations should forfeit all of their assets, that the guidelines should require full restitution to any victim of organizational crime, and that any sanction on organizations should include complete disgorgement of any illegal gain.¹⁴³ Judge Wilkins noted, however, that “there are other important issues yet to be resolved.”¹⁴⁴ One example of such an issue was whether “a distinction [should] be made between a corporation that had a strong and meaningful compliance program prior to an employee committing a crime in the name of the corporation . . . and a corporation that has no such compliance program.”¹⁴⁵ Judge Wilkins concluded his remarks by assuring the subcommittee members that he was confident that the Commission would promulgate organizational guidelines and that those guidelines “[would] fairly and adequately and appropriately punish organizations which violate our Federal law.”¹⁴⁶

During the question and answer period following Judge Wilkins’ testimony, two commissioners (Judge Wilkins and Judge MacKinnon) discussed concerns about public acceptance of the organizational guidelines.¹⁴⁷ Judge MacKinnon explained that the Commission’s consideration of corporate guidelines has been “vigorously, if not viscosly (sic), opposed by the corporations at practically every meeting we had.”¹⁴⁸ In light of that opposition, it was his view that guidelines passed “by a minimal Commission that was 57 percent at strength” would be subject to attack.¹⁴⁹ Judge MacKinnon assured the congressmen that it was this concern, and not any external pressure brought to bear, that motivated his decision to abstain from a vote on the organizational guidelines until the new commissioners assumed office.¹⁵⁰

Judge Wilkins also advised the subcommittee that the Commission had been moving in the direction of a vote on the organizational guidelines and had been engaged in ongoing discussions of the topic. He described the process involved in developing those guidelines:

[V]arious drafts were being prepared by staff. The Commission had met, for example, and talked about some issues we had learned from the recent public hearing and a draft had been put together, combining generally the thoughts of the four Commissioners that had been discussed at that session.

¹⁴² *Id.* at 176.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 177.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 197–98. Judge MacKinnon did not testify at the hearing but was asked by Congressman Schumer to come forward and explain his decision. *Id.* at 198.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 203.

Other staff members with ideas were working with the staff director to develop various approaches. This thing is a fluid process. You write and draft. You study and you move and reject and move to a different [draft]. [S]o I don't know what the draft would have looked like, but we were moving forward with the documents that had been disseminated, as well as those that were being generated internally by the staff.¹⁵¹

Judge Wilkins assured the subcommittee members that the Commission would “not [defer] reading itself so that once the new Commissioners are on board it may efficiently renew deliberations. . . when we have our vacancies filled we will be in a position to move expeditiously.”¹⁵²

IV. The Commission's Promulgation of Organizational Guidelines

General Drafting Principles of Proposed Organizational Guidelines

At the Commission's direction, the staff working group on organizational sanctions continued its work, and received feedback from the Commission, along with a renewed commitment to schedule another public hearing once new commissioners were appointed.¹⁵³ Three new commissioners were sworn in on July 24, 1990. At the first meeting attended by all members of the now fully constituted Commission, the Commission agreed on a set of general principles to be used in drafting guidelines on organizational sanctions.¹⁵⁴ These principles included a provision that “mitigating factors should be designed to provide incentives for organizations to take steps to minimize the likelihood of criminal behavior and to assure that when such conduct does occur, it is detected and reported by the organizations.”¹⁵⁵ The Commission also discussed agenda items during this meeting, including the “weight to be given such mitigating factors as compliance program and . . . incentives to corporations. . .”¹⁵⁶

In addition to drafting the organizational guidelines in accordance with the newly established principles, the Commission's staff continued to conduct empirical research concerning organizational sanctions during this period.¹⁵⁷ The Commission also decided to create a working group of judges to advise the agency on the development of organizational sanctions.¹⁵⁸ After making various changes

¹⁵¹ *Id.* at 201.

¹⁵² *Id.* at 186 (Written Statement of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

¹⁵³ See U.S. Sent'g Comm'n, Public Meeting Minutes (June 14, 1990) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (July 10, 1990) (on file with the Commission).

¹⁵⁴ See U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

¹⁵⁵ See U.S. Sent'g Comm'n, Supplementary Report on Sentencing Guidelines for Organizations, App. A (Aug. 1991).

¹⁵⁶ See U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

¹⁵⁷ See U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 11, 1990) (on file with the Commission).

¹⁵⁸ See U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 25, 1990) (on file with the Commission).

to a set of draft guidelines, the Commission agreed to publish both the Commission's draft and a proposal from the Department of Justice.¹⁵⁹

November 1990 Draft of Proposed Organizational Guidelines

On November 5, 1990, the Commission published guidelines, policy statements, and accompanying commentary relating to the sentencing of organizations and sought public comment "on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations."¹⁶⁰ The Commission also solicited public comment on "the suggested organizational guidelines prepared by the U.S. Department of Justice."¹⁶¹

In the published Commission draft, compliance programs were recognized as a mitigating factor that should lead to a reduction of the applicable fine range. Two options were included in the Commission's proposal with respect to the compliance program mitigator. Under the first, having "an effective program to prevent and detect violations of law" added three points to the mitigation score.¹⁶² The second option added two points to the mitigation score if

the organization prior to the offense had, and after the offense continues to maintain, an effective program to prevent and detect violations of law, and no policy-setting or legal compliance official within the organization or other person who exercised substantial managerial authority in carrying out the policies of the organization had knowledge of the offense, or would have had such knowledge had such person performed his or her responsibilities as contemplated by the compliance plan[.]¹⁶³

With respect to both options, the published commentary defined "an effective program to prevent and detect violations of law" as "a program that has been reasonably designed, implemented, and enforced so that it will generally be effective in preventing and detecting criminal conduct" and further provided that "[f]ailure to prevent or to detect the instant offense does not, by itself, mean that

¹⁵⁹ See U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (Oct. 23, 1990) (on file with the Commission).

¹⁶⁰ See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46601 (Nov. 5, 1990).

¹⁶¹ *Id.* The Department of Justice's proposal included both aggravating and mitigating factors that would increase or decrease the offense level used for determining the fine level. Notably, the Department's proposal did not identify the existence of an effective program to prevent and detect violations of law as a mitigating factor but allowed for a one level reduction in the offense level if "the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense" or "the organization substantially cooperated in the investigation, or if the organization has taken substantial steps to prevent a recurrence of similar offenses, such as implementing appropriate monitoring procedures." *Id.* at 46612. The Department's proposed commentary did not contain language explaining any of the terms used, such as "bona fide policies and programs" or "substantial steps to prevent recurrence."

¹⁶² *Id.* at 46604. In the published Commission draft, this mitigation score was used to determine the minimum and maximum multipliers used to compute the applicable guideline fine range. It operated much like the culpability score in the current version of the guidelines. See USSG §8C2.5. Unlike the culpability score, however, the Commission's draft proposals did not include increases in the multipliers based upon aggravating factors.

¹⁶³ *Id.* at 46606.

the program was not effective.”¹⁶⁴ It also made clear that “[t]he hallmark of [such a program] is that the organization exercised, prior to the offense, and continues to exercise due diligence in seeking to prevent and detect criminal conduct by its agents. Due diligence requires at a minimum that the organization has taken at least seven general types of steps to assure compliance with the law.”¹⁶⁵ Those steps were:

“[T]he organization must have had policies defining the standards and procedures to be followed by its agents and employees;”¹⁶⁶

“[A] specific high-level person within the organization must have been designated and assigned ultimate responsibility to ensure compliance with those standards and procedures;”¹⁶⁷

“[T]he organization must have used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities;”¹⁶⁸

“[T]he organization must have effectively communicated its standards and procedures to agents and employees, e.g., by requiring participation in training programs and by the dissemination of publications;”¹⁶⁹

“[T]he organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to ferret out criminal conduct by its agents and employees and by having in place and publicizing a reporting system whereby agents and employees can report criminal conduct within the organization without fear of retribution;”¹⁷⁰

“[T]he standards must have been consistently enforced through appropriate disciplinary mechanisms;”¹⁷¹ and

“[A]fter an offense has been detected, the organization must have taken all reasonable steps to prevent further similar offenses.”¹⁷²

The published commentary also stated that an organization would not “ordinarily qualify” for the effective compliance program mitigating factor unless it also qualified for the mitigating factor requiring that no compliance personnel or person with “substantial managerial authority” knew about the violation.¹⁷³ Credit for the “no knowledge” mitigating factor would be disallowed “if any person who held a policy-setting or legal compliance position within the organization or who exercised

¹⁶⁴ *Id.* at 46605.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 46604.

substantial managerial authority in carrying out the policies of the organization became aware of the offense [or through the exercise of due diligence should have known about the offense] and the organization subsequently failed to make a timely report of the offense to appropriate government authorities.”¹⁷⁴ Persons holding legal compliance positions were broadly defined to include “inside counsel and any other person who has significant responsibility for ensuring that the organization complies with requirements imposed by law.”¹⁷⁵

As in earlier drafts, the November 5, 1990 draft also included implementation of a compliance plan as a possible condition of probation.¹⁷⁶ The Commission requested that public comment on the draft be received no later than December 10, 1990, and announced that it would conduct a public hearing on organizational sanctions on December 13, 1990, in Washington, D.C.¹⁷⁷ On December 3, 1990, the Commission extended the public comment period through January 10, 1991.¹⁷⁸

December 13, 1990 Public Hearing

The Commission held the final hearing on the organizational guidelines, as planned, on December 13, 1990, in Washington, D.C. Thirteen witnesses with varied backgrounds offered testimony.¹⁷⁹ The witnesses, including those who opposed promulgation of guidelines, generally favored including an effective compliance program as one of the mitigating factors. One witness told the Commission that “[e]ncouraging corporations to have effective compliance programs should be the highest priority of this Commission.”¹⁸⁰ Witnesses expressed the view that giving credit for an effective compliance program would deter future criminal activity¹⁸¹ and would lead to widespread acceptance of compliance programs.¹⁸² Others agreed, but expressed concerns that compliance programs were not receiving sufficient credit under the proposed guidelines as drafted.¹⁸³ Still others expressed the view

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 46605.

¹⁷⁶ *Id.* at 46610.

¹⁷⁷ *Id.* at 46600.

¹⁷⁸ See Notice of Extension of Public Comment Period for Draft Sentencing Guidelines for Organizational Defendants, 55 Fed. Reg. 49971 (Dec. 3, 1990).

¹⁷⁹ For a complete list of the witnesses, see Commission, Supplementary Report on Sentencing Guidelines for Organizations, App. B (Aug. 1991). A transcript of the hearing is on file at the Commission.

¹⁸⁰ See Testimony of Griffin Bell, King & Spaulding, to the Commission, at 7 (Dec. 13, 1990).

¹⁸¹ *Id.* at 17.

¹⁸² See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 131 (Dec. 13, 1990) (if the guidelines give credit for compliance programs every “major or minor corporation in the country will adopt every one of these points.”).

¹⁸³ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 69–71 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 90 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

that an effective program and voluntary disclosure to authorities should not be linked, but rather each should be given separate credit.¹⁸⁴

Several witnesses thought that the Commission correctly identified the essential elements of an effective compliance program in the published commentary.¹⁸⁵ A few offered suggestions for strengthening the definition: programs should be adequately funded; should have enough teeth to be enforced; should have widespread publication within an organization; should not be simply paid lip service;¹⁸⁶ and should develop and publicize a system for reporting criminal conduct without retribution.¹⁸⁷ At least one witness expressed some concern that the definitions in the commentary regarding “persons holding legal compliance positions” might include corporate counsel, thereby having a possible impact on the attorney–client privilege.¹⁸⁸

Final Efforts to Refine the Organizational Guidelines Draft Proposal

Following the public hearing, the Commission continued to meet to discuss the organizational guidelines. On December 17, 1990, the Commission met with the judges’ working group on organizational sanctions to solicit their input on the draft proposals.¹⁸⁹ The Commission directed its staff to meet with representatives of the Department of Justice “to discuss issues and rationales” in the respective drafts.¹⁹⁰ Following those meetings, the Commission considered and discussed a revised draft prepared by its staff, after which it directed the staff “to take the most recent draft and make every effort to simplify from an application perspective.”¹⁹¹ The Commission also agreed to have a group of federal probation officers apply the draft guidelines and submit written comments on their application.¹⁹²

The Commission also continued to receive and consider public comment on the draft guidelines. Some public comment echoed the concerns expressed at the public hearing about the weight given to

¹⁸⁴ See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 133–34 (Dec. 13, 1990); Testimony of Andrew L. Frey, Mayer, Brown & Platt, to the Commission, at 194 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

¹⁸⁵ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 78–79 (Dec. 13, 1990); Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 99 (Dec. 13, 1990).

¹⁸⁶ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 79–80 (Dec. 13, 1990).

¹⁸⁷ See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990).

¹⁸⁸ See Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 249 (Dec. 13, 1990).

¹⁸⁹ See U.S. Sent’g Comm’n, Public Meeting Minutes (Nov. 27, 1990) (announcing meeting with judges’ working group) (on file with the Commission).

¹⁹⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 5 (Jan. 3, 1991) (on file with the Commission).

¹⁹¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Mar. 12, 1991) (on file with the Commission).

¹⁹² *Id.*

compliance programs and the linkage to voluntary disclosure.¹⁹³ While receiving and considering the public comment, the Commission continued to refine the proposed guidelines.¹⁹⁴

Vote to Promulgate Organizational Guidelines and Resulting Guideline Provisions

On April 26, 1991, the Commission resumed its consideration of proposed organizational guidelines. At this meeting, Judge MacKinnon highlighted a piece of public comment received from the National Association of Manufacturers recognizing “that a statutory imperative for mandatory guidelines exists in 28 U.S.C. § 994(b)(1).”¹⁹⁵ Judge Wilkins briefed the Commission on an inquiry from the House Committee on the Judiciary about the organizational guidelines.¹⁹⁶ He advised the Commission that in his response to the inquiry, he had noted that “the Commission’s efforts in this area have been deliberate and thorough: requesting and receiving input from interested members of the business community, government and academia, holding public hearings and conducting extensive empirical research.”¹⁹⁷ His response to the inquiry also had mentioned “the pledge from the Commission to promulgate organizational guidelines during the 1991 cycle and the Commission’s intent to adhere to this schedule.”¹⁹⁸

Following this discussion, the Commission resumed deliberations about the proposed guidelines. The Commission voted on language changes, additions, and deletions to various sections of Chapter Eight. Judge Wilkins then moved to promulgate “the Organizational Sanction guidelines as amended and submit to Congress.”¹⁹⁹ The motion passed unanimously.²⁰⁰ Judge Wilkins concluded the

¹⁹³ See, e.g., Letter from James W. Crowley, Vice President, Secretary and General Counsel, and Gary L Hopkins, Deputy General Counsel, E-Systems, to the United States Sentencing Commission (Dec. 7, 1990); Letter from Paul A. Rancour, Senior Vice-President and General Counsel, American Brands Inc. to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 23, 1991); Letter from Charles A. Tausche, Sears, Roebuck and Co., to Hon. William W. Wilkins, Jr., Chairman, and Members of the U.S. Sentencing Commission (April 25, 1991); Letter from Arthur Levine, Department of Health and Human Services, to the Commission (undated); Letter from David R. Bergerson, Vice President and General Counsel, Honeywell Inc. to the Commission (April 23, 1991); Letter from J. Bruce Ipe, Vice President and General Counsel, First Brands Corporation, to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 20, 1991).

¹⁹⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (April 9, 1991) (reflecting discussion of a revised senior staff draft on organizational sanctions) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Apr. 16, 1991) (reflecting discussion of an April 12 draft on organizational sanctions and approval of wording changes) (on file with the Commission).

¹⁹⁵ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (April 26, 1991) (on file with the Commission). As previously noted, the Commission had received public comment suggesting that it lacked the authority to issue guidelines for organizational offenses. See Ilene H. Nagel & Winthrop M. Swenson, *supra* note 134.

¹⁹⁶ The House Committee on the Judiciary requested consultation with the Commission prior to Commission action on the organizational guidelines.

