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May 19, 1989

MEMORANDUM

TO: Commissioners
USSC Staff

FROM: Sid Moore *SM*

SUBJECT: Attorney Working Group Recommendations on
Organizational Sanctions

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We received the attached letter to Judge Wilkins from Joe diGenova and the accompanying recommendations of the Attorney Working Group today. I am circulating them for your information in preparation for the meeting next Tuesday.

Attachment

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May 19, 1989

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Chairman:

I am pleased to be able to send you today our Working Group's recommendations regarding criminal penalties for organizations. Since last October, the Attorney Working Group you appointed has had frequent meetings, including a meeting with representatives of various government agencies to hear their views regarding the role of organizational probation and a meeting with members of the Antitrust Division to discuss the relationship between antitrust sanctions and other organizational sanctions. As a result of our meetings, the working group has reached the consensus positions reflected in the enclosed statement.

In the process of our deliberations, we have considered all of the various proposals that have been presented to the Commission, including the Discussion Materials circulated by the Commission and the proposal from the Criminal Division. Although we found merits in all of the proposals, we did not find any single proposal with which we completely agreed. The Discussion Draft had a coherent theoretical framework, but it failed to give adequate weight to nonpecuniary losses, failed to focus on fault or culpability, resembled a civil regulatory model, and relied too much on the probability of detection (which we think is unknown and may be unknowable). The Criminal Division's proposal focused on important elements of nonpecuniary loss, but lacked a coherent framework and relied upon numbers that we thought were simply arbitrary.

The issues relating to organizational sanctions turned out to be more complex than many of us had at first thought. Nevertheless, we have sought to present principles to the Commission for a system for sentencing of organizations that have

a coherent framework, that provide proper incentives for organizational managers to prevent crime, and that punish on the basis of harm and culpability. In the process of developing these principles we addressed a number of important questions, including the following: What are the purposes of organizational sanctions? What should be the role of loss in setting fines? What should be the relationship between the sentencing of an organization and the sentencing of the organization's agents? What is the appropriate role of mitigating factors and aggravating factors? What is the proper relationship between the criminal sanction and collateral penalties assessed against organizational defendants? As a broader framework for understanding the principles that we are recommending, I set forth below some of our thoughts regarding these issues.

In our view, organizational sanctions should serve dual purposes. On one hand, sanctions should punish for violations of societal norms. On the other, sanctions should serve a deterrence purpose and provide incentives for organizations to take optimal steps to prevent crimes.

Consistent with the underlying premises of criminal law, we concluded that organizational sanctions can best achieve these purposes by focussing upon harm and culpability. Harm reflects the seriousness of an offense and is measured by the loss caused or threatened. Our experience has been that in most cases of organizational crime, there is pecuniary loss that can be measured or reasonably estimated. Nevertheless, pecuniary loss is not always sufficient by itself as a measurement of harm. In some cases, there are significant nonpecuniary losses as well as pecuniary losses. The measurement of harm must include these nonpecuniary losses. In some cases, gain can be measured but loss cannot. In these cases, gain may serve as a proxy for loss. Thus, in order to measure harm, one must potentially look at three component elements: pecuniary loss, nonpecuniary loss, and pecuniary gain.

While harm measures the seriousness of an offense, culpability measures the degree of fault for causing or threatening the harm. In our view, the goals of just punishment and adequate deterrence can be achieved by varying the sanction depending upon the degree of culpability.

There is a base level sanction that should be required in all cases. Even if an organization is only minimally culpable, it should be required to provide full restitution. The requirement to make full restitution relies upon both culpability and harm. The organization, which is culpable because it benefited from the crime, is forced to disgorge its ill-gotten gains and provide restitution. In effect, restitution uses harm as the base and imposes a sanction based upon a multiple of one.

The extent of the additional sanction needed to achieve just punishment and adequate deterrence depends in large part upon the degree of culpability of the organization. When an organization is more culpable, a higher punishment is warranted and a greater deterrence is needed. In our view, in almost all cases an additional punitive fine (beyond restitution) will be required. Our Working Group concluded that the deterrence and punishment goals could be accomplished most effectively by starting with a presumption that a convicted organization is fully culpable, except to the extent to which there are factors that mitigate its culpability. Accordingly, we recommend a high presumptive fine against organizations from which possible reductions might be made based upon factors that diminish the degree of culpability. (By starting with a high presumptive fine, we thought it unnecessary to adjust for aggravating factors.)

