

# APPENDIX B

## PROPOSED AMENDMENT: EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

### Proposed Amendment:

## CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

### Introductory Commentary

*The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting ~~criminal conduct~~violations of law.*

*This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect ~~criminal conduct~~violations of law, 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. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future ~~criminal conduct~~violations of law.*



## PART A - GENERAL APPLICATION PRINCIPLES

\* \* \*

### §8A1.2. Application Instructions - Organizations

- (a) Determine from Part B, **Subpart 1** (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
- (b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

\* \* \*

- (2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

\* \* \*

- (D) Apply §8C2.5 (Culpability Score) to determine the culpability score. **To determine whether the organization had an effective program to prevent and detect violations of law for purposes of §8C2.5(f), apply §8B2.1 (Effective Program to Prevent and Detect Violations of Law).**

\* \* \*

#### Commentary

#### Application Notes:

\* \* \*

- 3. *The following are definitions of terms used frequently in this chapter:*

\* \* \*

- (c) *"Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel **of the organization**, 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). Whether an individual falls within this category must be determined on a case-by-case basis.*

- ~~(k) An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. 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.~~
  - ~~(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.~~

~~The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:~~

~~(i) Size of the organization -- The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.~~

~~(ii) Likelihood that certain offenses may occur because of the nature of its business -- If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.~~

~~(iii) Prior history of the organization -- An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct. An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.~~

\* \* \*

## **PART B - REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF LAW**

### **1. REMEDYING HARM FROM CRIMINAL CONDUCT**

\* \* \*

## 2. PREVENTING AND DETECTING VIOLATIONS OF LAW

### §8B2.1. Effective Program to Prevent and Detect Violations of Law

- (a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
- (1) exercise due diligence to prevent and detect violations of law; and
  - (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

- (b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:
- (1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.
  - (2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report on the implementation and effectiveness of the program to prevent and detect violations of law directly 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 a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.

- (4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities.
  - (B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, 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 program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law;
    - (B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and
    - (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.
  - (6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.
  - (7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.
- (c) In implementing subsection (b), the organization shall conduct ongoing risk

assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.

### Commentary

#### Application Notes:

1. Definitions.—For purposes of this guideline:

*"Compliance standards and procedures" means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.*

*"Governing authority" means the (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.*

*"Organizational leadership" means (A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "high-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations). The term "high-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).*

*Except as provided in Application Note 4(A), "violations of law" means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.*

2. Factors to Consider in Meeting Requirements of Subsections (a) and (b).—

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.



(ii) Small Organizations.—*In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of law through relatively informal means. For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily “walk-arounds” or continuous observation while managing the business. In appropriate circumstances, this reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require more formally planned and implemented systems.*

(C) Applicable Government Regulations.—*The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an “effective program to prevent and detect violations of law” within the meaning of this guideline.*

3. Application of Subsection (b)(2).—

(A) Governing Authority.—*The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization’s efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization’s compliance efforts.*

(B) High-Level Personnel.—*The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report on the effectiveness and operation of the program to detect and prevent violations of law to the governing authority, or to an appropriate subgroup of the governing authority.*

*In addition to receiving reports from the foregoing individual(s), the governing authority or an appropriate subgroup thereof typically should receive periodically information on the implementation and effectiveness of the program to detect and prevent violations of law from the individual(s) with day-to-day operational responsibility for the program.*

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. Application of Subsection (b)(3).—

(A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3(C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable

*steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud.*

*(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.*

*(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A) as most likely to occur and most serious.*

*(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.*

*Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."*

*The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of the law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.*

*\* \* \**

**§8C2.4. Base Fine**

*\* \* \**

Commentary

Application Notes:

\* \* \*

2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~)(**Theft, Property Destruction, and Fraud**). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

\* \* \*

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational ~~criminal conduct~~**violations of law** and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting ~~criminal conduct~~**violations of law**. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, *e.g.*, price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

**§8C2.5. Culpability Score**

\* \* \*

(f) Effective Program to Prevent and Detect Violations of Law

- (1) If the offense occurred ~~despite~~**even though the organization had in place, at the time of the offense**, an effective program to prevent and detect violations of law, as provided in §8B2.1 (**Effective Program to Prevent and Detect Violations of Law**), subtract 3 points.

