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

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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.

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[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

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[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 Commission[11] 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;
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> (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
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> (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

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[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

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[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]

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[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

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[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 culpability[41] 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 Act[44] 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

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[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]

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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 obstruction 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

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[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;
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> (B) The appointment of independent counsel or the use, if available, of a special committee of independent directors;
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> (C) The hiring and use of special consultants;

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[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]

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[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

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[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

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[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

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[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 Justice[98] and its internal staff working group.[99]

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[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

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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

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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

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[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 management[123] 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

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[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

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[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]

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[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 viscously (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.

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[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] readying 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

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[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

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[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

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[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 activity [181] 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

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[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

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[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

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[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.

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[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]

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[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]

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[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.ussc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/corpbehavior2.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 drug[219] 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

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[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

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[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.ussc.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

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[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

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[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

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[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

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[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

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[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

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[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.ussc.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.ussc.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

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[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]

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[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 organizations[297] 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

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[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.ussc.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

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[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 Eight[315] and to report on organizational data[316] without substantially revisiting the 2004 amendment.[317] This continued until the Commission's 2009-2010 amendment cycle.[318]

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[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]

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[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.ussc.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

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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

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[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

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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.ussc.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.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.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]

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[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]

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[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 attention[358] 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.

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[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.