

(Excerpted from: U.S. Sentencing Commission's 1996 *Annual Report*)

Organizational Sentencing Practices

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 and the payment of remedial costs to compensate victims for any harm, disgorge illegal gains, regulate probationary sentences, and implement other statutory penalties such as forfeiture and the assessment of prosecution costs.

The Chapter Eight organizational guidelines apply to all federal felonies and Class A misdemeanors committed by organizational defendants. The fine provisions of Chapter Eight cover offenses for which pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax violations. In addition, the sentencing guidelines for bribery and kickbacks, antitrust, and money laundering offenses contain specific formulations for calculating fines for organizations.² The organizational guidelines do not presently contain fine provisions for most environmental, food and drug, and export control violations; in these cases, courts must look to the statutory provisions of title 18, sections 3553 and 3572 to determine an appropriate fine. The guidelines also provide that, under certain circumstances, fines imposed upon owners of closely held corporations who are convicted of the same offense conduct as the corporation may offset the total amount of the corporate fine.

According to statute, the sentencing guidelines should be applied to all *sentencings* that occur on or after their effective date of November 1, 1991. The Department of Justice, in light of relevant court decisions, has sought application of the organizational guidelines only when the offense conduct occurred on or after this effective date. As a consequence, some organizations sentenced in 1996 are not subject to the organizational guidelines. However, the proportion of these cases is consistently declining.

In 1996, the Commission received information on 157 organizations that were sentenced under Chapter Eight,³ a 41-percent increase from 1995 and a 83-percent increase from 1994.⁴ Fines were imposed upon 119 organizations. In 34 of the 41 cases in which no fines were imposed, the organization was unable to pay the fine after making restitution, or the organization had ceased operations and was insolvent at the time of sentencing.

¹ See *Guidelines Manual*, Chapter Eight - Sentencing of Organizations.

² See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d); 2S1.1(c); and 2S1.2(c).

³ The Commission also received three antitrust cases that were sentenced under §2R1.1 because the offense conduct occurred before the November 1, 1991, effective date of Chapter Eight.

⁴ As with individual defendants, the Commission 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 (1-800-999-0960).

Offense Characteristics

As in 1995, fraud was the most frequent offense committed by an organization, accounting for 35.5 percent of cases sentenced. Other significant offense categories included: environmental (waste discharge) (14.2%), money laundering (11.0%), and antitrust (9.0%).

Offender Characteristics

The organizations sentenced in 1996 ranged in size from a closely held private corporation with five employees, to the nation's largest privately owned provider of home health care with offices in 450 locations throughout 22 states, to a publicly traded company with more than 8,500 employees and annual revenues of more than \$1 billion.

None of the organizations sentenced in 1996 had in place an effective program to prevent and detect violations of law, and none reported the suspected wrongdoing – two aspects of organizational conduct which can result in a decrease in the culpability score for sentencing purposes.⁵ Once under investigation by the authorities, 50.0 percent of the organizations were considered to have cooperated with the government's investigation and another 26.1 percent were given credit for accepting responsibility for their wrongdoing. Only two organizations had a history of prior criminal or administrative offenses in the past five years.

Sanctions Imposed

The largest organizational fine imposed in 1996 – \$25 million – was imposed upon three separate corporations for environmental offenses.⁶ The largest Chapter Eight fine imposed for fraud was \$7 million for convictions of illegal remunerations/kickbacks and false statements and related offenses in connection with the Medicare program. The single racketeering conviction reported in 1996 resulted in a fine of \$5.6 million.⁷

Restitution was imposed as part of the organization's sentence in 47 of the 160 reported cases (29.4%), and ranged from a high of \$7,486,458 for a fraud and money laundering conviction to a low of \$32 for a drug conviction. The highest restitution imposed in connection with a fraud offense was \$2,914,529; the average restitution amount for fraud offenses is \$493,564.86.⁸

⁵ See §8C2.5(f) and (g).

⁶ The Commission's current datafile does not include a highly publicized case involving a financial institution in which a \$340 million criminal fine was imposed, nor a number of other organizational convictions and fines obtained as a result of negotiated plea agreements.

⁷ See Chapter Three, Legal Issues, for significant case law on organizational defendants.

⁸ When restitution or remedial costs are paid prior to criminal conviction or in connection with a prior or subsequent civil or administrative action, such information is not necessarily furnished to the

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

- 60.0 percent were placed on probation;
- 11.7 percent were ordered to implement a compliance program to prevent and deter future violations of law;
- 4.8 percent were ordered to notify their victims of the conviction or make a public apology; and
- 1.3 percent were ordered either to dissolve or sell the organization.

Of the 14 antitrust cases, the maximum fine imposed was \$10 million. In one of these instances, it was determined that the calculation of the volume of commerce affected was too speculative and that calculation of the pecuniary gain or loss attributable to the offense (under the alternative fine provision of 18 U.S.C. § 3571(d)) would unduly prolong adjudication. Therefore, the offense was referenced to the fraud guideline and resulted in a fine of \$112,000.