In our recommendations, we have identified a number of possible reductions that relate to culpability. First, reductions are appropriate 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. Second, reductions are appropriate if an organization itself takes steps to discipline the responsible individuals and if an organization takes steps that make it easier for the criminal justice system to identify and punish responsible individuals. Third, reductions are appropriate if an organization takes appropriate steps to prevent a recurrence of similar offenses. And fourth, in the case of closely-held organizations, reductions are appropriate to the extent to which the owners are being punished for the same conduct. By working from a high presumptive fine and allowing reductions that relate to diminished culpability, the criminal justice system can simultaneously provide an incentive for managers to take steps to prevent crimes and punish both organizations and individuals based upon a combination of harm and culpability.

Although the working group quickly agreed to start with a high presumptive fine, we found it difficult to decide how high is high. We were aware of the theoretical arguments that the magnitude of an organizational fine should depend upon the probability of detection. We examined, but then rejected, the approach of the Discussion Draft, which seeks to determine the optimum multiple.

After considerable discussion, the group decided to recommend a high presumptive fine based upon magnitude of the harm caused by the offense (after full restitution and including nonpecuniary loss and gain as appropriate). We rejected a multiple higher than one (or two counting full restitution) for a number of reasons. First, we could not identify any other multiple that did not appear arbitrary. Second, we concluded

that for particular types of offenses in which detectability is typically a serious problem, Congress has provided for civil or administrative penalties (such as treble damages in antitrust and racketeering cases, administrative penalties in securities cases, civil penalties in tax and environmental cases, and disbarment in government procurement cases). Third, we recognized that the criminal justice system provides for criminal sanctions against organizational agents as well as organizations. (And in our view, the principles that govern sanctions against organizations should provide incentives whereby the responsible individuals are identified and punished.) Taking these factors into consideration, we simply could not find a theoretical or empirical basis for a greater criminal multiple, so long as appropriate civil and administrative sanctions are imposed against organizations and appropriate civil and criminal sanctions are imposed against responsible individuals.

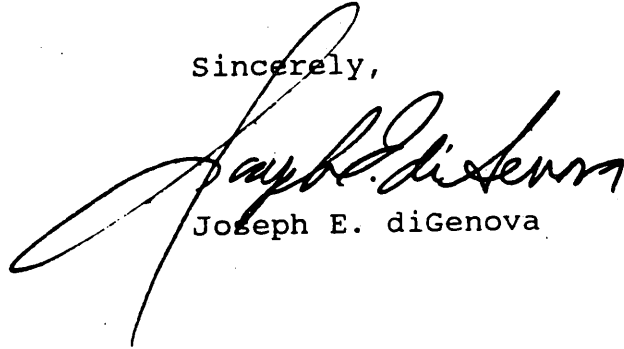
We have recommended that the Commission, for the time being, promulgate flexible policy statements rather than rigid and binding guidelines. In part, this recommendation is based upon the limited guidance provided by past sentencing practices. Existing knowledge regarding past practices in the sentencing of organizations and codefendants is still very limited. We recommend that the Commission have the staff conduct further research in this area. In addition, we think that it is important to examine the effects of the Congressionally-increased fine maximums against organizations. On the basis of additional research plus the increased knowledge that will result from judicial application of policy statements, the Commission may be in a position to promulgate guidelines in 1991. We urge the Commission to aim for this goal. In our view, flexible policy statements should be viewed as a stepping stone to more binding guidelines.

One of the advantages of binding guidelines over flexible policy statements is that guidelines can build in rules that are administratively simpler to apply. We do recognize the value of administrative convenience. Nevertheless, in our view, arbitrary rules are worse than less definite, but more flexible, policy statements. Our hope is that with additional research and experience, the Commission can develop guidelines that are both reasonable and also relatively easy to apply. In the meantime, however, we strongly favor the flexibility of more general policy statements.

We recognize that guidelines are already in place in the area of antitrust. Some members of the Working Group are concerned that the rules in Part R of Chapter 2 may prove to be arbitrary. As a group, however, we have taken no position with regard to Part R, other than that it should eventually be harmonized with the principles that we are recommending. In the meantime, we suggest that antitrust cases be monitored closely to

determine the effects of the rules prescribed by Part R of Chapter 2.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph E. diGenova". The signature is written in dark ink and is positioned above the typed name.