~~Provided, that this subsection does not apply 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 participated in, condoned, or was willfully ignorant of the offense. Participation 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.~~

~~Provided, further, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.~~

- (2) This section does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.
- (3) Participation of an individual within high-level personnel of the organization in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

\* \* \*

Commentary

Application Notes:

- 1. ~~"Substantial authority personnel," "condoned," "willfully ignorant of the offense," "similar misconduct," and "prior criminal adjudication," and "effective program to prevent and detect violations of law," are defined~~*have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).*

\* \* \*

- 3. *"High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means 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 in its entirety, four points (rather than three) would be added under subsection (b)(2).*

\* \* \*

- 10. ~~The second proviso in subsection (f)~~*Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no*

reporting is required by ~~this provision~~ *subsection (f)(2)* if the organization reasonably concluded, based on the information then available, that no offense had been committed.

\* \* \*

12. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation.**

\* \* \*

**§8C2.8. Determining the Fine Within the Range (Policy Statement)**

- (a) In determining the amount of the fine within the applicable guideline range, the court should consider:

\* \* \*

- (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score); ~~and~~
- (10) any factor listed in 18 U.S.C. § 3572(a)-~~and~~
- (11) *whether the organization failed to have, at the time of the instant offense, an effective program to prevent and detect violations of law within the meaning of §8B2.1 (Effective Program to Prevent and Detect Violations of Law).*

Commentary

Application Notes:

\* \* \*

4. *Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or **within high-level personnel of** a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization.*

\* \* \*

**4. DEPARTURES FROM THE GUIDELINE FINE RANGE**

\* \* \*

**§8C4.1. Substantial Assistance to Authorities - Organizations (Policy Statement)**

\* \* \*

Commentary

Application Notes:

1. ***Intent of Provision.**—Departure under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.*
2. ***Waiver of Certain Privileges and Protections.**—If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, in some circumstances, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure.*

\* \* \*

**§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)**

If the organization’s culpability score is reduced under §8C2.5(f) (Effective Program to Prevent and Detect Violations of Law) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required under law to have an effective program to prevent and detect violations of law, but the organization did not have such a program, an upward departure may be warranted.

\* \* \*



## PART D - ORGANIZATIONAL PROBATION

### Introductory Commentary

Section 8D1.1 sets forth the circumstances under which a sentence to a term of probation is required. Sections 8D1.2 through 8D1.5 address the length of the probation term, conditions of probation, and violations of probation conditions.

#### §8D1.1. Imposition of Probation - Organizations

- (a) The court shall order a term of probation:

\* \* \*

- (3) 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~~ (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective program to prevent and detect violations of law; and (B) the organization does not have such a program;

\* \* \*

#### §8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

\* \* \*

- (b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:

\* \* \*

- (4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: ~~(1A)~~ restitution; ~~(2B)~~ fine; and ~~(3C)~~ any other monetary sanction.
- (c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:
- (1) The organization shall develop and submit to the court ~~an effective program to prevent and detect violations of law, consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law). The organization shall include in its submission including~~ a schedule for implementation of the program.

- (2) Upon approval by the court of a program referred to in subdivision (1) ~~to prevent and detect violations of law~~, the organization shall notify its employees and shareholders of its criminal behavior and its program to prevent and detect violations of law. Such notice shall be in a form prescribed by the court.
- (3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1) ~~to prevent and detect violations of law~~. Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.
- (4) In order to monitor whether the organization is following the program referred to in subdivision (1) ~~to prevent and detect violations of law~~, the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Notes:

1. *In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a program to prevent and detect violations of law submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect violations of law, ~~provided as long as~~ *it is consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law), and any applicable statutory and ~~or~~ regulatory requirements.**

\* \* \*

~~§8D1.5. Violations of Conditions of Probation – Organizations (Policy Statement)~~

~~Upon a finding of a violation of a condition of probation, the court may extend the term of~~

~~probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.~~

---

Commentary

Application Note:

- ~~1. In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.~~

\* \* \*

## **PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS**

### **§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)**

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Note:

1. Appointment of Master or Trustee.—*In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.*
2. Conditions of Probation.—*Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).*