(Excerpted from: U.S. Sentencing Commission's 1995 *Annual Report*)

Organizational Sentencing Practices

Organizational Guidelines

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.[1] The organizational guidelines establish fine ranges to deter and punish illegal conduct, require full restitution to compensate victims for any harm, disgorge illegal gains, regulate probationary sentences, and implement other statutory penalties such as forfeiture.

While the organizational guidelines apply to all felonies and Class A misdemeanors committed by organizational defendants, their fine provisions (Chapter Eight, Part C) are primarily applicable to offenses for which pecuniary loss or harm can be more readily quantified (*e.g.*, fraud, theft, and tax violations). The fine provisions also apply to some offenses for which pecuniary loss or harm is not readily quantified but for which the Commission was able to identify other reasonable measures of offense seriousness. These latter offenses include antitrust violations, money laundering, and other money transaction offenses.[2] The guidelines' fine provisions do not yet apply to most environmental, food and drug, and export control violations.

In response to its statutory mandate to collect systematically and disseminate information concerning sentences actually imposed, the Commission developed a data collection module for organizational defendants sentenced pursuant to the guidelines. Like the data collection system for individual defendants, the module for organizational defendants captures information describing the defendant; the charging, plea, and sentencing documents received by the Commission; the offense of conviction; the mode of adjudication; and the sanctions imposed. Additionally, this module records information describing the organization's structure, size, and economic viability and the application of the Chapter Eight guidelines.[3]

Even though the Chapter Eight guidelines took effect November 1, 1991 (and according to statute should be applied to all <u>sentencings</u> that occur on or after that date), the Department of Justice has instructed its prosecutors, in light of relevant court decisions, to apply the guidelines only to <u>offenses</u> that occur on or after November 1, 1991. As a consequence, sentencings are still taking place in cases that are not subject to the organizational guidelines.[4]

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1 *See* <u>Guidelines Manual</u>, Chapter Eight – Sentencing of Organizations.

2 *See* U.S. Sentencing Commission, <u>Supplemental Report on Sentencing Guidelines for Organizations</u> (1991).

3 The datafile describing organizational defendants, with individual identifiers deleted, is available through the Inter-University Consortium for Political and Social Research at the University of Michigan.

4 The Commission does not regularly receive sentencing information on organizations not sentenced under the guidelines.

Over time, the proportion of cases subject to the organizational guidelines will grow and eventually reach 100 percent. In 1995, 111 organizational defendants were sentenced pursuant to the organizational guidelines, with Chapter Eight fine provisions applicable in 83 of those cases.

Offender Characteristics

During 1995, 96.3 percent of the cases sentenced pursuant to Chapter Eight involved closely held organizations (*i.e.*, privately held companies owned by a small number of people). Companies sentenced under Chapter Eight ranged from the old to the young. The oldest company was incorporated in 1899, the youngest in 1994. Although there is a 95-year difference between the oldest and youngest companies, more than 50 percent of the companies sentenced under Chapter Eight were 14 years old or less. More than 25 percent of the companies had been incorporated for fewer than seven years. Fifty-two percent of the defendant organizations were businesses employing fewer than 15 persons. More than 40 percent of the organizational defendants sentenced were companies that had been incorporated for 15 years or less and had 20 or fewer employees.

These organizations engaged in varied lines of business such as manufacturing or distributing consumer commodities (18.3%) and industrial commodities (14.7%), providing services such as banking, management and consulting, health care, or shipping and transportation (16.5%), and mining natural resources (5.5%). Approximately 34 percent of organizations sentenced under the Chapter Eight guidelines had ceased operations or were in poor financial condition at the time of sentencing. For example, 21.1 percent were defunct; one percent had filed for reorganization under Chapter 11; and 11.9 percent were experiencing substantial financial stress.

The data indicate that no organization sentenced in 1995 received recognition under the guidelines for having an effective program to prevent and detect violations of law in place at the time of the offense. Court documents do indicate, however, that in at least three cases, compliance efforts were examined. In one case, the defendant company had been convicted of fraudulent billing and claimed that it had in place a system designed to prevent billing errors. Without elaborating on the specific reasons, the presentence report concluded that this system fell short of the guidelines' due diligence requirements for maintaining an effective program.

The other two cases in which effective compliance efforts are known to have been considered involved environmental violations. Even though Chapter Eight's culpability scoring factors were not directly applicable in determining the relevant fines, the organization's compliance efforts were examined. In one case, the company was in the electroplating business and its compliance efforts were still in the development stage. The presentence report noted a number of actions that the company was in the process of taking to prevent future violations. The company received a $5,000 fine and was directed, as a condition of probation, to continue those efforts.

The other case involved a company in the agricultural chemical business. The presentence report indicated that the company "has taken a proactive approach to regulatory compliance." Among the compliance efforts detailed in the presentence report were a description of the duties and reporting obligations of the company's "compliance specialist" position. The position was described as reporting directly to a designated senior official at the company's headquarters, working with local facilities – such as the one where the violation occurred – to achieve compliance along several

specified avenues, and providing training on compliance issues. The company also was described as having had written compliance policies and having employed an outside expert to assist in providing technical training on specific environmental issues. The company received a $10,000 fine.