¹⁹⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Apr. 26, 1991) (on file with the Commission).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* Although the motion passed unanimously, two commissioners made statements following the vote indicating disagreement with certain policy decisions reflected in Chapter Eight. Nevertheless, “the corporate sanctions draft was the workproduct of all Commissioners.” See *id.* (reflecting comments by Commissioners MacKinnon, Nagel and Mazzone) (on file with the Commission).

meeting by expressing “appreciation to the staff and all outside parties who contributed to the production of these guidelines.”²⁰¹

The newly promulgated Chapter Eight, titled “Sentencing of Organizations,” took effect on November 1, 1991. The guidelines reflected the general principles and approach that the Commission had settled on over many months of deliberation. Among other things, the fine range would be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally would be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table and culpability generally would be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization’s actions after an offense has been committed.²⁰² Additionally, based upon the feedback and discussion regarding the impact of an effective compliance program, the guidelines also authorized a three point reduction in the culpability score, resulting in a reduced final fine range, if “the offense occurred despite an effective program to prevent and detect violations of law.”²⁰³

The commentary in Chapter Eight defined an effective program to prevent and detect violations of law as “a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.”²⁰⁴ The commentary further noted that the “[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not effective.”²⁰⁵ The commentary described the “hallmark of an effective program to prevent and detect violations of law” as the organization’s exercise of “due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”²⁰⁶ The commentary further provided:

Due diligence requires at a minimum that the organization must have taken the following types of steps:

- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
- (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
- (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

²⁰¹ *Id.* at 7.

²⁰² See USSG, Ch. Eight, intro. comment. (Nov. 1, 1991).

²⁰³ See USSG §8C2.5(f) (Nov. 1991).

²⁰⁴ See USSG §8A1.2, comment (n.3(k)) (Nov. 1991).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

- (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
- (5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
- (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses — including any necessary modifications to its program to prevent and detect violations of law.²⁰⁷

Because of the wide variety of organizations potentially covered by the guidelines, both in size and type, the Commission recognized that a determination of whether a particular organization had an effective program to prevent and detect violations of law would depend on certain factors, including “the size of the organization,” “the likelihood that certain offenses may occur because of the nature of its business,” and the organization’s prior history.²⁰⁸ The Commission also accounted for the existence of applicable industry practices or standards called for by any applicable governmental regulation.²⁰⁹ The failure to incorporate or follow such practices or standards would “[weigh] against a finding of an effective program to prevent and detect violations of law.”²¹⁰

The guidelines further recognized the importance of an effective program to prevent and detect violations of law by requiring the court to impose a term of probation “if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law.”²¹¹ Finally, the guidelines provided that development and implementation of such a program could also be ordered as a condition of probation.²¹²

²⁰⁷ *Id.* The Commission retained the seven steps reflected in the November 5, 1990 draft, but refined and added language to the descriptions of those steps.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See USSG §8D1.1(a)(3) (Nov. 1991).

²¹² See USSG §8D1.4(c)(1) (Nov. 1991).

Under the promulgated guideline scheme, even if an organization had instituted an effective program to prevent and detect violations of law, it would nevertheless be ineligible for the culpability score reduction if

an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense.²¹³

In addition to this automatic bar for the involvement of high-level personnel, the guidelines provided that “[p]articipation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.”²¹⁴ An unreasonable delay in reporting the offense to appropriate governmental authorities once the organization became aware of it would also bar application of the culpability score reduction for having an effective program to prevent and detect violations of law.²¹⁵

The Commission expressed the aspiration that “organizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance.”²¹⁶ Moreover, if a corporate crime was committed, “the sentencing guideline incentives would drive the corporate actor toward swift and effective disclosure and other remedial actions.”²¹⁷

²¹³ See USSG §8C2.5(f) (Nov. 1991). The term “high-level personnel” was defined as “individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization,” and specifically included “a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.” See USSG §8A1.2, comment (n.3(b)). “High-level personnel of the unit of the organization” was defined as “agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high level personnel of the entire organization, four points (rather than three) would be added under subsection (b)(2).” See USSG §8C2.5, comment. (n.3) (Nov. 1991).

²¹⁴ See USSG §8C2.5(f) (Nov. 1991). The term “substantial authority personnel” was defined as “individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. It includes high-level personnel, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization’s management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). The Commission concluded that whether “an individual falls within this category must be determined on a case-by-case basis.” See USSG §8A1.2, comment (n.3(c)).

²¹⁵ See USSG §8C2.5(f) (Nov. 1991).

²¹⁶ See John R. Steer, *Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit* (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma, at 8 (April 26, 2001)), available at https://www.uscc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/corpbbehavior2.pdf.

²¹⁷ *Id.*

The Commission also “hoped this punishment scheme initiative would help contribute over time, to a more healthy, values-based way of doing business in America.”²¹⁸

V. The 2004 Amendments to the Organizational Guidelines

A Decade of Post-Promulgation Activities Relating to the Organizational Guidelines

Following promulgation of the organizational guidelines in 1991, the Commission continued to consider the issue of guideline fine provisions for organizations with respect to food and drug²¹⁹ and environmental offenses.²²⁰ Although the Commission had previously agreed to publish the proposal submitted by the advisory group on environmental sanctions,²²¹ in 1994, it deferred further action on organizational guidelines for both food and drug and environmental offenses until after the appointment of new commissioners.²²² To inform further consideration of the organizational guidelines, the Commission voted to hold a symposium on corporate crime, which would be designed to focus on four major issue areas: “(i) how companies and industries are responding to [Commission] incentives to establish compliance programs; (ii) how collateral penalties can affect guideline incentives; (iii) complementary government policies that can strengthen good corporation citizenship; and (iv) different models demonstrating how government can be helpful.”²²³

In late 1994, four new commissioners joined the Commission.²²⁴ Thereafter, the Commission decided to “[engage] in a [two year]comprehensive guideline assessment and simplification effort.”²²⁵ In light of these efforts, the Commission opted to forego promulgating any new guideline amendments for one year,²²⁶ and it also tabled any discussion of the organizational guidelines.²²⁷ The

²¹⁸ *Id.* at 8–9.

²¹⁹ See, e.g., Food and Drug Working Group Final Report, available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/food.htm.

²²⁰ See Report from Advisory Group on Environmental Sanctions, available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/ENVIRON.pdf.

²²¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Nov. 30, 1993), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-november-9-1993>.

²²² See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (May 3, 1994), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-may-3-1994>. The terms of Judge William W. Wilkins, Jr. and Ilene H. Nagel expired that year and there were two additional vacancies.

²²³ See U.S. Sent’g Comm’n, Public Meeting Minutes (July 26, 1994, on file with the commission).

²²⁴ In November, 1994, Judge Richard P. Conaboy assumed the chairmanship of the Commission, joined by three other new commissioners: Judge Deanell R. Tacha, Michael Goldsmith, and Wayne A. Budd.

²²⁵ See Notice of Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Commentary, and Request for Public Comment, 61 Fed. Reg. 79 (Jan. 2, 1996).

²²⁶ *Id.*

²²⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (May 8, 1995), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-may-8-1995> (reflecting request to give environmental organizational guidelines lower priority because of guideline simplification efforts); see also U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation (Sept. 1995), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf.

Commission nevertheless continued with plans to conduct the corporate crime symposium, which was held in September of 1995.²²⁸

At the symposium, the Commission explained that the organizational guidelines embodied a “carrot and stick” approach that had emerged from the Commission’s acceptance of three facts: 1) vicarious liability means not all corporate defendants are alike; 2) responsible corporate actions can foster crime control; and 3) sentencing guidelines are rules that can incentivize good conduct. Moreover, the Commission’s stated objectives for structuring the guidelines as it did were not only to define a model for good corporate citizenship but also to use the model to make corporate sentencing fair and to create incentives for companies to take crime controlling action.²²⁹

Senator Edward M. Kennedy, a keynote speaker at the symposium, noted the significance of the organizational guidelines. Although asserting that the “guidelines are largely untested,” he agreed that “commendable efforts are underway to help ensure that companies doing business in this country are, in fact, good corporate citizens.”²³⁰ Other panelists discussed various survey results, which suggested that the guidelines were beginning to impact organizations’ efforts to prevent and detect violations of law.²³¹

Among other things, the symposium included a discussion of the role of ethics as a component of effective compliance programs.²³² The discussions at the symposium led to various suggestions for

²²⁸ The Commission held the symposium in Washington, D.C., and 450 participants attended, including “a wide range of federal enforcement officials, representatives of Fortune 500 as well as smaller corporations, private attorneys and other consultants who advise organizations, and academics who focus on business ethics and crime.” See U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at i (Sept. 1995). The agenda included panels discussing corporate experiences in developing “effective” compliance programs, “best practices,” and evolving compliance standards.

²²⁹ See Win Swenson (Moderator), The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance, U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 28–32 (Sept. 1995), available at https://www.uscc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf.

²³⁰ See Edward M. Kennedy, Keynote Address, U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 119 (Sept. 1995).

²³¹ See generally, Cameron Counters (Moderator), A Presentation of Empirical Research on Compliance Practices: What Companies Say they Are Doing – What Employees Hear, U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 123–91 (Sept. 1995).

²³² See Mary E. Didier (Moderator), Bringing Carrots and Sticks in House: The Role of Ethics, Incentives, and Private “Inspectors General” in Achieving “Effective” Compliance, in U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 174–96 (1995) (transcript of panelists’ discussion on the role of ethics in compliance programs); Win Swenson (Moderator), Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference, in U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 375–400 (Sept. 1995) (transcript of panelists’ discussion on role of ethics in compliance programs).

future commission action in this area.²³³ In light of other policy priorities, however, the Commission did not immediately promulgate amendments to Chapter Eight of the *Guidelines Manual* in response to those suggestions.²³⁴

Rekindled Interest in Possible Amendments to the Organizational Guidelines

Between 1996 and 1998, the terms of three commissioners expired and two others resigned, leaving the agency to operate without commissioners for a period of 13 months. The President nominated seven new commissioners to serve staggered terms, and the slate was confirmed by the Senate on November 10, 1999. Judge Diana E. Murphy, the new chair of the Commission, and the other commissioners “became aware of the wide impact the [organizational] Guidelines have on organizations ...extend[ing] far beyond their use in the context of criminal cases.”²³⁵ Not only did the organizational guidelines influence the prosecutorial policy of the Department of Justice, they also influenced the policies of other regulatory agencies.²³⁶ In addition, the organizational guidelines were “credited with helping to create an entirely new job description: the Ethics and Compliance Officer.”²³⁷

The Commission began to consider whether ethics was “an *implicit* component of effective compliance programs, or whether ethics should now *explicitly* be incorporated into the compliance

²³³ See U.S. Sent’g Comm’n, Public Meeting Minutes (Oct. 11, 1995), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-october-11-1995>.

²³⁴ The symposium did lead to increased training efforts. See U.S. Sent’g Comm’n, Public Meeting Minutes, at 1 (Nov. 21, 2000), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-november-21-2000> (“Commissioner Steer stated that the previous Commission had entered into a partnership with the [Ethics Officer Association] to hold a series of regional programs featuring the organizational guidelines”). Moreover, the Commission continued to collect and report on organizational sentencing data. See, e.g., U.S. Sent’g Comm’n, 1996–2001 Sourcebook of Federal Sentencing Statistics, available at <https://ussc.gov/about/annual-report/archive>.

²³⁵ See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 698 (2002). See also *In re Caremark International Inc. Derivative Litigation*, Del. Chancery C.A. 13670, 698 A.2d 959, 969 (Sept. 25, 1996) (noting that “[t]he Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law promptly and to report violations to appropriate public officials when discovered, and to take voluntary remedial efforts.”).

²³⁶ See Diana E. Murphy, *supra* note 235, at 712 (internal citations omitted).

²³⁷ *Id.* at 713 (internal citations omitted).

program criteria in the organizational guidelines.”²³⁸ Commentators offered the new commissioners additional suggestions for amendments to Chapter Eight.²³⁹

Shortly after the tenth anniversary of the organizational guidelines and in response to feedback on the operation of the guidelines,²⁴⁰ the Commission solicited public input on the scope, potential membership, and possible formation of an ad hoc advisory group to consider any “viable methods to improve the operation of these guidelines.”²⁴¹ At the time, one commissioner remarked that although the organizational guidelines had been an “overwhelming success,” they could still be improved.²⁴²

On February 21, 2002, the Commission announced “the formation of an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations,” and it asked the group to “place particular emphasis on examining the criteria for an effective program to ensure an organization’s compliance with the law.”²⁴³ The fifteen member group was “composed of industry representatives, scholars, and experts in compliance and business ethics.”²⁴⁴ The Commission formed

²³⁸ *Id.* at 714 (emphasis supplied). Judge Murphy cited authorities that defined a good compliance program as one that “emphasizes values and moral responsibility” while a good ethics program “must help employees to know and obey the law.” *Id.* at 714 (internal citations omitted). See also Win Swenson (Moderator), Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference, in U.S. Sent’g Comm’n, Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation, at 380 (Sept. 1995) (“A compliance program sets basic rules and procedures and can be summed up in a checklist. An ethics program addresses values and decisions in grey areas.”)

²³⁹ Commentators included the Health Care Compliance Association, the Practising Law Institute, and the Alliance for Health Care Integrity, among others. Comments were made in writing and orally to the Commission. For a more detailed discussion of these suggestions, see Diana E. Murphy, *supra* note 235, at 716–18.

²⁴⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (Nov. 21, 2000), available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-november-21-2000>; U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 28, 2001, on file with the commission). See also Diana E. Murphy, *supra* note 235, at 716–18.

²⁴¹ See Notice of Policy Priorities for Amendment Cycle Ending May 1, 2002; Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Organizational Guidelines; and Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Issues Related to the Impact of the Sentencing Guidelines on Native Americans in Indian Country, 66 Fed. Reg. 48306 (Sept. 19, 2001).

²⁴² See U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 10, 2001) (reflecting statement made by Judge Ruben Castillo) available at, <https://www.ussc.gov/policymaking/meetings-hearings/notice-september-10-2001>.

²⁴³ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at <https://www.ussc.gov/about/news/press-releases/february-21-2002>.

²⁴⁴ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at <https://www.ussc.gov/about/news/press-releases/february-21-2002>. The chair of that advisory group, B. Todd Jones, Esq., currently serves as both the United States Attorney for the District of Minnesota and the Acting Director of the Bureau of Alcohol, Tobacco and Firearms. The other members of the advisory group included both the current Attorney General, Eric Holder, Esq., and the current Inspector General for the Department of Justice, Michael Horowitz, Esq. For a complete list of Advisory Group members and relevant backgrounds, see U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, App. A (Oct. 7, 2003), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrprpt/AppA.pdf.

the advisory group for a term of 18 months “to foster dialogue about possible refinements to the organizational guidelines.”²⁴⁵

The Commission’s decision to form this advisory group turned out to be a prescient one. Five months after the formation of the advisory group, Congress passed the Sarbanes-Oxley Act of 2002.²⁴⁶ Section 805 of the Sarbanes-Oxley Act directed the Commission to “review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, [C]hapter 8, are sufficient to deter and punish organizational criminal misconduct.” The Commission used the advisory group’s work, as discussed below, to inform its response to that directive.

The Work of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines

The advisory group immediately convened and decided, among other things, to solicit public comment “on the nature and scope of issues which [it] might wish to address during its (18) eighteen-month term.”²⁴⁷ The advisory group informed the public that it did “not intend to consider fines for environmental crimes committed by organizations, nor the structure of the fine tables generally.”²⁴⁸ Rather, its primary focus would be “on the application of the criteria for an effective compliance program, as listed in Application Note 3(k) to §8A1.2 of the Sentencing Guidelines, and the ways in which those criteria affect the operation of Chapter Eight as a whole.”²⁴⁹ Nonetheless, the advisory group made clear that it would “also consider whether there are other features of the organizational guidelines that merit review or change.”²⁵⁰

In response to this inquiry, the advisory group received public comment from a variety of sources.²⁵¹ This public comment and “its own initial evaluation of both the terminology and the application of Chapter Eight of the Guidelines” led the advisory group to issue an additional request for public comment.²⁵² The advisory group explained that it had “identified several specific areas of concern and generated a list of key questions in an effort to focus and stimulate additional public comment prior to

²⁴⁵ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at <https://www.ussc.gov/about/news/press-releases/february-21-2002>.

²⁴⁶ Pub. L. 107–204, 116 Stat. 745 (July 30, 2002).

²⁴⁷ See Advisory Group for Organizational Sentencing Guidelines, Request for Public Comment (Mar. 19, 2002), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/_RPC_3_02.htm.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See Public Comment Received by Advisory Group for Organizational Sentencing Guidelines in Response to Request for Public Comment (Mar. 19, 2002), available at <https://www.ussc.gov/guidelines/organizational-guidelines/public-comment-received-advisory-group-organizational-guidelines-response-request-public-comment>.