Joseph E. diGenova

JED:dmc

May 18, 1989

ATTORNEY WORKING GROUP

RECOMMENDATIONS REGARDING CRIMINAL PENALTIES FOR ORGANIZATIONS

- I. Due to the complexity of the subject and the limited guidance provided by Congress and by past sentencing practices, the Commission should, for the present, limit itself to the promulgation of flexible policy statements rather than detailed and binding guidelines. The Commission should review these policy statements within a year of promulgation, looking toward possible guidelines for organizations in 1991.
- II. Commission policy statements on organizational sanctions should be directed at for-profit organizations (corporate or otherwise). Relatively few federal criminal cases involve non-profit organizations and the responsiveness of non-profit organizations to various penalties may be somewhat different from the responsiveness of for-profit organizations. However, to the extent to which the policy statements are relevant, they should be applied to non-profit organizations.
- III. When an organization is convicted, it should, as a first priority and as a general rule, be required to make restitution to identifiable victims of the criminal activity and to take other cost-effective remedial actions necessitated by that criminal conduct (such as environmental cleanups or product recalls).
- IV. In addition to restitution, a convicted organization should ordinarily be forced to pay a punitive fine. The imposition of such fines can properly serve two purposes: (1) to punish on the basis of culpability; and (2) to provide managers with incentives to take reasonable steps to prevent crime.
- V. The following principles should govern the imposition of fines:
 - A. The magnitude of the fine should be based primarily upon the pecuniary loss or harm caused by the criminal conduct. Most cases involving organizational crimes entail measurable or reasonably estimable pecuniary loss.

- B. When pecuniary loss cannot be measured or reasonably estimated, the punitive fine should be based upon pecuniary gain. In addition, when pecuniary gain exceeds the amount of the loss, the gain reaped by the organization from the criminal activity that is the subject of conviction should presumptively constitute the punitive fine.
- C. In some cases, pecuniary loss or gain may not adequately measure the full gravity of an offense because: (1) additional harm was intended or expected; or (2) the offense caused substantial nonpecuniary losses. In such cases, the magnitude of the fine should be increased to reflect expected and nonpecuniary losses.
- D. If neither gain nor loss can be reasonably estimated, the court should apply generally applicable principles and set a fine that reflects the seriousness of the offense, taking into consideration relevant aggravating and mitigating factors.
- E. If full restitution is not made because of the difficulty of identifying victims or because the victims cannot be effectively reimbursed, the fine should be increased by the amount of loss for which restitution is not provided (or, alternatively, the amount of the gain that has not been disgorged).
- F. A fine based upon the principles stated above, combined with full restitution, will yield a high presumptive fine and should generally be sufficient to achieve the punitive and deterrent purposes of sentencing, particularly in light of other punitive consequences that can result from the commission of a crime, such as administrative fines, punitive civil recoveries, effects on organizational reputation, imprisonment for responsible individuals, and fines imposed upon individuals. We do not think that there is presently a theoretical or empirical basis to support a higher level of fine.
- G. The size and assets of an organization are irrelevant to the determination of the fine to be imposed. If the organization lacks the ability to pay a fine, the appropriate consequences can be better determined in bankruptcy proceedings than in a criminal proceeding.
- H. The amount of the fine should be subject to downward adjustment to the extent to which the following ameliorative factors were present:

1. the existence and effectiveness of organizational policies and practices reasonably designed to prevent violations of the type involved in the offense;
2. actual and reasonable lack of knowledge of the offense on the part of high-level management;
3. the reporting of the offense to law enforcement officials when the offense became known to high-level management;
4. management cooperation with law enforcement officials during investigation and after filing of criminal charges;
5. the organization's taking appropriate steps to prevent a recurrence of similar offenses, including but not limited to removal of or penalties assessed against top management; and,
6. in the case of closely-held organizations, the magnitude of punitive sanctions imposed upon the owners arising out of the same conduct for which the organization was convicted.

I. The amount of the fine should not be reduced because of other punitive civil or administrative sanctions that have or will be imposed upon the organization because of the offense. The availability of punitive civil or administrative remedies generally reflects a Congressional judgment that a higher penalty is appropriate for certain types of crimes, often because of the difficulty of detection. Our recommended fine levels (which otherwise might appear too low) are expressly premised upon the assumption that additional civil or administrative penalties are available in appropriate cases.