The guidelines state that fines for organizations that operate primarily for criminal purposes or by criminal means should be set high enough to result in divestment of the organization's assets (subject to the statutory maximum). In 1995, three organizations were identified as operating primarily for a criminal purpose or primarily by criminal means. The presentence investigation reports indicated that two of the three defendant companies were engaged in the manufacturing or selling of products that did not meet safety and quality standards. In addition to selling substandard products, the companies also had provided fraudulent documentation that indicated the products met applicable standards. The third company manufactured and distributed false identification documents.

Offense Characteristics

In the cases sentenced under the organizational guidelines during 1995, fraud was the most frequent offense committed by an organization, accounting for 38.9 percent of the cases sentenced. Other offense categories included: environmental (20.4%), tax (13.0%), and antitrust (7.4%) offenses (*see* Table 47).

Culpability Score

As an incentive for organizations to engage in serious efforts to prevent and self-report criminal conduct, the guidelines mandate high fines for organizations that fail to take such actions and that demonstrate other indicia of culpability such as having senior management involved in the offense. Overall, the guidelines seek to take into account a broad range of organizational culpability, from an offense committed by a low-level employee in contravention of clearly communicated and vigorously enforced corporate policy to an offense committed by an organization created solely for criminal purposes.

The culpability score, an essential element in determining the guideline fine range, is an index of six factors that assess the organization's blameworthiness with respect to the commission of the offense. Points are added based on:

- the extent to which higher-echelon personnel, as defined in the guidelines, were involved in or tolerated the criminal activity;

- whether the organization had a history of similar violations, and if so, the recency of the prior violation;

- whether the organization violated a judicial or administrative order or a condition of probation; and

- whether the organization obstructed the official investigation, prosecution, or sentencing of the instant offense.

Points are subtracted from the culpability score based on:

- whether the organization had in place, prior to the offense, an effective program to prevent and detect violations of law; and

- whether the organization self-reported the violation to the appropriate authorities, fully cooperated with the official investigation, or accepted responsibility for the offense.

During 1995, the only culpability score factors applied with regularity were the enhancement for "Involvement in or Tolerance of Criminal Activity" (59.3%) and the reduction for "Self-Reporting, Cooperation, or Acceptance of Responsibility" (87.7%).

Of the organizations receiving a reduction under this latter adjustment, 22.2 percent received the smallest reduction available (one point) because they demonstrated only acceptance of responsibility. The majority (61.7%) received a two-point reduction for cooperating and demonstrating acceptance of responsibility. Only three organizations received the full five-point reduction for self-reporting, cooperating, and demonstrating acceptance of responsibility.

Other culpability factors applied were prior history, violation of an order, and obstruction of justice. As noted, no organizations received credit for having an effective program to detect violations of law. Table 48 describes the application of the guideline culpability factors.

Sanctions Imposed

More than 78 percent of defendants sentenced pursuant to the Chapter Eight guidelines received a sentence that included a criminal fine. The mean fine imposed was $242,892 (median= $30,000).[5] The largest fines were imposed on defendants convicted of antitrust (mean= $1,397,268; median= $460,000). The one corporation sentenced for racketeering ordered to pay a fine was assessed $2,266,711. Table 49 describes the fines imposed by primary offense category.

In addition to criminal fines, defendants sentenced pursuant to Chapter Eight also were ordered to pay restitution in 32.4 percent of the cases. The mean amount of restitution was $232,988 (median = $27,912). Fraud offenses made up the largest percent of cases with restitution imposed (54.3%). Table 50 describes the amount of restitution assessed by primary offense category.

Other monetary penalties paid by defendants sentenced under Chapter Eight included: asset forfeiture (7.2%); disgorgement (4.8%); cost of prosecution (1.8%); and cost of supervision (1.8%).

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[5] As measures of central tendency, the mean is more sensitive to extreme values than the median. The large difference between the mean fine amount and median fine amount indicates that there are a few cases with very high fine amounts.

In addition to monetary penalties, defendants sentenced under the organizational guidelines were subject to other sanctions:

- 63.1 percent were placed on probation;
- 13.5 percent were ordered to implement a compliance program to prevent further violations of law;
- 6.3 percent were ordered to notify their victims of the conviction; and
- 2.7 percent were ordered either to dissolve or sell the organization.

Organizations Sentenced Under Pre-November 1991 Antitrust Guideline

Prior to November 1, 1991, the guidelines applied only to organizations convicted of antitrust violations (guideline 2R1.1 provided a fine range equal to 20 to 50 percent of the volume of commerce affected by the offense). During 1995, four organizational defendants were sentenced pursuant to the fine provisions of §2R1.1 (1987).

Organizational defendants sentenced under the pre-Chapter Eight antitrust fine provisions received sentences including a criminal fine, with a mean of $229,375 (median= $6,250). Table 51 describes the fines imposed by the volume of commerce attributable to the organizational defendant and indicates that, consistent with instructions in §2R1.1, imposed fines generally increased as the volume of commerce attributable to the defendant increased.

In addition to fines imposed, one organizational defendant sentenced pursuant to §2R1.1 received a sentence that included probation.