²⁵² See Advisory Group for Organizational Sentencing Guidelines, Request for Additional Public Comment Regarding the U.S. Sentencing Guidelines for Organizations (Aug. 21, 2002), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom8_02.pdf.

preparing its report to the United States Sentencing Commission.” Among the specific questions asked was:

Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would an organization’s performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight?²⁵³

The advisory group received a robust response to the request for additional public comment.²⁵⁴ At a full day public hearing held on November 14, 2002, “invited representatives with a broad range of perspectives submitted oral and written testimony,”²⁵⁵ which further informed the advisory group’s work. The advisory group announced that the public comment period would close on December 1, 2002, after which it would begin work on deciding what, if anything, should be amended in Chapter Eight.²⁵⁶ The advisory group’s work also involved “extensively canvass[ing] the practice commentary and scholarly literature, survey[ing] current representatives of the U.S. Department of Justice regarding prosecutorial decision making, and familiariz[ing] itself with the policies of a variety of other governmental agencies and departments.”²⁵⁷ The advisory group “continuously kept abreast of Congress’s response to [high-profile] corporate scandals, most notably in the Sarbanes-Oxley Act of 2002, as well as the relevant output of public and private regulators.”²⁵⁸

On October 7, 2003, the advisory group presented a comprehensive report to the Commission “intended to assist the [Commission] in its future consideration of potential amendments to Chapter Eight of the federal sentencing guidelines.”²⁵⁹ The report concluded that “the organizational sentencing guidelines have been successful in inducing many organizations, both directly and

²⁵³ *Id.*, Question 6.

²⁵⁴ See Public Comment Received in Response to Additional Public Comment Requested (Oct. 15, 2002), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom_1002/PC_1002.htm.

²⁵⁵ See U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 1 (Oct. 7, 2003). The written testimony submitted and a transcript of the hearing is available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/Advisory_Group_Organizational_Guidelines.cfm.

²⁵⁶ Transcript, Public Hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Plenary Session I, at 6–7 (Nov. 14, 2002) (Opening Remarks by B. Todd Jones, Chair), available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/ph11_02/plenary1.pdf.

²⁵⁷ See U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 1 (Oct. 7, 2003).

²⁵⁸ See U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 2 (Oct. 7, 2003). During the period in which the advisory group was evaluating the efficacy of the organizational guidelines, financial scandals erupted at large public companies such as Enron, WorldCom, Tyco International, and Adelphia Communications. *Id.* at 35–7 (internal citations omitted). The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, was enacted partly in response to such events.

²⁵⁹ See U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 2 (Oct. 7, 2003). The presentation took place at a public hearing. A transcript of the proceedings is available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrprpt/1007_Brief.pdf.

indirectly, to focus on compliance and to create programs to prevent and detect violations of law.”²⁶⁰ Notwithstanding this success, the advisory group also maintained that “changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in *effective* programs to prevent and detect violations of law.”²⁶¹ Among other things, the advisory group believed that the organizational guidelines should “better address the role of organizational leadership in ensuring that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose,” and should be updated to reflect the “best practices” in the compliance field.²⁶²

The report made several suggestions relating to compliance programs. First, the advisory group recommended that the Commission “promulgate a stand-alone guideline at §8B2.1 defining an ‘effective program to prevent and detect violations of law.’”²⁶³ The advisory group also recommended that, when promulgating the suggested standalone guideline, the Commission make the following modifications and additions to the definition of “effective program to prevent and detect violations of law”:

Emphasize the importance within the guidelines of an organizational culture that encourages a commitment to compliance with the law

Provide a definition of “compliance standards and procedures”

Specify the responsibilities of an organization’s governing authority and organizational leadership for compliance

Emphasize the importance of adequate resources and authority for individuals within organizations with the responsibility for the implementation of the effective program

Replace the current terminology of “propensity to engage in violations of law” with language that defines the nature of an organization’s efforts to determine when an individual has a reason to know, or history of engaging in, violations of law

Include training and the dissemination of training materials and information within the definition of an “effective program”

Add “periodic evaluation of the effectiveness of a program” to the requirement for monitoring and auditing systems

Require a mechanism for anonymous reporting

²⁶⁰ See U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 3 (Oct. 7, 2003).

²⁶¹ *Id.* (emphasis in original).

²⁶² *Id.*

²⁶³ *Id.* at 3–5.

Include the phrase “seek guidance about potential or actual violations of law” within the criteria in order to more specifically encourage prevention and deterrence of violations of law as part of compliance programs

Provide for the conduct of ongoing risk assessments as part of the implementation of an “effective program”²⁶⁴

Notable, the advisory group recommended against an increase in the culpability score of sentenced organizations for the *absence* of an “effective program,” reasoning that such an increase might have a disparate impact on small organizations.²⁶⁵

The advisory group proposed specific changes to the language of the guidelines regarding compliance programs, in light of its conclusions. These suggested changes were set out in a proposed amendment, which was included in an appendix to the report.²⁶⁶ The report also included other proposed changes to Chapter Eight.²⁶⁷

Commission’s Response to the Ad Hoc Advisory Group’s Report on the Organizational Sentencing Guidelines

Upon receipt of the advisory group’s report, the Commission immediately began to consider the conclusions and proposed amendments set out in the report.²⁶⁸ The Commission placed the report on its website and made it available to the public through its Public information Office.²⁶⁹ On November 5, 2003, one month after receiving the advisory group’s report, the Commission unanimously voted to “publish for comment a proposed amendment to Chapter 8 to provide greater guidance, emphasis, and clarity regarding effective compliance programs.”²⁷⁰ The published proposed amendment “would move the seven minimum steps for a compliance program from their present location in an application note to a new guideline” to emphasize the importance of compliance programs.²⁷¹ In addition, the proposed guideline “would define the obligations and purposes of such programs, add

²⁶⁴ *Id.* at 4.

²⁶⁵ *Id.* at 7.

²⁶⁶ *Id.* at App. B.

²⁶⁷ The advisory group’s other recommendations to the Commission—which included a recommendation that the Commission add clarifying language regarding the role of waiver of attorney-client privilege and work product protection for purposes of receiving sentencing credit based on cooperation with the government during the investigation and prosecution of an organization, *id.* at 5—are generally beyond the scope of this paper. Notably, although the Commission adopted the attorney-client privilege recommendation when it promulgated the 2004 amendments to Chapter Eight, see USSG, App. C, amend. 673 (eff. Nov. 1, 2004), the Commission later deleted the commentary relating to waiver of attorney-client privilege and work product protection. See USSG, App. C, amend. 695 (eff. Nov. 1, 2006).

²⁶⁸ See U.S. Sent’g Comm’n, Public Meeting Minutes (Oct. 8, 2003), available at <https://www.uscc.gov/policymaking/meetings-hearings/notice-october-7-8-2003>.

²⁶⁹ *Id.*

²⁷⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 5 (Nov. 5, 2003), available at <https://www.uscc.gov/policymaking/meetings-hearings/notice-november-4-5-2003>.

²⁷¹ *Id.*

more detail to the seven minimum requirements, and provide definitions throughout the associated commentary.”²⁷²

The proposed amendment was published on December 30, 2003.²⁷³ Although the substance of the proposed amendment essentially incorporated the guideline language that the advisory group had suggested, the Commission formulated several issues for comment to accompany the published proposed amendment.²⁷⁴ Among other things, the Commission asked whether there were “factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs.”²⁷⁵ The Federal Register notice publishing the proposed amendment also announced that the advisory group’s report was available on the Commission’s website.²⁷⁶

Following publication of the proposed amendment, the Commission followed its usual process for promulgating amendments, which included studying relevant data and information that the Commission staff compiled and reviewing the formal public comment.²⁷⁷ In addition, the Commission held a public hearing in March, 2004, at which two panels of subject matter experts testified about the proposed amendment to Chapter Eight.²⁷⁸ The witnesses agreed with the advisory group’s conclusion that the organizational guidelines had been successful in focusing attention on compliance.²⁷⁹ One described the Commission’s “profound influence on corporate behavior,” asserting that the guidelines had been “incredibly successful in galvanizing [and] inspiring

²⁷² *Id.*

²⁷³ See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments, 68 Fed. Reg. 75340, 75354 (Dec. 30, 2003).

²⁷⁴ *Id.* at 75360. See also U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Nov. 5, 2003), available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-november-4-5-2003>.

²⁷⁵ See 68 Fed. Reg. 75340, 75360.

²⁷⁶ See *id.* at 75354.

²⁷⁷ For a more detailed discussion of the Commission’s amendment process, see U.S. Sent’g Comm’n, The History of the Child Pornography Guidelines at 4–5 (Oct. 2009).

²⁷⁸ The hearing agenda, written statements submitted by the witnesses and the hearing transcript are available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-march-17-19-2004>.

²⁷⁹ See, e.g., Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 38 (Mar. 17, 2004); Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General’s Advisory Committee, to the Commission, at 59 (Mar. 17, 2004) (on behalf of the Department of Justice); Linda A. Madrid, Managing Director, General Counsel and Corporate Secretary, CarrAmerica Realty, and Member, Board of Directors of the Association of Corporate Counsel, to the Commission, at 93 (Mar. 17, 2004).

companies to . . . put programs in place.”²⁸⁰ Many agreed, however, that “there is still room for improvement”²⁸¹ and supported the advisory group’s focus on organizational culture and ethics.²⁸²

The Commission received public comment or written testimony from approximately thirty sources, representing a broad spectrum of interests.²⁸³ After close of the public comment period, the Commission refined the proposed amendment in light of the comments and testimony it received. On April 8, 2004, the Commission unanimously voted to promulgate the proposed amendment, making changes to various parts of Chapter Eight of the *Guidelines Manual*.²⁸⁴

In its Reason for Amendment, the Commission explained that the change to Chapter Eight was the “culmination of a multi-year review of the organizational guidelines [that] implements several recommendations issued on October 7, 2003, by the Commission’s Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act.”²⁸⁵ The amendment elevated the criteria for an effective compliance program from the commentary into a separate guideline, USSG §8B2.1 (Effective Compliance and Ethics Program), which was done “[i]n order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program.”²⁸⁶ In addition to the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, the new guideline added a requirement that an organization “otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²⁸⁷ The Commission “intended [this requirement] to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms.”²⁸⁸

²⁸⁰ See Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 24, 39 (Mar. 17, 2004).

²⁸¹ See Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General’s Advisory Committee, to the Commission, at 65–66 (Mar. 17, 2004) (on behalf of the Department of Justice).

²⁸² See, e.g., Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 39 (Mar. 17, 2004) (The focus on culture is “very very important.”); Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 28–29 (Mar. 17, 2004) (“[C]ompanies are increasingly focused on protecting and strengthening their reputation, which in turn focused them on ethics, not just compliance.”).

²⁸³ Commentators included the Department of Justice, the Commission’s Practitioners Advisory Group, academics, corporations, compliance professionals, and various professional organizations, such as the Health Care Compliance Association, the Business Roundtable, and the Association of Corporate Counsel. Some of these commentators had actively participated in the promulgation of the original set of organizational guidelines. The public comment is on file with the Commission.

²⁸⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Apr. 8, 2004), available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-april-8-2004>.

²⁸⁵ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

²⁸⁶ See *id.*

²⁸⁷ See USSG, §8B2.1(a)(2) (Nov. 1, 2004).

²⁸⁸ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004). For a discussion of these legislative and regulatory reforms, see U.S. Sent’g Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 35–47 (Oct. 7, 2003).

The Commission explained that the amendment also provided “significant additional guidance” about the seven requirements that “are the hallmarks of an effective program that encourages compliance with the law and ethical conduct.”²⁸⁹ The amendment “elaborate[d] upon [these seven requirements], introducing additional rigor generally and imposing significantly greater responsibilities on the organization’s governing authority and executive leadership.”²⁹⁰ As amended, those requirements provided as follows:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
- (2)
 - (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
 - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4)
 - (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures,

²⁸⁹ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004). The Commission moved those seven requirements from the commentary in USSG, §8A1.2, comment. (n.3(k)) into the new guideline, USSG §8B2.1.

²⁹⁰ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

and other aspects of the compliance and ethics program, to the individuals referred to in subdivision

- (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
 - (C) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
- (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
 - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
- (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.²⁹¹

In addition to the changes made to the seven requirements for an effective compliance and ethics program, the Commission added a new provision requiring that “as an essential component of the design, implementation, and modification of an effective program, an organization must periodically assess the risk of the occurrence of criminal conduct.”²⁹² The commentary lists factors that should be considered when making the required risk assessment.²⁹³ The Commission explained that “organizations should evaluate the nature and seriousness of potential criminal conduct, the

²⁹¹ See USSG, §8B2.1(b)(1)–(7) (Nov. 1, 2004).

²⁹² See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); see also USSG §8B2.1(c) (eff. Nov. 1, 2004).

²⁹³ See USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization."²⁹⁴ Moreover, the guideline commentary establishes that "[t]o be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified."²⁹⁵

The Commission further highlighted the role of ethics by amending the introductory commentary to Chapter Eight. Among other things, the amended commentary stated that:

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance *and ethics* program, will assist an organization in *encouraging ethical conduct* and in complying fully with all applicable laws.²⁹⁶

The Commission also took several additional steps to address concerns regarding the lack of incentives for small organizations²⁹⁷ to develop compliance programs. First, through commentary and illustrations, the Commission "provide[d] additional guidance with respect to the implementation of compliance and ethics programs by small organizations."²⁹⁸ Next, the commentary encouraged "larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business."²⁹⁹ Finally, the Commission changed "the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score)," so as to "assist smaller organizations that previously may have been automatically precluded, because of their size [and the involvement of high level personnel], from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements."³⁰⁰ The amendment replaced the automatic preclusion with a rebuttable presumption, allowing a small organization to rebut the presumption in order to receive credit for having an effective compliance and ethics program.³⁰¹

Finally, just as with the original implementation of the organizational guidelines, the Commission again deliberately decided not to offer precise details for implementation of an effective compliance and ethics program "in order to encourage flexibility and independence by organizations in designing

²⁹⁴ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

²⁹⁵ *Id.*

²⁹⁶ See USSG, Chapter Eight, intro. comment (Nov. 1, 2004) (emphasis supplied). See also USSG, App. C, amend. 673 (eff. Nov 1, 2004).

²⁹⁷ The Commission defined small organization as an organization having fewer than 200 employees. See USSG, §8C2.5, comment. (n.1) (Nov. 1, 2004).

²⁹⁸ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* See also USSG, §8C2.5(f)(3)(B). A motion to allow the rebuttable presumption to extend to all organizations, both large and small, failed by vote of 2 to 4. See U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 8, 2004), available at <https://www.uscc.gov/policymaking/meetings-hearings/notice-april-8-2004>.

programs that are best suited to their particular circumstances.”³⁰² The Commission expected, however, that the amended organizational guidelines would “provide an important roadmap for compliance officers and corporate officials throughout the country” and “encourage compliance among corporations.”³⁰³ By promulgating these changes to Chapter Eight, the Commission intended to send the clear message that “good corporate conduct means above all else ethical conduct.”³⁰⁴

VI. The 2010 Amendments to the Organizational Guidelines

Changes in the Federal Sentencing Landscape

Two months after the Commission voted to promulgate the 2004 amendments to Chapter Eight of the *Guidelines Manual*, the United States Supreme Court decided *Blakely v. Washington*,³⁰⁵ holding that the State of Washington’s sentencing guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,³⁰⁶ the decision had an immediate impact on the federal criminal justice system.”³⁰⁷ “[C]ourts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the guidelines.”³⁰⁸ Assuming a central role in the debate concerning the validity of the federal guideline system, the Commission “worked intensively with Congress, the Department of Justice, representatives of the federal judiciary, and other interested persons to analyze the impact of the Supreme Court’s decision and help guide the discussion concerning the future of the federal sentencing guidelines system.”³⁰⁹

On January 12, 2005, the Supreme Court decided *United States v. Booker*,³¹⁰ which held that mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. “The Court remedied the violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the

³⁰² See Paula Desio, An Overview of the Organizational Guidelines, available at https://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf.

³⁰³ See U.S. Sent’g Comm’n, Public Meeting Minutes (Apr. 8, 2004) (reflecting statement made by Commissioner Michael Horowitz) available at, <https://www.ussc.gov/policymaking/meetings-hearings/notice-april-8-2004>.

³⁰⁴ *Id.* (reflecting statement made by Judge Ruben Castillo).

³⁰⁵ 542 U.S. 296 (2004).

³⁰⁶ *Id.* at 305, n.9.

³⁰⁷ U.S. Sent’g Comm’n, Final Report on the Impact of United States v. Booker on Federal Sentencing, at iv (Mar. 2006), available at https://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

³⁰⁸ *Id.*

³⁰⁹ See Testimony of Commissioner John R. Steer and Judge William K. Sessions, III, before the Senate Committee on the Judiciary, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines* (July 13, 2004) at 1, available at https://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20040716_Sessions_Steer_Testimony.pdf.