J. Prior unrelated criminal proceedings are irrelevant to a determination of the amount of fine to be imposed. Prior related criminal, administrative, or civil proceedings may be relevant to the determination of the amount of fine to be imposed, but this factor will generally be taken into consideration in determining whether the organization's policies and practices were reasonably designed to prevent the violation and whether high-level management had a reasonable lack of knowledge of the offense. Thus, when an organization has committed similar prior offenses, ameliorative factors are less likely to reduce the fine imposed upon the organization.

- K. If more than one organizational defendant was involved, each offending firm should be apportioned a reasonable share of the total fine, based either on the loss caused by each organization, the gain received by each organization, or by each organization's relative responsibility for the harm caused.
 - L. The minimum fine should ordinarily not be less than the loss caused by or apportioned to the organization, less restitution made or ordered, and should always be greater than the gain to the organization, less restitution made or ordered.
- VI. Criminal forfeiture is a penalty unrelated to fines and should be applied as provided for by statute. Criminal forfeiture can be used to seize instrumentalities used in the commission of crime and should be the sanction of choice used for dealing with organizations that serve little purpose other than to facilitate the commission of crimes. Because forfeiture can frequently be used to deal with organizations set up for illegal purposes, there is no need, when determining fine levels, to distinguish between legitimate organizations and organizations that are mere instrumentalities for the commission of crime.
- VII. Organizational probation is appropriate in limited circumstances and may be used as follows:
- A. Probation may be used to enforce another remedy, such as restitution, environmental cleanup, or a fine paid in installments and to ensure that the other remedy is carried out in a timely fashion.
 - B. Probation may be used to require an organization to change its operating structure or procedures (supervisory probation). The following preconditions should be met for imposition of supervisory probation.
 - 1. The offense should be quite serious, i.e.,
 - a. a felony, or
 - b. a misdemeanor that (i) resulted in a loss of human life, (ii) otherwise created a serious threat to human health or safety, or (iii) was a part of a pattern of criminal behavior.
 - 2. The offense should indicate a significant problem with the organization's structure or procedures, such as:

- a. senior management were involved in the offense;
 - b. senior management encouraged or condoned the offense; or
 - c. the organization lacked reasonable or customary controls to monitor and supervise its employees to prevent crimes of the type committed.
3. Probation must appear to be a justifiable method to remedy the structural or procedural problems because:
- a. the structural or procedural problem has not been remedied and is unlikely to be remedied by the organization itself without supervisory probation;
 - b. probation is likely to remedy the problem and prevent future violations;
 - c. there is no alternative civil, criminal, or administrative remedy that is likely to be equally effective; and
 - d. probation can achieve the expected benefits without unduly interfering with the organization's legitimate operations.
- C. When supervisory probation is appropriate, the conditions of supervisory probation should be selected as follows:
1. the conditions imposed should be limited to those needed to prevent future violations; and
 2. organizational obligations should be set forth in a specific compliance plan proposed by the organization and approved by the court, adherence to which plan can be objectively determined.

VIII. The Commission should have uniform policy statements (and eventually guidelines) that apply to all types of offenses committed by for-profit organizations, including antitrust violations. Part R of Chapter 2 of the Sentencing Guidelines should eventually be limited to individuals.

IX. The individual fine guidelines provide little help or assistance in determining the amount of fine to be imposed

upon an organization. They should not be used as the basis for setting organizational fines.

- X. Although disciplinary actions taken by an organizational defendant (including dismissals and resignations of corporate officers or directors) should be considered by sentencing courts in determining whether an organization has taken appropriate steps to prevent further similar violations, organizational sanctions policy statements promulgated by the U.S. Sentencing Commission should not advise courts to require dismissal of corporate officers or directors who held office when the offenses were committed.

Full

ORGANIZATIONAL SANCTIONS ATTORNEY WORKING GROUP

MEMBERS ATTENDING

Joseph E. diGenova
Ernest Gellhorn
Bert Rein
Winthrop Swenson
Justin Thornton
Victoria Toensing

MEMBERS NOT ATTENDING

Samuel Buffone
Earl Silbert
Carl Rauh
Robert Jordan, III