³¹⁰ 543 U.S. 220 (2005).

mandatory system that existed for almost 20 years into an advisory one.”³¹¹ The *Booker* opinion “maintain[ed] *all* of the Sentencing Commission’s statutory obligations under the Act,”³¹² stating specifically that “the Sentencing Commission remains in place, writing Guidelines, collecting information and actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”³¹³

Following *Booker*, “[t]he Commission and other actors in the criminal justice system took immediate steps to implement the advisory system.”³¹⁴ As far as the organizational guidelines were concerned, the Commission continued to conduct training programs with respect to Chapter Eight³¹⁵ and to report on organizational data³¹⁶ without substantially revisiting the 2004 amendment.³¹⁷ This continued until the Commission’s 2009-2010 amendment cycle.³¹⁸

³¹¹ See U.S. Sent’g Comm’n, Final Report on the Impact of United States v. Booker on Federal Sentencing, at iv (Mar. 2006), available at https://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

³¹² See Prepared Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Feb.10, 2005) at 1, available at https://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20050210_Hinojosa_Testimony.pdf (emphasis in original).

³¹³ 543 U.S. at 264.

³¹⁴ See U.S. Sent’g Comm’n Final Report on the Impact of United States v. Booker on Federal Sentencing, at 37 (Mar. 2006), available at https://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

³¹⁵ Commissioners and staff lectured on the organizational guidelines at conferences sponsored by the Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, and the Practising Law Institute, among others. In addition, national seminars sponsored by the Commission included at least one session on the organizational guidelines. See, e.g. https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2009/2009_Agenda_Annual_National_Seminar.pdf.

³¹⁶ See U.S. Sent’g Comm’n, 1990–2017 Sourcebooks on Federal Sentencing Statistics, available at <https://www.ussc.gov/research/sourcebook/archives>.

³¹⁷ As noted, *supra* note 267, the Commission did strike language about the waiver of attorney-client privilege from the commentary in USSG 8C2.5. See USSG, App. C, amend. 695 (eff. Nov. 1, 2006). In the Reason for Amendment, the Commission explained its decision to strike the last sentence of Application Note 12 to §8C2.5 (Culpability Score). “The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that ‘[t]he Commission expects that such waivers will be required on a limited basis.’ See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.”

³¹⁸ On October 21, 2009, the Senate confirmed Chief Judge William K. Sessions, III as chair of the Commission. See https://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20091021_Press_Release.htm.

The Evolution of a Miscellaneous Policy Priority

On September 9, 2009, the Commission published a notice of final priorities for the amendment cycle ending May 1, 2010.³¹⁹ The Commission did not specifically identify consideration of changes to Chapter Eight as a possible priority. However, the priorities list included a provision allowing for consideration of “miscellaneous guideline application issues, including . . . (C) other miscellaneous issues coming to the Commission’s attention from case law and other sources.”³²⁰ As the amendment cycle progressed, consideration of certain changes to Chapter Eight evolved as one of the “miscellaneous” issues under consideration. The commissioner who spearheaded this endeavor explained that “Chapter Eight is an important deterrent to criminal activity, and. . . the Commission must remain abreast of current industry practice in order to ensure that this deterrent effect continues.”³²¹

On January 12, 2010, the Commission voted to publish proposed guidelines changes,³²² including a proposed amendment that made “several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.”³²³ Several of the proposed changes related to effective compliance and ethics programs, as discussed in §8B2.1 (Effective Compliance and Ethics Program). First, the proposed amendment added a new application note to that guideline describing the reasonable steps that an organization should take to respond appropriately after criminal conduct is detected. The note provided as follows:

The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.³²⁴

³¹⁹ See Notice of Final Priorities, 74 Fed. Reg. 46478 (Sept. 9, 2009).

³²⁰ *Id.* at 46479.

³²¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 4 (Jan. 12, 2010) (reflecting statement made by Commissioner Beryl A. Howell), available at https://www.uscourts.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100112/20100112_Minutes.pdf.

³²² *Id.* at 3–4.

³²³ See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments; and Notice of Public Hearing, 75 Fed. Reg. 3525, 3534 (Jan. 21, 2010).

³²⁴ *Id.* at 3535.

The proposed amendment also bracketed two proposed additions to the commentary of §8B2.1. The first bracketed addition proposed to amend Application Note 3 to include a new paragraph requiring high-level and substantial authority personnel to be “aware of the organization’s document retention policies” and conform those policies “to meet the goals of an effective compliance program.”³²⁵ The second bracketed addition proposed to amend Application Note 6 to provide more guidance on the requirement relating to periodic risk assessment. As proposed, the matters assessed in a periodic risk assessment should include the “nature and operations of the organization with regard to particular ethics and compliance functions” and identified the organization’s document retention policies as an example of the operations to be included in such assessment.³²⁶

Finally, the Commission decided to reconsider the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score) when high-level personnel are involved in the criminal conduct.³²⁷ Accordingly, the Commission included an issue for comment, asking whether the Commission should “amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense” if certain conditions were met.³²⁸ The first potential condition was that “the individual(s) with operational responsibility for compliance in the organization [must] have direct reporting authority to the board level (e.g. an audit committee of the board).”³²⁹ Second, “the compliance program [must have been] successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization.”³³⁰ Finally, “the organization [must have] promptly reported the violation to the appropriate authorities.”³³¹

Mindful of the fact that “even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization,”³³² the Commission actively solicited input on the proposed amendment from groups known to have an interest in Chapter Eight. As a result of these efforts, the Chapter Eight proposed amendment received more public comment than

³²⁵ *Id.* at 3534–35.

³²⁶ *Id.* at 3535.

³²⁷ As amended in 2004, USSG §8C2.5 included a rebuttable presumption allowing small organizations to receive credit for having an effective compliance and ethics program under specified circumstances. See *supra* notes 300–301 and accompanying text. During the discussions of potential changes to the organizational guidelines in 2004, two commissioners sought to extend this rebuttable presumption to all organizations, regardless of size. Those efforts were unsuccessful. See U.S. Sent’g Comm’n, Public Meeting Minutes (Apr. 8, 2004), available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-april-8-2004>.

³²⁸ See 75 Fed. Reg. 3525, 3535.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See Letter from Daniel R. Roach, Co-Chair, Society of Corporate Compliance and Ethics, to the Commission (Mar. 19, 2010), available at https://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/SCCE.pdf.

any other proposed amendment in 2010.³³³ Commentators included several government agencies,³³⁴ the Commission’s standing advisory groups,³³⁵ ethics and compliance industry professionals,³³⁶ and non-profit research organizations.³³⁷

In March, 2010, the Commission conducted a public hearing on all of the guideline amendments that were being considered that year. Two panels at that hearing were devoted to a discussion of the proposed Chapter Eight amendments.³³⁸ The witnesses unanimously favored expanding the culpability score reduction,³³⁹ while offering suggestions on refinement to the language proposed by the Commission.³⁴⁰ Likewise, the witnesses generally favored the addition of commentary describing

³³³ All public comment received on the 2010 proposed amendments is available at <https://www.ussc.gov/policymaking/public-comment/public-comment-march-17-2010>.

³³⁴ The Department of Justice, the Department of Health and Human Services, the Department of Commerce, National Oceanic and Atmospheric Administration, and the Environmental Protection Agency submitted comment.

³³⁵ At the time, those standing advisory groups were the Probation Officers Advisory Group, the Practitioners Advisory Group and the Victims Advisory Group. In 2016, the Commission created a fourth standing advisory group, the Tribal Issues Advisory Group.

³³⁶ The Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, Ethisphere Institute, the Defense Industry Initiative on Business Ethics and Conduct, the Association of Corporate Counsel, and the Open Compliance and Ethics Group were among those commentators. In addition, a former Vice Chair of the Commission, John Steer, and a member of the ad hoc advisory group, Win Swenson, also submitted public comment. Both of these commentators were Commission staff members when the organizational guidelines were promulgated in 1991.

³³⁷ The Ethics Resource Center, the RAND Center for Corporate Ethics and Governance, and the Washington Legal Foundation commented on the proposed amendment.

³³⁸ The hearing agenda and witness statements are available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-march-17-2010>. The transcript of the hearing is available at https://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Hearing_Transcript.pdf.

³³⁹ See Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 257 (Mar. 17, 2010) (“We applaud the Commission for its efforts to make this three-point reduction in the culpability score available in more cases.”); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (Mar. 17, 2010) (“ACC supports efforts by the Commission to make the three-level mitigation more available in more cases.”); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 290 (Mar. 17, 2010) (“We support the idea of allowing sentence mitigation in these types of cases.”); Testimony of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 212 (Mar. 17, 2010) (indicating ECOA members “overwhelmingly support” expansion of the culpability score reduction); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321–23 (Mar. 17, 2010) (suggesting language changes to the proposed three-point mitigation for an effective program when high-level personnel are involved); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and Ethics, to the Commission, at 326 (Mar. 17, 2010) (stating that the proposed culpability score amendment is “an excellent and important change.”).

³⁴⁰ See, e.g., Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 261 (Mar. 17, 2010) (suggesting language changes to the proposal); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321–23 (Mar. 17, 2010) (same); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (Mar. 17, 2010) (“The term ‘directing reporting relationship’ is not well defined and is subject to broad misinterpretation in the corporate context...”); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and

remediation, but expressed concerns about the published language.³⁴¹ Finally, most of the witnesses voiced objections to the proposed commentary mentioning document retention policies.³⁴²

After considering the comments and testimony it received, the Commission made refinements to the language that had been published. Additionally, the Commission struck certain provisions from the proposed amendment and added new language.

Promulgated Changes to Chapter Eight

On April 7, 2010, the Commission voted to promulgate an amendment making changes to Chapter Eight.³⁴³ First, the amendment added a new application note to the commentary to USSG 8§B2.1 (Effective Compliance and Ethics Program). The application note clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) has two aspects:

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making

Ethics, to the Commission, at 327 (Mar. 17, 2010) (“[T]he reference to the compliance officer’s reporting authority to the highest governing authority needs to be clarified and enhanced.”).

³⁴¹ See, e.g., Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 269–270 (Mar. 17, 2010) (suggesting that the Commission add language indicating that the need for and extent of remedial measures will vary according to the circumstances, and also suggesting that the Commission strike the language about retaining an independent monitor); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 285–86 (Mar. 17, 2010) (expressing concerns that additional language would undermine the existing flexibility to adopt an appropriate response to potential violations); Testimony of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 310 (Mar. 17, 2010) (opposing language regarding monitors).

³⁴² See, e.g., Statement of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 3–4; Statement of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 3–4; Statement of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 2–4; Statement of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 2–3. Much of the public comment that the Commission received voiced similar opinions about the Commission’s proposed amendments. See generally Public Comment Letters Received by the United States Sentencing Commission in Response to Request for Public Comment (see 75 Fed. Reg. 3525), available at <https://www.usc.gov/policymaking/public-comment/public-comment-march-17-2010>.

³⁴³ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Apr. 7, 2010), available at https://www.usc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minute_s.pdf.

modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.³⁴⁴

The Commission explained that “[t]his application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct.”³⁴⁵ The Commission also noted that “[t]he steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.”³⁴⁶

The Commission also amended “subsection (f) of USSG 8§C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program when an organization’s high-level or substantial authority personnel are involved in the offense.”³⁴⁷ An organization may receive the decrease for having and effective compliance and ethics program, if the organization meets four criteria:

- (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization’s governing authority or appropriate subgroup thereof;
- (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (3) the organization promptly reported the offense to the appropriate governmental authorities; and
- (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.³⁴⁸

This change responded to “concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases.”³⁴⁹

³⁴⁴ See USSG §8B2.1, comment. (n.6) (Nov. 1, 2010).

³⁴⁵ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ See USSG §8C2.5(f)(3)(C) (Nov. 1, 2010).

³⁴⁹ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010). Commission data indicates that only ten of the 4,558 organizations sentenced under the organizational guidelines since inception have received the culpability score reduction for having an effective compliance and ethics program from the effective date of the organizational guidelines through the most recent fiscal year (FY2017). See U.S. Sentencing Commission, 1993–2017 Datafiles, CORP93-CORP17.

The Commission added an application note that describes the “direct reporting obligations” necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has “direct reporting obligations” if the individual has “express authority to communicate personally to the governing authority or appropriate subgroup thereof

(A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.”³⁵⁰ The Commission added this application note in response to “public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.”³⁵¹

Finally, the Commission amended USSG 8§D1.4 (Recommended Conditions of Probation—Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. Notably, the Commission retained the condition that would require an organization to “develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program).”³⁵² As noted in the Reason for Amendment, the “amendment remove[d] the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.”³⁵³ The Commission expected the amendment would further incentivize corporate self-policing by “[promoting] compliance by organizations, [encouraging] early reporting when criminal activity is detected, and [encouraging] the remediation of harm caused by criminal activity.”³⁵⁴

VII. Conclusion

The organizational guidelines have now celebrated their 26th anniversary and have been credited with “achiev[ing] significant success in reducing workplace misconduct by nurturing a vast compliance and ethics movement and enlisting business organizations in a self-policing effort to deter law-breaking at every level of their business.”³⁵⁵ Since the promulgation of the organizational guidelines in 1991, “the development of comprehensive ethics and compliance management practices has mushroomed” and the seven minimal steps for an effective compliance and ethics program “have become the de facto framework used to design such programs in the United States — and to some extent around the world.”³⁵⁶

³⁵⁰ See USSG §8C2.5, comment. (n.11) (Nov. 1, 2010).

³⁵¹ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁵² See USSG §8D1.4(b)(1).

³⁵³ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁵⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Apr. 7, 2010), available at https://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.pdf.

³⁵⁵ See Ethics Res. Ctr., *The Federal Sentencing Guidelines for Organizations at Twenty Years: a Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs*, at i (May 2012).

³⁵⁶ *Id.* at 29–30.

Although lauded as “one of the indisputable success stories of the Commission,”³⁵⁷ the Commission has a continuing duty to review and revise the guidelines, in consideration of comments and data coming to its attention³⁵⁸ and to reflect “advancement in the knowledge of human behavior.”³⁵⁹ As the best practices for the compliance and ethics profession continue to evolve, the Commission will give careful consideration to the need for guideline changes in light of the input received from industry professionals. Consequently, new chapters in the history of the organizational guidelines remain to be written.

³⁵⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes (Jan. 10, 2012) (reflecting statement made by Judge Beryl A. Howell), available at https://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120110/Meeting_Minutes.pdf.

³⁵⁸ See 28 U.S.C. § 994(o).

³⁵⁹ See 28 U.S.C. § 991.

Guide to Judiciary Policy

Vol 8: Probation and Pretrial Services

Pt D: Presentence Investigation Report (Monograph 107)

Ch 1: Overview

Appx 1E: Presentence Report for an Organizational Defendant

The presentence report designed for the sentencing of an individual defendant does not easily accommodate the application of the guidelines for organizations. Since organizations are not subject to the same sanctions as an individual defendant, the structure of the guidelines for organizations is different. This document provides a format for a presentence report on an organization that is intended to provide the factual information necessary for application of the guidelines for organizations and to assist the court in making an informed sentencing decision.

This document has two distinct sections. The first section presents an outline of the format and content of the presentence report for an organization. The elements of information included in each section of the report are outlined with the rationale for organizing the report in this manner. The outline is intended as a reference and checklist for the required content of the report. Figure 1 provides a topical outline of the sections of the report with the pertinent subheadings.

Following the outline, the section entitled “Conducting a Financial Investigation of an Organization” provides a discussion of techniques for gathering information about organizations, focusing primarily on collection and analysis of financial data. Since the principal sanctions available to the court for sentencing an organization are fines and restitution, it is important that the probation officer provide a complete and accurate analysis of the organization's financial profile. Determining an organization's ability to pay financial sanctions requires a process of analysis that differs from the analysis of an individual's ability to pay. A step-by-step discussion of the process is provided in this chapter.

Outline and Contents of the Organizational Presentence Report

Face Sheet

- * Information related to the sentencing hearing includes:
 - * Court of jurisdiction
 - * Identification of the defendant
 - * Sentencing Judge

- * U.S. Probation Officer
- * Prosecutor
- * Defense Counsel
- * Sentencing date

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

Figure 1

- * Offense data include:
 - * Offense(s) of conviction
 - * Maximum Statutory penalties (fine & probation)
- * Codefendants identified by name and docket number
- * Related Cases identified by name and docket number
- * Dates of preparation of the report and revision of the report
- * The second page of the face sheet contains identifying data:
 - * Federal employer identification number (tax identification number)
 - * Legal address
 - * Other organizational names
 - * Organization representative (spokesperson)

Rationale. The face sheet contains significant court-related information for ease of reference. The second page contains data provided for the use of the sentencing judge, probation officer, and U.S. Sentencing Commission. The "appropriate judge or officer" is required to submit a written report of the sentence to the U.S. Sentencing Commission. The report includes the offense for which the sentence is imposed as well as other factors relevant to the guidelines. 28 U.S.C. § 994(w).¹ Accordingly, submission of copies of the presentence report, judgment, statement of reasons, and written plea agreement (if available) to the Commission will meet these statutory obligations.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

- * Identify specific charge(s) filed against the defendant and any co-defendant(s) in the indictment, information, or complaint.
- * Summarize any superseding indictment(s) or information(s).
- * List the charge(s) of conviction and date(s) of the offense(s).

¹ "The Commission shall assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(D).

- * Report the method(s) of conviction (plea, jury verdict, court verdict, etc.) and date.
- * Identify individual entering plea/accepting verdict on the organization's behalf.
- * Provide a synopsis of the plea agreement (if any).
- * Report the status of the co-defendant(s).
- * Report the status of related cases, including individuals.

Rationale. This section of the report provides a brief chronological history of the prosecution of the case from the filing of the initial charges to the referral to the probation office for a presentence report.

The Offense Conduct

- * Provide a concise but complete description, in chronological order, using significant dates as points of reference, of the organization's conduct and the conduct of codefendants or other participants during the offense of conviction, including planning, preparation for the offense, and the circumstances leading to the detection of the criminal conduct.
- * Present all information about the offense that is relevant to the application of the sentencing guidelines, including the facts pertaining to relevant conduct, specific offense characteristics, and appropriate guideline adjustments. In cases involving multiple participants, describe each participant's conduct and role in the offense.
- * Identify the number of employees directly involved in the offense and the degree of managerial involvement. Managerial involvement includes: facts regarding an individual(s) within high-level personnel who participated in, condoned, or was willfully ignorant of the offense; or pervasive tolerance of the offense by substantial authority personnel throughout the organization or unit of the organization (culpability score factors).
- * Describe any violation of a judicial order or injunction that occurred as a result of the commission of the offense (culpability score factor).
- * Note any other details of the offense behavior that may assist in understanding the offense.

- * If the defendant is a criminal purpose organization, include facts regarding the history and characteristics of the organization supporting this guideline determination.

Rationale. The description of the offense in this section of the report provides the court with the factual basis for application of the sentencing guidelines. The details pertaining to the offense(s) of conviction and all relevant conduct are included. The facts supporting determination of the base offense level, any specific offense characteristics or adjustments, and the culpability score factors are addressed. This section also provides the facts that support application of the guideline provision for Criminal Purpose Organizations. Any details that will assist the court in understanding the offense conduct are included so that the court will be able to make findings for the guideline application. The description of the offense will also assist the court in identifying factors that may be considered grounds for departure.

Victim Impact

- * Report all consequences of the offense conduct affecting any identifiable victim or the community.
- * Provide an assessment of the financial, social, psychological, and medical impact upon any individual victim of the offense.
- * Report any financial loss or impact caused by the conduct in the offense.
- * Describe the status of any related civil suits filed by victims that are pending or have been settled.
- * Report any remedial orders for corrective action that have been issued to the organization, including judicial, administrative, or civil orders.

Rationale. Rule 32(c) of the Federal Rules of Criminal Procedure requires that the presentence report address the consequences of the offense on any victim. By furnishing an account of this information in a separate section of the report, it is intended that the full impact on the victim(s) will be emphasized, regardless of whether the information affects guideline application. The status of civil suits and administrative actions is important in assessing the victim impact of organizational offenses.

Offense Behavior Not Part of Relevant Conduct (if applicable)

- * Describe criminal behavior related to the offense that is not considered relevant conduct, as defined by the guidelines, for guideline application.

Rationale. In some cases, the offense behavior of the count(s) to be dismissed is not considered part of relevant conduct (as defined by the guidelines). Since such behavior is not part of relevant conduct and is not included in the guideline application, the criminal conduct is included in this section rather than in The Offense Conduct. Discussion of the facts in this section makes it clear to the court that the conduct is not captured within the guideline application. For example, an organization pled guilty to one count of bid rigging; a count alleging tax evasion is to be dismissed. The conduct in the tax evasion would not be relevant conduct to the bid rigging conviction and would be presented in this section. Presentation of the information in this manner will assist the court in evaluating a plea agreement. There may also be instances in which related offense behavior that is not part of relevant conduct has not been included in the criminal charges. If sufficient evidence is present to establish that the conduct took place, it may be included in this section.

Obstruction of Justice

- * Describe any efforts by the defendant to impede the investigation, prosecution, or sentencing of this case (culpability score factor).

Rationale. This guideline adjustment is separated from The Offense Conduct because an assessment of the organization's obstruction conduct usually focuses on behavior occurring after law enforcement authorities have initiated an investigation. In general, evaluation of obstruction of justice is distinct from consideration of the offense conduct.

Self Reporting, Cooperation, and Acceptance of Responsibility

- * Identify whether or not the organization reported the offense to appropriate governmental authorities. Address whether the self reporting took place prior to an imminent threat of disclosure or government investigation. (culpability score factor)
- * Identify conduct, or lack thereof, demonstrating that the organizational defendant fully cooperated in the investigation and demonstrating a recognition and acceptance of responsibility for its criminal conduct (culpability score factor)

Rationale. In the same manner as the adjustment for obstruction of justice, this guideline adjustment is distinguished from The Offense Conduct because an assessment of the defendant's self reporting, cooperation and acceptance of responsibility usually focuses on behavior occurring after law enforcement authorities have initiated an investigation or have filed criminal charges. In

general, evaluation of these areas entails an assessment distinct from the presentation of the offense conduct.

PART B. PRIOR HISTORY OF MISCONDUCT

Similar Misconduct

- * List all similar incidents of misconduct, including criminal, civil, and administrative adjudications.
- * For each incident of similar misconduct list: the date of the charges (criminal, civil, or administrative charges); the charges of conviction or charges sustained; for criminal and civil cases list the date and court with the docket number; for administrative adjudications list the date of the action and the case identification number; for all actions, report the sentence imposed or action taken; report all pending matters that have been adjudicated but are awaiting disposition. Display applicable culpability score points (including zero).
- * Provide a brief description of the behavior underlying each incident of misconduct.
- * In criminal actions, address the status of representation of counsel.
- * If supervised on probation, describe the organization's performance.
- * Report probation revocations in the same entry as the original conviction or misconduct.

Rationale. Identification of similar misconduct with the dates of action facilitates application of the prior history portion of the culpability score.

Other Misconduct

- * List all other incidents of misconduct (that are not similar to the instant offense), including criminal, civil, and administrative adjudications.
- * For each incident of misconduct list: the date of the charges (criminal, civil, or administrative charges); the charges of conviction or charges sustained; for criminal and civil cases list the date and court with the docket number; for administrative adjudications list the date of the action and the case identification number; for all actions, report the sentence imposed or action taken; report all pending matters that have been adjudicated but are awaiting disposition.

- * Provide a brief description of the behavior underlying each incident of misconduct.
- * In criminal actions, address the status of representation of counsel.
- * If supervised on probation, describe the organization's performance.
- * Report probation revocations in the same entry as the original conviction or misconduct.

Rationale. Identification of prior misconduct that is dissimilar to the instant offense may be considered by the court as a factor that may warrant departure.

Pending Charges

- * Describe the status of any pending criminal, civil, or administrative charges.

Rationale. Identification of pending charges alleging misconduct provides facts that the court may consider in determining a sentence within the range or whether to depart and to what extent. Of particular importance, the court should be aware of pending civil cases that parallel the instant case in order to consider the potential for remedial orders, restitution, and other financial matters.

PART C. ORGANIZATIONAL CHARACTERISTICS

Organizational Data

Organizational data should include as much information as possible regarding the following:

- * When the organization was established or incorporated.
- * The location(s) of the business and description of the physical facilities.
- * The type of organization: public corporation; closely held corporation; subchapter S corporation; partnership; association; union; trust; non-profit organization, etc.
- * Identification of the owners of the organization and percentage of ownership.
- * Purpose of the organization and/or the nature of the business (including criminal purpose organization, if applicable).

- * General structure of the organization, including the number of employees, the hierarchical structure of the management, whether there are company subsidiaries or separately managed lines of business, and any history of acquisitions of other businesses and reorganizations.
- * Describe the present status of the organization in view of the criminal action, including:
 - impact of public knowledge of the offense on the organization's business or activities;
 - impact on the stock price;
 - debarment proceedings;
 - whether the organization is defunct;
 - projections of organizational recovery.

Rationale. Information regarding the history, growth, and future of the organization is of assistance to the court in applying the guidelines and in selecting appropriate sentencing options, particularly in determining the need for probation supervision as well as the length of the term and appropriate conditions. Such information is relevant in determining the defendant's ability to pay financial sanctions.

Effective Compliance and Ethics Program

- * Describe the organization's program to prevent and/or detect misconduct and the date of the policy, or the lack thereof.
- * Describe what, if any, efforts were taken to prevent and detect criminal conduct and promote an organizational culture that encouraged ethical conduct and a commitment to compliance with the law.

Rationale. Inclusion of the information in this section enables application of the culpability score factor for Effective Compliance and Ethics Program in cases in which the fine guidelines apply. In cases in which the fine guidelines do not apply, it may also be helpful to the court in analyzing whether the organization had an effective compliance and ethics program at the time of the offense. In addition, this information may be helpful in setting conditions of any term of probation ordered.

Financial Condition: Ability to Pay

- * Report the organization's assets, liabilities, equity, income, expenses, and the source of the information being reported.
- * Analyze the organization's ability to make a lump-sum restitution or fine payment and the organization's ability to make installment restitution or fine payments.

Rationale. A fine is the primary sanction for an organizational defendant. Payment of a fine and restitution are subject to the organizational defendant's ability to pay. Presentation of the organization's financial status is critical to provide the factual basis for the court's finding as to the organization's ability to pay financial sanctions.

PART D. GUIDELINE APPLICATION

- * Identify the edition of the *Guidelines Manual* used to apply the guidelines.
- * Using U.S.S.G. §8C2.1, determine whether counts are excluded from the fine provisions at §§8C2.2 - 8C2.9. If the guideline for the offense is not listed in §8C2.1, the Commission has not promulgated guidelines for setting fines for those offenses. For such offenses, do not apply §§8C2.2 - 8C2.9, and instead apply §8C2.10. Even if the offense is not listed in §8C2.10 and those fine provisions do not apply, the other sections of Chapter Eight are applicable (e.g., Probation)
- * Identify whether there is an agreement regarding the use of certain information pursuant to U.S.S.G. §1B1.8.
- * If there are multiple convictions, describe the factual basis for grouping decisions and cite the grouping rule(s). The explanation for grouping counts may be addressed before display of the application or immediately before the multiple count adjustment, whichever placement, given the facts of the case, will be more helpful in understanding the application.
- * Identify the Chapter Two guideline that determines the base offense level for each count or group of counts.
- * Display specific offense characteristics that apply to each count or group, and summarize the factual basis for resulting increases or decreases in the base offense level.
- * Apply any special instructions for base fine calculation within Chapter Two.

- * Display the Offense Level Computation and summarize the factual basis for:
 - Base Offense Level
 - Specific Offense Characteristics
 - Total Offense Level

- * Provide the base fine calculation by identifying:
 - Fine Table Amount
 - Pecuniary gain
 - Pecuniary loss
 - Apply Chapter Two special instructions, if applicable
 - Base Fine

- * Determine the Culpability Score Computation by displaying the culpability score factors and summarize the factual basis for the resulting increases or decreases in the base score for the factors:
 - Starting Culpability Score (See 8C2.5(a))
 - Involvement/Tolerance
 - Prior History
 - Violation of an Order
 - Obstruction of Justice
 - Effective Compliance and Ethics Program
 - Self Reporting/Cooperation/Acceptance of Responsibility
 - Total Culpability Score

- * Display the fine range computation stating:
 - Based on a culpability score of *** the minimum multiplier is *** and the maximum multiplier is ***. Given the base fine of ***, the guideline fine range is **** to ****.

- * Identify any applicable fine adjustments with a summary of the factual basis for:
 - Disgorgement
 - Fine Offset

- * Indicate whether the organization fits the criteria for being a Criminal Purpose Organization. The subheading for Criminal Purpose Organization appears in every report. If the provision applies, the officer provides a

synopsis of the facts and displays the net assets as defined in Application Note 1 of U.S.S.G. § 8C1.1. If the provision does not apply, display "not applicable" or N/A.

Rationale. This section presents the probation officer's application of the guidelines. A short synopsis of the facts underlying each application is included to provide tentative factual findings for the court. The provision for Criminal Purpose Organization is addressed in every report for two reasons: it communicates to the court that the provision has been considered by the officer, and, if the officer has applied the provision and the court then determines that it does not apply, the alternative guideline application is readily displayed.

PART E. SENTENCING OPTIONS

Restitution

- * Describe statutory provisions for restitution.
- * List guideline provisions applicable to the case.
- * Identify each victim and the amount of restitution outstanding.

Rationale. Listing the statutory provisions adjacent to the guideline provisions allows comparison of sentencing options that are statutorily available versus those that are available within the guidelines.

Fines

- * Identify statutory provisions applicable to any mandatory minimum and maximum fine for each count of conviction.
- * Report statutory provisions for special assessments for counts of conviction and the total amount for multiple-count cases.
- * List guideline provisions applicable to the case, including a determination of the fine range. *If a count of conviction has been excluded from U.S.S.G. §§ 8C2.2 - 8C2.9, a fine range will not have been determined. (See U.S.S.G. § 8C2.10).*

Rationale. Listing the statutory provisions adjacent to the guideline provisions allows comparison of sentencing options that are statutorily available versus those that are available within the guidelines.

Probation

- * Report statutory provisions applicable to the counts of conviction, eligibility for probation, authorized term, and mandatory conditions of supervision, if applicable.
- * State the guideline provisions applicable to the total offense level.

Rationale. Listing the statutory provisions adjacent to the guideline provisions allows comparison of sentencing options that are statutorily available versus those that are available within the guidelines.

Impact of the Plea Agreement

- * If the plea agreement includes counts to be dismissed, identify the counts to be dismissed and display the fine range that would have resulted if the defendant had been convicted on all counts.
- * Describe any mandatory minimum fine penalty or sentence enhancement that would have been required by the count(s) that will be dismissed.
- * If the plea agreement includes stipulations, or any other factor that may affect the guideline range, display the range that would have resulted if there had been no plea agreement.
- * Provide any other information regarding the plea agreement that is requested by the court.

Rationale. A description of the guideline range that would have resulted had there been no plea agreement assists the court in evaluating the impact of the plea agreement on the ultimate sentence. This section will only be included when the case includes a plea agreement.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

- * Identify any factors that warrant consideration for departure from the guideline range.
- * Note that inclusion of a factor does not constitute a recommendation by the probation officer for a departure.

Rationale. Reporting all factors that the officer believes might be a consideration for departure serves two purposes: It provides notice to the court and to counsel

that the officer has considered each factor before making the sentencing recommendation, and it allows the court to independently consider each factor.

PART G. FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE GUIDELINE SYSTEM

- * Identify any factors that warrant consideration of a sentence outside of the guideline system (i.e., any sentence authorized by statute, but not supported by the advisory guidelines or policy statements).
- * Note that inclusion of a factor does not constitute a recommendation by the probation officer for a departure.

Rationale. Reporting all factors that the officer believes might be a consideration for a sentence outside of the guideline system serves two purposes: It provides notice to the court and to counsel that the officer has considered each factor before making the sentencing recommendation, and it allows the court to independently consider each factor.

Addendum

- * Describe unresolved objections to the presentence report raised by the defendant, defense attorney, or the Government attorney.
- * Indicate whether the objections are based on disputed facts or legal arguments.
- * Report the probation officer's comments on the issues, with references, including statutory authority, sentencing guideline provisions, Supreme Court or circuit case law.

Rationale. The function of the addendum is to advise the court of the remaining disputed issues pertaining to the application of the guidelines and related sentencing matters, as well as to articulate the probation officer's position pertaining to those issues.

Sentencing Recommendation

- * As to each count, present the statutory and guideline provisions and recommended sentence in a chart format, including:
 - * Restitution
 - * Fine

- * Disgorgement
 - * Fine Offset
 - * Total Fine
 - * Special Assessment
 - * Probation
-
- * Provide a justification for the recommended sentence, including the need for special conditions of probation.
 - * Restate the recommended sentence, including special conditions of probation, using Model Sentencing Form language

Rationale. The sentencing chart allows the court to easily compare the recommendation to the statutory and guideline provisions. The justification provides the court with the officer's evaluation of the offense and the organizational defendant in order to support the recommended sentence. The justification includes references to the statutory objectives for sentencing to assist the court in providing a statement of reasons for imposition of the sentence. Displaying the recommendation in Model Sentencing Form language allows the court to adopt the recommendation in the appropriate language for the judgment.

Investigative Procedures and Gathering Information

Historically, probation officers have not had much experience completing organizational presentence reports. In 2003, only 200 organizational defendants were sentenced nationally, compared to 70,258 individual defendants.² Because preparation of organizational presentence reports has been a relatively rare task, the Probation System had not developed a format or standards for organizational presentence reports. Publication of Chapter Eight of the Sentencing Guidelines, "Sentencing an Organization," necessitated development of standards and a structure for the preparation of an organizational presentence report.

The guidelines for organizations pose new challenges to probation officers, who must not only interpret the guidelines, but also provide the court with the information necessary to support the officer's findings. Additionally, officers must provide the court with the same accurate and concise background information regarding an organization

² Source: U.S. Sentencing Commission.

that they provide for individual defendants. Since the primary punitive sentence that can be imposed on an organization is a fine, the greatest responsibility, if not challenge, is the determination of the organization's ability to pay the financial sanctions required by the guidelines. Probation officers are trained investigators; just as officers have developed the necessary skills and techniques to provide the court with an accurate and concise picture of an individual defendant's background, with training and experience, they can produce organizational reports of equal quality. In collecting and analyzing background information and financial records of organizations, officers rely on the same tested methods of investigation.

For preparation of many sections of the organizational presentence report, officers will rely on the same sources of information and verification techniques employed during the investigation of an individual defendant. For example, the sources of information for such sections as Charges and Convictions, The Offense Conduct, Victim Impact, and Sentencing Options will often be the same sources as for an individual defendant. However, there are certain areas of guideline application that are unique for organizations. Investigative procedures and methods of gathering information for an organization's prior history of misconduct and organizational characteristics will be discussed, as well as suggestions for determining the effectiveness of an organization's program to prevent and detect violations, commonly known as a compliance plan. Because of the importance of determining the ability of an organization to pay financial sanctions, techniques for gathering and analyzing the financial background of an organization will be discussed in detail.

PART B. HISTORY OF MISCONDUCT

The sources of information for an organization's prior history of misconduct include state and Federal civil and criminal court records, regulatory agencies, the assistant U.S. attorney, case agents, and, for public corporations, 10K reports filed with the Securities and Exchange Commission (10K reports will be described in detail below).

PART C. ORGANIZATIONAL CHARACTERISTICS

Organizations are not much different than individuals. Like people, they are born (or created) and have histories and lifestyles. The history of the organization is somewhat analogous to the biography of an individual defendant. The officer describes where and when the organization was formed, the type of organization, who created it, and how much investment or capital was provided. Pertinent questions that should be answered within the Organizational Characteristics section include: Who owns the organization and how much do they own? What is the purpose of the organization and the nature of its business? How did it evolve, i.e., what is the organization's developmental history? Does it have divisions or subsidiaries and, if so, what are the different business objectives of these separately managed profit centers? Discuss the structure of the organization, key officers, the composition of management, and the number of

employees. To assist in collecting this information, the Probation Form 1-B, Worksheet for Organizational Presentence Report, has been developed.

Interview

Many of the organizational characteristics can be obtained by interviewing the organization's representative. In most cases, the organization will be a rather small closely held corporation and the corporation's representative will be its president, owner, and often, its codefendant. It is important to conduct an interview with the representative as soon as possible and have this individual provide the necessary background information. It is desirable to schedule the interview at the organization's place of business because the representative will have access to records the officer will be requesting. In addition, an on-site inspection can be conducted.

Site Visit

A visit to the organization's place of business is essential. After learning about the nature of the business, take a tour with the representative. Ask for an explanation of activities and do not be timid about asking questions. Do your observations coincide with the nature of business as described by the organization's representative? Does it look like a legitimate business, i.e., if it is a retail store, does it have inventory? If it is a manufacturing firm, does the organization have the necessary personnel and equipment to manufacture? Observe the manufacturing process in action.

Effective Compliance and Ethics Program

In order to evaluate the effectiveness of an organization's program to prevent and detect violations of law, also known as a compliance plan, the officer requests information from the organization's representative, appropriate governmental authorities, and the case agents. Federal or state law enforcement, regulatory agencies, or program officials having jurisdiction over regulations applying to the organization may be of particular assistance in assessing whether a program is effective.

Some Basic Definitions

Any investigation of an organization will require the gathering of records to verify and expand information already provided on behalf of the organization. However, the type of records that are available for investigation largely depends on the nature of the organization.

An organization is "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions

thereof, and non-profit organizations.³ Most organizations will fall into the categories of public or closely held corporations.

Corporation

A corporation is an entity legally separate from the persons owning it. Corporations are registered with state governments and their activities are regulated by law. A corporation is owned by its stockholders (also called shareholders), who hold stock or shares in the corporation. A corporation can own property, buy and sell, enter into contracts, borrow money, and take any other business action that an individual can take, subject to state law.

Articles of Incorporation

The organization's Articles of Incorporation may be useful to verify certain information provided by the organization's representative. The Articles will identify the officers of the company, the purpose of the company, and information about stock ownership.

Public Corporation (AKA: Open Corporation)

A public corporation is a corporation whose stock is available for sale to the public, subject to regulation by state and federal agencies. All public corporations are regulated by the Securities and Exchange Commission (SEC). Other state and Federal agencies may regulate a public corporation depending on the nature of the corporation's business. For example, a public corporation producing pharmaceuticals, such as Merck, Sharp, and Dome, is subject to regulation by the Federal Drug Administration. A public corporation providing telecommunications services, such as American Telephone and Telegraph (AT&T), is subject to regulation by the Federal Communications Commission. Public corporations file F-1120 tax forms.

Closely Held Corporations and Partnerships (AKA: Closed Corporations)

A corporation that is owned by a small group of people and whose stock is not available for sale to the general public.

Types of Closely Held Corporations

1. Incorporated Entities

A business entity that is legally separate from the individuals owning it. The owners who hold stock or shares in the corporation are known as

³ U.S.S.G. § 8A1.1, Application Note 1

stockholders or shareholders. Incorporated entities file F-1120 or F-1120A tax forms.

2. **Subchapter S Corporation**

A corporation that files a tax return but generally pays no taxes. Income is passed on to the owners who pay taxes on it as individuals, as in a partnership. Allows certain small businesses to enjoy the benefits of incorporation without the burden of double taxation. Subchapter S corporations file F-1120S tax forms.

Partnership

An unincorporated business that is owned by two or more individuals. Partnerships are either general or limited. In a general partnership, each of the partners has authority to participate in the management of the business. A limited partnership is one in which individuals may invest without actually taking part in the operation of the business. Interests in limited partnerships are sold much like stocks. Partnerships file F-1065 tax forms.

What to Request and Where to Obtain it

Once the type of organization has been determined, probation officers will find the records available that will provide important information.

Public Corporations

Although public corporations can pose complex investigative issues, i.e., subsidiaries, numerous business objectives, sophisticated management structure, intimidating financial statements, etc., the good news is they also provide the most in-depth and reliable background and financial information available. Some of the records will provide information that overlaps; however it is important to obtain as many of these items as possible for verification and comparison purposes. The more records that the officer obtains and reviews, the more comfortable the officer will be that the presentence report is as accurate as possible.

10K Report

A 10K is a report that public corporations are required to file annually with the Securities and Exchange Commission (SEC). Federal securities laws enacted in the 1930's established requirements for filing the 10K report requiring that it contain:

- corporate history/background
- organizational structure (subsidiaries, divisions)

- names of officers and board of directors
- background of key officers
- identity of significant stockholders
- where and when company was incorporated and where it now does business
- discussion of any significant current litigation
- discussion of any other significant legal issues, including indictment, bankruptcy
- audited financial statement

10K reports are the most reliable financial statements because they are filed under penalty of perjury. 10K reports will often include management's discussion of operations during the previous year and what they expect in the future. These are typically self-serving statements, not required by the SEC, nor scrutinized for accuracy. Such statements may be self-serving in that 10K reports are often submitted with loan applications. Nonetheless, these statements regarding the corporation's future projections are important since they are typically prepared prior to conviction and can be compared with what the corporation will represent about its future post-conviction.

10Q Reports

A 10Q is a quarterly filing with the SEC. A 10Q may provide more current information than a 10K, but they contain *unaudited information*. Accordingly, the information in a 10K is more reliable than the information in a 10Q.

Checklist for Public Corporation (Open Corporation)

* Documents containing financial statements.

What	Where⁴
1. U.S. corporate returns F-1120 for last 5 years (U.S. Corp. Tax Return)*	Corporate officer or IRS (IRS requires release)
2. 10 K's - filing that public corps must submit to SEC annually (5 years)*	Corporate officer or SEC
3. <u>Audited</u> financial statement*	Corporate officer or chief financial officer

⁴ The U.S. attorney and the investigating agents may have information regarding all of these areas.

4.	Annual reports (5 years)*	Corporate officer or state regulatory agency (e.g., comptroller, secretary of state)
5.	Price per share of stock	Business section of newspaper or library
6.	Reports from Standard and Poor's, Dunn and Bradstreet, and/or Moody's reports*	Public library
7.	Bankruptcy history	Bankruptcy court, corporate officer and 10K filings
8.	Company's current financial projections with assessment of impact of convictions on the business	Corporate officer and/or chief financial officer

Standard and Poor's, Dun and Bradstreet, and Moody's Reports

Standard and Poor's, Dun and Bradstreet, and Moody's are private companies that prepare reports containing descriptions of various, mostly public, corporations. Dun and Bradstreet provides reports of some very large private corporations. Although their reports differ in format, they typically contain corporate history, organizational structure, subsidiaries, number of employees, names of officers and Board of Directors, and two to five years of consolidated financial statements, and financial statements for the most recent quarters. These reports often analyze the financial health of a corporation using standard business ratios which will be discussed later.

The reports rate companies according to their present or forecasted general financial health. It may be beneficial to obtain several different reports on an organization. Moody's reports are particularly helpful because Moody's publishes separate manuals for industrial companies, banking and financial institutions, international companies, public utilities and municipalities and governments. While a Moody's report is often an excellent source for a description of the organizational structure of a company, including divisions and subsidiaries, a Standard and Poor's stock report often provides 10 years of financial statements on a company. Standard and Poor's stock reports are published every six months and, in the event there are significant financial developments in a company, more frequently. Therefore, a Moody's report and a Standard and Poor's stock report may provide complementary information on a company.

Annual Reports

Annual reports are the vehicle through which public corporations present themselves to their stockholders. They usually contain a succinct, audited financial statement, often simpler than the financial statement in a 10K report. In essence, annual reports are glorified 10K reports and contain self-serving projections. They are an excellent source of information.

Stock Price

The price per share of stock is available in the business section of the newspaper or in the public library. It may be instructive to compare the price of stock prior to the indictment with the current price to determine the effect the indictment and negative publicity associated with the prosecution has had on the company.

Closely Held Corporations

In contrast to a public corporation that generate public records, in completing the organizational data section on a closely held corporation or partnership, the probation officer must rely on the representations provided by the organization's representative. Occasionally, the assistant U.S. attorney, Government agents, or state or Federal regulatory agencies may be able to verify an provide additional background.

Checklist for Closely Held Corporation (Closed Corporation)

*Documents containing financial statements.

What	Where⁵
1. U.S. corporate tax return F-1120* or F-1120-S*; or U.S. partnership returns F-1065* for last 5 years	Corporate officer or IRS (IRS requires release)
2. <i>Audited</i> financial statement* (preferred) or compilation report (unaudited)*	Corporate officer or CPA

A compilation is an unaudited financial report.
For verification it may be necessary to request:

⁵ The U.S. attorney and the investigating agents may have information regarding all of these areas.

- | | |
|---|--|
| a. bank records | Corporate officer or banks (with release) |
| b. business invoices | Corporate officer |
| c. real property records | Corporate officer or county/local records |
| 3. <i>Request information regarding:</i> | |
| a. outstanding judgments and/or liens | County or local public records |
| b. pending civil suits | Corporate officer or county records |
| c. contingent (future) assets and contingent liabilities | Corporate officer or county records |
| d. bankruptcy history | Bankruptcy court and/or corporate officer |
| 4. Financial statements filed with banks (filed for loans, line of credit, etc.)* | Corporate officer |
| 5. Company's current financial projections with assessment of impact of convictions on the business | Corporate officer and/or chief financial officer |

Financial Condition: Ability to Pay

Conducting financial investigations of organizations is a continual learning process. In each case, a probation officer has opportunities to learn more about corporate finances and techniques to investigate them. In general, businesses want to put "their best foot forward" in working with the court and will provide information upon request. It is therefore important to know what to ask for. The courts, prosecutors, and defense attorneys are aware that probation officers are usually not experts in the subject of corporate finance. Accordingly, if an officer does not understand something submitted by the organization's representative, it is important to ask for an explanation. This section is designed to provide assistance in understanding basic concepts of corporate financial statements, direction in knowing what to ask for, and guidance in knowing what to do with the information upon receipt. As with any new complex responsibility undertaken by probation officers, such as sentencing guidelines, case law, or electronic monitoring, the process becomes easier with experience, but there will always be something new to learn. In this section, the process for determining an organization's

ability to pay financial sanctions will be presented. However, for more detail, officers are referred to the *Financial Investigation: Desk Reference for U.S. Probation and Pretrial Services Officers*, published by the Federal Judicial Center as part of a training curriculum.

In the Financial Condition: Ability to Pay section of the report, the goal is to determine an organization's ability to pay restitution and a fine. The officer conducts an investigation of the organization's financial condition and provides a summary in a manner that will be easy for the court and attorneys to review and understand.

A financial investigation is not a static assessment; rather it is a process of incorporating an assessment over time. Organizations have financial histories and lifestyles. It is more accurate to assess and predict an organization's ability to pay by analyzing data over time. An accurate assessment of ability to pay is not a snapshot of the organization's current financial picture. It is more like a movie in which conditions and fortunes may change over time.

In assessing the ability of an organization to pay restitution and/or a fine, it is important to obtain financial records for several years. Unlike assessing the financial condition of an individual defendant, the current financial profile of an organization may not portray an accurate picture of the organization's ability to pay. Looking at the history of a company or organization will be of value in predicting the financial health of the organization in the future. For example, if an officer is evaluating a company that is currently not making much profit because the criminal prosecution has resulted in negative publicity and the value of the stock has dropped, it would be instructive to know that for the past three years the company has made large profits. In such a circumstance, the officer would consider whether the company's profits have a strong potential for recovery in the future. Conversely, an officer may receive a current financial statement from a company suggesting that it could pay a large fine over time. However, an assessment of the past three years shows indications that the company's solvency has been diminishing at an increasing rate each year and may indicate that the company is headed toward bankruptcy. Accordingly, it is preferable to obtain financial documents for the past three to five years.

The key element of any financial investigation is to obtain and analyze the organization's financial statements. Financial statements are needed to determine if the organization has the ability to pay financial sanctions. Many of the items that appear on the checklists above are marked with an (*), indicating they provide financial statements.

The most reliable financial statements for a public corporation are the 10K and the 1120 tax returns since both are submitted under penalty of law. Remember to request three to five years of financial statements to assist in analyzing the organization's financial history.

Types of Financial Statements

Although financial statements prepared by Certified Public Accountants (CPAs) all follow the same general format, they are prepared with different degrees of thoroughness. It is important to be able to recognize the standard types, to know how they are prepared, and to understand how much you can rely on each of them.

Compilation Report

The compilation report is the quickest and least expensive kind of statement to prepare. As the name suggests, all the accountant does is take the figures provided by his client and arrange them into a standard format. Accountants offer no independent assurance about the reliability of the figures since they have done nothing more than compile them. The report should include a brief disclaimer explaining this fact. Compilations can look very authentic and impressive but have little value for verification purposes. Without further investigation, the probation officer has no way of knowing whether the defendant simply made up the figures that were provided to the accountant. To verify the information, it may be helpful to request copies of bank records and/or inspect the books, invoices, accounts payable, and accounts receivable.

Review Report

The review report is only slightly more reliable. In preparing this statement, the accountant also asks the client about his record keeping procedures and how he arrived at his figures. The accountant then makes a limited analysis to see if the figures seem consistent with what the client told him. The report should include a statement similar to that found in the compilation.

Audited Financial Statement

The audited financial statement is by far the most reliable. Theoretically, all of the information in the statement has been verified by independent auditors following a strict set of rules. Auditors verify the financial records, observe inventory, send letters to customers, creditors and lending institutions to verify the company's financial transactions. The CPA attaches a statement to the audited financial statement certifying that it has been prepared using proper accounting methods and that it accurately represents the financial condition of the business. The officer can generally rely on the accuracy of information contained in an audited financial statement. In actuality, the officer is relying on the integrity of the CPA that prepared the audited statement.

Financial Statement Filed With Banks

On occasion, there may be value in obtaining copies of financial statements that an organization has filed with banks. These are commonly filed with loan applications and applications for lines of credit. Such financial statements provide a profile of the organization at a certain point in time.

Requesting Copies of Tax Returns

In requesting organizations to provide copies of tax returns, there are a few considerations to keep in mind. A corporation with subsidiaries may file separate returns for the subsidiaries or may file a "consolidated" tax return that includes the subsidiaries. The decision regarding how to file the returns will depend upon the tax considerations and which method would be most beneficial to the company. Thus, when asking for copies of tax returns, the probation officer should inquire about subsidiaries and ask whether the company files a consolidated return.

Remember that organizational tax returns are financial statements. Income or the profit/loss statement is on the front page and the balance sheet is on Schedule L of the return. Some corporate returns are voluminous because of the extensive backup information that is submitted with the return. In all circumstances, the officer should request copies of the IRS forms (F-1120, F-1120-S, or F-1065) and the schedules (IRS required addendums).

Corporations are rarely indicted alone. Corporate defendants often have corporate officers charged as individual codefendants. In such a case, the probation officer also requests copies of the F-1040 tax returns (individual tax returns) regarding the codefendant corporate officers. The probation officer will be able to examine the corporate returns and the individual returns to see how compensation flowed from the corporation to the individual. Obviously, compensation paid as wages should be reflected in the individual's W-2 income statement. Director fees paid to a corporate officer, a form of compensation that is not considered wages, are typically reported on a F-1099 report. By obtaining the tax returns for both the company and the individual defendants, the probation officer will be able to examine the flow of funds. In doing so the officer may discover discrepancies. In comparing the returns, it is important to be aware that while individuals are required to file their tax returns on the basis of the calendar year, organizations may define a fiscal year for the time frame covered in their tax returns based upon their accounting procedures. Accordingly, the figures transferred from a corporate return to an individual return may not be consistent if the time frames differ.

Bankruptcy History

When an organization files for bankruptcy, it is required to file a financial statement under penalty of perjury, including the company's net worth. A bankruptcy file, whether it is an old file or a current file, will pinpoint the financial condition of an organization at a given point in time. If the company is currently undergoing bankruptcy proceedings, the officer contacts the trustee in order to determine the feasibility of collecting restitution and a fine.

A filing under Chapter 11 is a request for temporary protection from creditors with the intention to reorganize, pay creditors, and continue operations. A filing under Chapter 7 is indicative of an organization's intent to liquidate available assets, pay creditors, and cease business operations. On occasion, Chapter 11 protection may serve as a prelude to the filing of a Chapter 7.

Financial Projections

Ask the individual presenting the organization for a statement of the company's projections for the future, including an assessment of the impact of the conviction(s) on the organization. Such projections will be helpful in several ways. The officer can compare what the organization is stating now with what the organization previously represented to the public in its annual reports and 10K reports. Projections will also assist in evaluating the future financial health of the organization. It is important to inquire about contingent (future) assets and contingent liabilities. For example, a pending major contract that will bring substantial funds to the company is an example of a contingent asset. An example of a contingent liability is when a company will be entering into a legal settlement in the near future and the financial plan must allow for payment. Another example is a company that must retool in the next six months. Requesting a statement from the organization regarding its financial projections is also a good procedure in that the officer is, in essence, providing the organization the opportunity to provide its statement as to ability to pay.

What do you do with the information?

In order to understand the documents, definitions of a financial statement and the contents are provided below and clarifying comments follow in italics.

Financial Statement

A financial statement is a formal report prepared by an accountant, reflecting the financial condition of a business. It includes a balance sheet, an income or profit and loss statement, and possibly other tables reflecting changes in the financial condition of the business. Financial statements are the basic tools for both collecting and presenting

financial information. It is essential to be able to use them effectively in analyzing the ability of an organization to pay restitution and fines.

Balance Sheet

A balance sheet is a formal report prepared by an accountant reflecting the assets, liabilities, and owner's equity in a company on a specific date.

Assets

An asset is something that is owned and has value (can be sold). *A liquid asset is one that can be converted to cash. In a balance sheet format, assets are listed in order of their relative liquidity, with the most liquid assets appearing first.*

current assets

Current assets include cash and those assets (accounts receivable and inventory) which the organization expects will be turned into cash within a year. *Current assets are used by the organization to pay its current liabilities. Current assets may also be the source for immediate payment of financial sanctions.*

fixed assets

Fixed assets include assets not intended for sale that are used to manufacture the product, display it, warehouse it, or transport it. Examples include land, buildings, machinery, equipment, furniture, automobiles and trucks. *A financial statement will conservatively display the value of an organization's fixed assets, listing them at purchase price less accumulated depreciation. The value listed on the balance sheet may not have any correlation to fair market value. Fixed assets are often not useful as a source for immediate payment of a fine or restitution since they are necessary for the continued operation of the company.*

other assets

Other assets include any other property with perceived value, often including intangibles (e.g, a trademark, a logo, goodwill, or a patent). *These assets are generally the least readily available to convert to cash.*

Liabilities

A liability is money owed to another; a debt. *A liability is a creditor's claim against assets.*

current liabilities

Current liabilities include accounts payable and other debts due within a year.

long term liabilities

Long term liabilities are debts that are not expected to be paid or satisfied within one year. *Long term debt is generally secured against a specific asset. Long term liabilities are generally used to finance the purchase of fixed assets.*

Stockholders' Equity

Stockholder's equity is the net worth of the organization and represents the collective owners' claim against the assets. Stockholders' equity consists of capital stock, capital surplus, and accumulated retained earnings.

capital stock

Capital stock represents ownership of a corporation, as evidenced by a stock certificate. A corporation's stock is divided into a specified number of shares.

capital surplus

Capital surplus is any monies received by the organization from the sale of stock which is in excess of the stock's par value. Par value is a specified amount printed on the face of a stock certificate; not to be confused with market value. The difference between par value and market value is designated as capital surplus on a balance sheet.

accumulated retained earnings

After payment of dividends, accumulated retained earnings represent the yearly profit or loss which is held by the organization and which accumulates over time.

Income Statement (profit and loss statement)

Also known as a Profit and Loss Statement, the Income Statement is a formal report prepared by an accountant reflecting the income, expenses, and net profit of a business over a specified period of time. The income statement displays the cash flow of the organization; **sufficient cash flow may provide a source for payment of financial sanctions over time.**

gross receipts

Gross receipts represent the primary source of money received by the organization from its customers for goods sold or services rendered.

cost of goods sold (adjustment to income)

Cost of goods sold include the costs of manufacturing, producing, and delivering goods and services sold.

gross profit

Gross profit is the difference between the gross receipts and the cost of goods sold.

other income

Other income includes all other sources of income not directly related to the nature of the business.

total income (revenue)

Total income represents the gross profit plus other income.

expenses

Expenses are costs incurred by an organization to conduct its day to day operation. *Expenses are not to be confused with liabilities.*

net profit

Net profit is total income minus expenses, costs, and tax obligations. *It is important to remember that the tax liability in Subchapter S corporations and partnerships becomes the*

responsibility of their owner(s) and is transferred to the individual's tax return (F-1040).

Formatting the Information

The officer examines the information in the documents looking for consistency. The officer then selects the source with the most reliable information to look for financial patterns. When comparing the figures, an effective method is to take the financial statements from the same source (e.g., tax filings) for several years and compare the figures by laying them out on one page. The financial condition on the following page exhibits a format for plotting the information.

BALANCE SHEET				
	1990	1989	1988	1987
ASSETS				
Cash	\$ 43,737	\$ 116,522	\$ 479,512	\$ 330,857
Accounts Receivable	896,060	943,229	1,051,516	1,407,758
Inventory	393,000	375,000	400,000	569,200
Other Current Assets	61,978	75,818	214,126	191,435
Loans to Shareholders	520,000	180,000	80,000	50,000
Fixed Assets less depreciation	5,955,606	4,483,119	4,977,238	5,598,180
Other Assets	3,700	3,700	3,700	3,700
TOTAL ASSETS	7,874,081	6,177,388	7,206,092	7,151,130
LIABILITIES				
Accounts Payable	619,520	538,729	347,704	292,689
Mortgages, Notes	462,731	315,482	223,182	399,892
Other Current Liabilities	73,119	104,010	508,003	499,794
Long Term Liabilities	5,603,129	4,277,890	1,357,720	1,726,115
TOTAL LIABILITIES	6,758,499	5,236,111	2,436,609	2,918,490
EQUITY				
Stock	1,000	1,000	1,000	1,000
Paid-in Capital	1,298,566	1,321,739	2,672,208	3,334,367
Retained Earnings	(183,984)	(381,516)	2,096,275	1,897,273
TOTAL EQUITY	1,115,582	941,277	4,769,483	5,232,640
TOTAL LIABILITIES & EQUITY	\$7,874,081	\$6,177,388	\$7,206,092	\$8,151,130

PROFIT/LOSS

INCOME

Gross Sales	\$8,171,714	\$3,853,417	\$8,137,317	\$8,035,990
Cost of Goods	5,471,207	4,364,730	6,376,090	5,534,339
Gross Profit	2,700,507	(511,313)	1,761,227	2,501,651
Other Income	195,884	218,204	900,195	153,300
Total Income	2,896,391	(293,109)	2,661,422	2,654,951

EXPENSES

Compensation to Officers (Wages)	73,850	80,000	80,000	83,077
Rents	124,791	350,454	447,415	407,236
Interest	1,157,800	1,045,738	1,016,740	799,163
Depreciation	768,906	618,704	179,135	153,302
Other Deductions	52,444	59,738	62,314	93,526
Total Deductions	521,068	432,285	574,300	345,788
Taxable Income	2,698,859	2,586,919	2,359,904	1,882,092
Tax	197,532	(2,880,028)	301,518	772,859
	0	(401,237)	102,516	298,721
Net Income	197,532	(2,477,791)	199,002	474,138

Analyzing the Financial Information

In examining the financial statements for several years, the officer is looking for patterns of growth and decline. In determining the ability of an organization to pay financial sanctions, it is important to be able to assess the quality of a business. Is it healthy? Is it just holding its own? Or is it heading toward bankruptcy? Is it a legitimate, income-producing activity or simply a "front" or "cover" used to conceal other sources of income? These questions can be answered by analyzing the financial statement using certain standard formulas. These formulas, known as "key business ratios," are used to measure how solvent and how profitable a business is:

Name	Formula	Comments
1. Current Ratio	$\frac{\text{Current Assets}}{\text{Current Liabilities}}$	A measure of working capital. The higher the ratio, the higher the probability that the business will be able to meet its short-term obligations to creditors. A ratio of 2.0 is normally considered healthy, although ratios as low as 1.5 can be acceptable in some cases.

Name	Formula	Comments
2. Quick Ratio	$\frac{\text{Cash} + \text{Receivables}}{\text{Current Liabilities}}$	Another measure of solvency. It indicates the ability to meet short-term obligations without selling inventory, which might be overvalued or hard to move. A ratio of 1.0 or better indicates a <i>liquid</i> business.
3. Total Liabilities to Net Worth	$\frac{\text{Total Liabilities}}{\text{Net Worth}}$	A final measure of solvency. It should generally be less than 100%, otherwise the creditors have more of a stake in the business than the owners. The lower the percentage the better. A very high percentage usually indicates approaching bankruptcy.
4. Return on Sales (Profit Margin)	$\frac{\text{Net Profit}}{\text{Net Sales}}$	Varies depending on type of business. Compare to the industry norms discussed below for the type of business involved.
5. Return on Net Worth	$\frac{\text{Net Profit}}{\text{Net Worth}}$	A second measure of Net Worth profitability Net Worth indicating the return owners received on their investment. A ratio of 10% is usually considered good. Compare the return to what the owners could have received by simply putting their money in the bank or selecting other investments requiring no effort on their part.

The desirable ratios given above are a general guide. The ratios for an organization can be compared to those for similar businesses nationwide. Dun and Bradstreet, Inc., is a commercial credit reporting agency that maintains these statistics and publishes them in a booklet entitled "Industry Norms and Key Business Ratios," which is available at the public library.

Once you have a financial statement, it is a simple matter to compute the ratios and compare them to the general standards and industry norms. Significant irregularities should be explored through further questioning of the organization's representatives. Unexplained irregularities may indicate that the business is in trouble or that it is not intended to make a profit (a common situation with a "front" or "cover" criminal organization and warrants further investigation). By displaying the financial statement information on an organization for several years, the probation officer can calculate the ratios and look for trends in growth, solvency, and profitability.

Some Additional Tips in Analyzing Financial Information

In assessing general trends of growth and decline over time, it may be helpful to look for:

Growth: Look for a rise in assets and decline in liabilities. The end product would be an increase in the stockholders' equity.

Expansion: Look for a growth in assets and similar growth in liabilities (because the organization is borrowing more money to expand) and little change in equity. The assets must equal liabilities plus net worth. Ask what the expected outcome of the expansion will be. Does the organization forecast a change in sales? Obviously an expected increase in sales may improve the organization's ability to pay financial sanctions in the future. If an organization is in the process of expansion, we may need to look to the future for full payment of restitution and a fine.

Liquid Assets: Liquid assets include cash and those assets that can be quickly converted into cash. **Liquid assets will provide the basis for immediate payment of financial sanctions.**

Fixed Assets and Depreciation: The fixed assets are used by the organization to conduct business and typically include land, buildings, equipment, etc. If the organization asserts that it must replace equipment to remain solvent, look to see if the equipment has been depreciated in value. Capital outlay for purchase of equipment may reduce liquid assets and the ability of the organization to make a lump sum payment at sentencing. An assessment should be made as to whether or not the organization needs the new equipment to remain solvent. If the company is out of business, it may not be able to pay full restitution and a fine.

Loans to Stockholders (bleeding the corporation): A method to bleed money from a corporation is to make loans to the stockholders. The loans become assets of the company, but stockholders' equity (the value of the business) may have less value than represented. Bleeding money from the company may indicate a criminal organization. If an organization is not solvent but large amounts of money have been diverted to a principal officer who is also charged criminally, it may be appropriate to fine that individual with the amount the corporation would have been required to pay. If the money from the company is diverted to a principal officer year after year, the company may be a shell or alter ego of that principal officer.

Money Laundering: If large amounts of money are coming into the corporation from stockholders and the company is cash rich, look to see where the money is going. Sometimes laundered money will be hidden as a mortgage. If the mortgage is not secured with collateral, such a situation flags the potential for money laundering. A mortgage implies the purchase of an asset. Since mortgages must be filed with local

authorities, check the mortgage if the situation looks suspicious. Money coming into a corporation from stockholders that is subsequently returned to stockholders as loans may indicate money laundering.

Sample Analysis of an Organization's Financial Statements

On the next page is the financial condition of a company that was previously displayed to demonstrate a method to format the information from financial statements. The following analysis was developed by comparing the company's financial statements for four years, looking for trends and using the standard business ratios.

Analysis: This table represents the company's consolidated financial statement for years 1987 through 1990. Assembling the accounts for several years on a single sheet of paper allows the probation officer to look for trends, as well as identify red flags (i.e., unusual entries or drastic changes) that require further explanation by the company's representative or accountant.

The two most important components to the financial statement are the balance sheet and the income statement. The balance sheet is always presented first and the most current year is always presented in the far left column.

Typically, we look to the balance sheet for an immediate fine payment. Assets are listed in order of liquidity. First, we look to cash. This is not a cash rich company.

The Accounts Receivables appear substantial. The company may be able to secure a loan against them and use the money to pay a fine.

Look at the Loans to Shareholders account, which increased \$340,000 in 1990. Notice the increase to this account and the decrease to the cash account in the same year. If you can collect it from the shareholder, use it to pay a fine. If the shareholder is a codefendant and cannot pay, the company's equity is only half of what it now represents.

When the Fixed Assets account is quickly depreciated, it may be indicative of a company that may argue that they need to retool. That is not the case with this company. Fixed Assets and Long Term Liabilities both rose proportionally in 1990. Remember that Long Term Liabilities are typically the source to finance fixed assets.

Notice the negative retained earnings in 1989 and 1990 as compared to 1987 and 1988. Look at the Gross Profit and negative Taxable Income in 1989. Something happened to the company in 1989 (red flag) and the probation officer needs to look into this. However, notice how sales rebounded in 1990 to pre-1989 levels and the company was again profitable. Remember to look at the Income Statement when determining if the company can pay a fine over time.

BALANCE SHEET

	1990	1989	1988	1987
ASSETS				
Cash	\$ 43,737	\$ 116,522	\$ 479,512	\$ 330,857
Accounts Receivable	896,060	943,229	1,051,516	1,407,758
Inventory	393,000	375,000	400,000	569,200
Other Current Assets	61,978	75,818	214,126	191,435
Loans to Shareholders	520,000	180,000	80,000	50,000
Fixed Assets less depreciation	5,955,606	4,483,119	4,977,238	5,598,180
Other Assets	3,700	3,700	3,700	3,700
TOTAL ASSETS	7,874,081	6,177,388	7,206,092	7,151,130
LIABILITIES				
Accounts Payable	619,520	538,729	347,704	292,689
Mortgages, Notes	462,731	315,482	223,182	399,892
Other Current Liabilities	73,119	104,010	508,003	499,794
Long Term Liabilities	5,603,129	4,277,890	1,357,720	1,726,115
TOTAL LIABILITIES	6,758,499	5,236,111	2,436,609	2,918,490
EQUITY				
Stock	1,000	1,000	1,000	1,000
Paid-in Capital	1,298,566	1,321,739	2,672,208	3,334,367
Retained Earnings	(183,984)	(381,516)	2,096,275	1,897,273
TOTAL EQUITY	1,115,582	941,277	4,769,483	5,232,640
TOTAL LIABILITIES & EQUITY	\$7,874,081	\$6,177,388	\$7,206,092	\$8,151,130
PROFIT/LOSS				
INCOME				
Gross Sales	\$8,171,714	\$3,853,417	\$8,137,317	\$8,035,990
Cost of Goods	5,471,207	4,364,730	6,376,090	5,534,339
Gross Profit	2,700,507	(511,313)	1,761,227	2,501,651
Other Income	195,884	218,204	900,195	153,300
Total Income	2,896,391	(293,109)	2,661,422	2,654,951
EXPENSES				
Compensation to Officers (Wages)	73,850	80,000	80,000	83,077
Rents	124,791	350,454	447,415	407,236
Interest	1,157,800	1,045,738	1,016,740	799,163
Depreciation	768,906	618,704	179,135	153,302
Other Deductions	52,444	59,738	62,314	93,526
Total Deductions	521,068	432,285	574,300	345,788
Taxable Income	2,698,859	2,586,919	2,359,904	1,882,092
Tax	197,532	(2,880,028)	301,518	772,859
	0	(401,237)	102,516	298,721
Net Income	197,532	(2,477,791)	199,002	474,138

Remember that current ratios of 2.0 are normally considered healthy and 1.5 can be acceptable in some cases. (Current ratio = current assets divided by current liabilities). Our company had a current ratio of 1.21 in 1990 and 1.58 in 1989. Red Flag: If you can convert the \$520,000 from the shareholders into cash, you will increase the current assets, which then increases the current ratio to a more healthy 1.66 for 1990.

Remember that quick ratios of 1.0 are normally considered healthy. (Quick ratio = cash + receivables divided by current liabilities). Our company has a quick ratio of .81 for 1990 and 1.11 for 1989. Reg Flag: If you can collect the \$520,000 shareholder loan, you would increase the cash and the quick ratio to a healthy 1.26.

The primary questions for the probation officer are: How much can this company realistically pay? — and — Where will it come from?

Our best source to obtain a fine payment in a lump sum rests in the ability to convert the loans to shareholders to cash (in other words, collect the loans from the shareholders). There is a potential lump sum payment of \$520,000.

If that is not possible, the company only has the ability to make a much smaller, immediate payment (perhaps \$50,000). Since the company returned to profitability in 1990, it should be able to make fine payments over time (perhaps \$100,000 annually).

Sources of Financial Information		
Source	Information	Records
Internal Revenue Service	<ul style="list-style-type: none"> • Taxable income • Assets • Liabilities • Expenditures • Detailed accounting on self-employment • Previous employers 	<ul style="list-style-type: none"> • F-1120, • F-1120A, • F-1120S, • F-1065, all with schedules
Bank Records	<ul style="list-style-type: none"> • Income (deposits) • Expenses (checks & withdrawals) • Hidden assets • Associates • Unreported transactions 	<ul style="list-style-type: none"> • Statements • Canceled checks • Microfilm copies (from bank)

Sources of Financial Information		
Source	Information	Records
County Recorders	<ul style="list-style-type: none"> • Real estate transactions <ul style="list-style-type: none"> ▸ date purchased/sold ▸ to/from whom ▸ price ▸ amount financed ▸ monthly payment (or payoffs) ▸ claims by or against subject • Lawsuits • Income tax problems 	<ul style="list-style-type: none"> • Deeds • Mortgages • Liens • Judgments • Satisfactions • Other instruments relative to ownership • Transfer of encumbrance
County Tax Assessor	<ul style="list-style-type: none"> • Property owned • Address or legal description • Dimensions • Improvements • Date of purchase • Name(s) of owner(s) • Address(es) of owner(s) • Assessed value • Taxes paid or due • Delinquent taxes • Former owners 	<ul style="list-style-type: none"> • Indexes <ul style="list-style-type: none"> ▸ Name ▸ Legal description ▸ Address
Court Clerk – Civil County & Federal	<ul style="list-style-type: none"> • Allegations concerning financial transaction • Financial statements • Affidavits • Depositions • Stipulations • Agreements • Settlements • Copies of instruments & documents 	<ul style="list-style-type: none"> • Civil suits • Bankruptcy files
Fictitious Name Register County Courthouse	<ul style="list-style-type: none"> • Ownership of DBAs (doing business as) • Time in business 	<ul style="list-style-type: none"> • Indexes • Affidavits

Sources of Financial Information		
Source	Information	Records
Occupational License Bureaus – County & City	<ul style="list-style-type: none"> • Ownership • Time in business 	Original application
Better Business Bureau	<ul style="list-style-type: none"> • Unreported transactions • Potential witnesses or sources of information 	Consumer complaints
Securities and Exchange Commission (SEC)	<ul style="list-style-type: none"> • 10K reports • Licensing 	<ul style="list-style-type: none"> • Licensing records • Violator files
Federal Trade Commission (FTC); Commodities and Futures Trading Commission (CFTC); or State Securities Agency	<ul style="list-style-type: none"> • Civil & Criminal enforcements 	
Occupational Regulation Agencies	<ul style="list-style-type: none"> • Ownership • Time in business • Disciplinary actions 	Licensing records
Department of Motor Vehicles	Vehicles owned by organization	Title records
Newspaper, Library, or Morgue	Leads for further investigation	Newspaper articles
Bureau of Unemployment Compensation	<ul style="list-style-type: none"> • Compensation received • Payment of taxes by organization 	<ul style="list-style-type: none"> • Compensation records • Employer contribution records

ORGANIZATIONAL WORKSHEET A

OFFENSE LEVEL

Defendant _____ District/Office _____

Docket Number _____

Count Number(s) _____ U.S. Code Title & Section _____: _____; _____: _____

Guidelines Manual Edition Used: 20__ (Note: The Worksheets are keyed to the November 1, 2016 *Guidelines Manual*)

Preliminary Determination of Inability to Pay Fine

- If it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1, a determination of the guideline fine range is unnecessary (See §§8C2.2(a)). In such a case, skip to Worksheet D, Item 1.
- If it is readily ascertainable through a preliminary determination of the minimum guideline fine range that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary (See §8C2.2(b)). In such a case, skip to Worksheet D, Item 1.

INSTRUCTIONS

For each count of conviction (or stipulated offense listed at §8C2.1), complete a separate Worksheet A.

Exceptions:

1. Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (See §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (See §3D1.2(a) and (b)).
2. For counts of conviction (or stipulated offenses) not listed at §8C2.1, skip to Worksheet D, Item 1 (See §8C2.10).

Offense Level (See §8C2.3)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum, the adjusted offense level, in the box provided below.*

Guideline	Description	Level
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

If this worksheet does not cover all counts of conviction or stipulated offenses listed at §8C2.1, complete Worksheet B. Otherwise, enter this sum on Worksheet C, Item 1.

Sum
(Adjusted Offense Level)

Notes:

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

*Note: Chapter Three Parts A, B, C and E, **do not** apply to organizational defendants.

ORGANIZATIONAL WORKSHEET B

MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES

Defendant _____

Docket Number _____

INSTRUCTIONS

STEP 1: Determine if any of the counts group. All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (See §3D1.2(a)). Explain the reasons for grouping:

STEP 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various Worksheets "A" (Worksheet A, Item 1) that comprise the group (See §3D1.3). Note that a "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

STEP 3: Enter the number of units to be assigned to each group (See §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (½) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s) _____

_____ Unit

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s) _____

_____ Unit

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s) _____

_____ Unit

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s) _____

_____ Unit

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s) _____

_____ Unit

6. Total Units

_____ Total Units

7. Increase in Offense Level Based on Total Units (See §3D1.4)

1 unit:	no increase	2½ – 3 units:	add 3 levels
1½ units:	add 1 level	3½ – 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. Highest of the Adjusted Offense Levels from Items 1–5 Above

9. Combined Adjusted Offense Level (See §3D1.4)

Enter the sum of Items 7 and 8 here and on Worksheet C, Item 1.

ORGANIZATIONAL WORKSHEET C

BASE FINE, CULPABILITY SCORE, AND FINE RANGE

[Page 1 of 2]

Defendant _____

Docket Number _____

1. Offense Level Total

If Worksheet B is required, enter the combined adjusted offense level from Worksheet B, Item 9. Otherwise, enter the sum (the adjusted offense level) from Worksheet A, Item 1.

2. Base Fine (See §8C2.4(d))

(a) Enter the amount from the Offense Level Fine Table (See §8C2.4(d)) corresponding to the offense level total in Item 1 above.

Note: 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 (See §8C2.4(e)(1)).

(b) Enter the pecuniary gain to the organization (See §8C2.4(a)(2)).

(c) Enter the pecuniary loss caused by the organization to the extent the loss was caused intentionally, knowingly, or recklessly (See §8C2.4(a)(3)).

Note: The following Chapter Two guidelines have special instructions regarding the determination of pecuniary loss: §§2B4.1, 2C1.1, 2C1.2, 2E5.1, 2E5.6, and 2R1.1.

(d) Enter the amount from Item (a), (b), or (c) above, whichever is greatest.

3. Culpability Score (See §8C2.5)

(a) Start with five points and apply (b) through (g) below. (See §8C2.5(a))

(b) **Involvement/Tolerance** (See §8C2.5(b))

Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0".

(c) **Prior History** (See §8C2.5(c))

Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0".

Enter the earliest date of relevant conduct for the instant offense: _____

(d) **Violation of an Order** (See §8C2.5(d))

Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0".

(e) **Obstruction of Justice** (See §8C2.5(e))

If no adjustment is applicable, enter "0".

(f) **Effective Program to Prevent and Detect Violations of Law** (See §8C2.5(f))

If no adjustment is applicable, enter "0".

(g) **Self-Reporting, Cooperation, and Acceptance of Responsibility** (See §8C2.5(g))

Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0".

4. Total Culpability Score

Enter the total of Items 3(a) through 3(g).

Organizational Worksheet C

Base Fine, Culpability Score, and Fine Range [Page 2 of 2]

Defendant _____

Docket Number _____

5. Minimum and Maximum Multipliers (See §8C2.6)

Enter the minimum and the maximum multipliers from the table at §8C2.6 corresponding to the total culpability score in Item 4 above.

Note: If the applicable Chapter Two guideline is §2R1.1, neither the minimum nor the maximum multiplier shall be less than 0.75. (See §2R1.1(d)(2)).

(a) Minimum Multiplier

(b) Maximum Multiplier

6. Fine Range (See §8C2.7)

(a) Multiply the base fine (Item 2(d) above) by the minimum multiplier (Item 5(a) above) to establish the minimum of the fine range. Enter the result here and at Worksheet D, Item 4(a).

Minimum of fine range

(b) Multiply the base fine (Item 2(d) above) by the maximum multiplier (Item 5(b) above) to establish the maximum of the fine range. Enter the result here and at Worksheet D, Item 4(a).

Maximum of fine range

7. Disgorgement (See §8C2.9)

Skip this item if any pending or anticipated civil or administrative proceeding is expected to deprive the defendant of its gain from the offense.

(a) Enter the amount of pecuniary gain to the defendant from Item 2(b) above.

(b) Enter the amount of restitution already made and remedial costs already incurred.

(c) Enter the amount of restitution and other remedial costs to be ordered by the court. (See §§8B1.1 and 8B1.2.)

(d) Add Items (b) and (c) and enter the sum.

(e) Subtract the sum of restitution and remedial costs (Item (d)) from the amount of pecuniary gain to the defendant (Item (a)) to determine undisgorged gain. Enter the result here and at Worksheet D, Item 4(b). If the amount of undisgorged gain is less than zero, enter "0".

ORGANIZATIONAL WORKSHEET D

GUIDELINE WORKSHEET

[Page 1 of 3]

Defendant _____

Docket Number _____

Note: Unless otherwise specified, all items on Worksheet D are applicable to **all** counts of conviction.

1. Restitution (See §8B1.1)

(a) If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason:

(b) Enter whether restitution is statutorily mandatory or discretionary:

(c) Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute:

2. Remedial Orders (§8B1.2), Community Service (§8B1.3), Order of Notice to Victims (§8B1.4)

List if applicable. Otherwise enter "N/A".

3. Criminal Purpose Organization (See §8C1.1)

If a preliminary determination indicates that the organization operated primarily for a criminal purpose or primarily by criminal means, enter the amount of the organization's net assets. This amount shall be the fine (subject to the statutory maximum) for all counts of conviction.

\$

4. Guideline Fine Range (Only for counts listed under §8C2.1)

(a) Enter the guideline fine range from Worksheet C, Item 6.

\$ to \$

(b) Disgorgement (See §8C2.9)

Enter the result from the Worksheet C, Item 7(e). The court shall add to the fine determined under §8C2.1 (Determining the Fine Within the Range) any undisgorged gain to the organization from the offense.

\$

Check if guideline fine range was not calculated because of preliminary determination of inability to pay fine (See §8C2.2).

5. Counts Not Listed Under §8C2.1 (See §8C2.10)

Enter the counts not listed under §8C2.1 and the statutory maximum fine for each count. The court **may** impose an additional fine for these counts.

Organizational Worksheet D — Guideline Worksheet

[Page 2 of 3]

Defendant _____

Docket Number _____

6. Reduction of Fine Based on Inability to Pay (See §8C3.3)

Check the applicable box(es):

There is evidence that the imposition of a fine within the guideline fine range would impair the organization's ability to make restitution to victims. In such a case, the court **shall** reduce the fine below that otherwise required (See §8C3.3(a)).

There is evidence that the organization, even with use of a reasonable installment schedule, is not able or likely to become able to pay the minimum guideline fine. In such a case, the court **may** impose a fine below that otherwise required (See §8C3.3(b)).

7. Fine Offset (See §8C3.4)

Multiply the total fines imposed upon individuals who each own at least five percent (5%) interest in the organization by those individuals' total percentage interest in the organization, and enter the result. The court **may** reduce the fine imposed on a closely held organization by an amount not to exceed the fine offset.

\$

8. Imposition of a Sentence of Probation (See §8D1.1)

(a) Probation is required if any of the following apply. Check the applicable box(es):

- (1) Probation is necessary as a mechanism to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3).
- (2) Any monetary penalty imposed (*i.e.*, restitution, fine, or special assessment) is not paid in full at the time of sentencing and restrictions appear necessary to safeguard the defendant's ability to make payments.
- (3) At the time of sentencing the organization has 50 or more employees and does not have an effective program to prevent and detect violations of law.
- (4) Within the last five years prior to sentencing, the organization has engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication.
- (5) An individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense; and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication; and any part of the misconduct underlying the instant offense occurred after that adjudication.
- (6) Probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.
- (7) The sentence imposed upon the organization does not include a fine.
- (8) Probation is necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). State purpose(s):

(b) Length of Term of Probation (See §8D1.2). If probation is imposed, the guideline for the length of such term of probation is: (Check the applicable box)

- (1) At least one year, but not more than five years if the offense is a felony
- (2) No more than five years if the offense is a Class A misdemeanor

(c) Conditions of Probation (See §§8D1.3 and 8D1.4). List any mandatory conditions (§8D1.3), recommended conditions (§8D1.4), and any other special conditions that may be applicable.

Organizational Worksheet D — Guideline Worksheet

[Page 3 of 3]

Defendant _____

Docket Number _____

9. Special Assessments *(See §8E1.1)*

Enter the total amount of special assessments required for all counts of conviction.

10. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as necessary.

Completed by _____

Date _____