(Excerpted from: U.S. Sentencing Commission's 1997 *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, the payment of remedial costs to compensate victims for any harm, and the disgorgement of 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 offenders.[2] The fine provisions of Chapter Eight are limited to 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.[3]

The organizational guidelines do not presently contain fine provisions for most environmental, food and drug, and export control violations.[4] In those cases in which the Chapter Eight fine guidelines do not apply, courts must look to the statutory provisions of title 18, sections 3553 and 3572, to determine an appropriate fine. The guidelines also provide that fines imposed upon owners of closely held organizations who are convicted of the same offense conduct as the corporation may offset the total amount of the corporate fine.

In 1997, the Commission received information on 220 organizations that were sentenced under Chapter Eight,[5] a 40-percent increase from 1996 and a 98-percent increase from 1995.[6] Fines were imposed upon 183 organizations. In 26 of the cases in which no fines were imposed, the organization was unable to pay the fine after making restitution, or had ceased operations and was insolvent at the time of sentencing. The sentenced organizations pled guilty in 91.9 percent of the cases; 8.1 percent were convicted after trial.

---

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

[2] *See* USSG §8A1.1.

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

[4] *See* USSG §8C2.1.

[5] The Commission also received two antitrust cases that were sentenced under the former organizational fine component of USSG §2R1.1 because the offense conduct occurred before the November 1, 1991, effective date of Chapter Eight.

[6] As with individual defendants, the Commission datafile describing organizational defendants is available through the Inter-University Consortium for Political and Social Research at the University of Michigan.

Offense Characteristics

As in 1996, fraud was the most frequent offense committed by an organization, accounting for 41.0 percent of the cases sentenced. Other significant offense categories included: environmental waste discharge (20.3%), tax (6.3%), antitrust (6.3%), and food and drug violations (5.4%).[7] The proportion of organizational money laundering cases declined from 11.0 percent in 1996 to 4.1 percent in 1997. One organization was sentenced for misprision of a felony (18 U.S.C. § 4).

Offender Characteristics

The majority of organizations sentenced in 1997 were closely held private corporations. In addition, a number of subsidiaries of major publicly traded corporations, four publicly traded corporations (the largest two of which employ 82,200 and 17,200 individuals, respectively) and three major international corporations headquartered outside the United States were among the organizational offenders sentenced in 1997.

Information on the number of individuals employed by organizations sentenced in 1997 is available for 140 of the 222 cases provided to the Commission. Of those cases, 33.6 percent employed fewer than 10 individuals; 42.1 percent employed at least 10 but fewer than 100 individuals; 12.9 percent employed at least 100 but fewer than 200 individuals; 8.5 percent employed at least 200 but fewer than 1,000 individuals; and 2.9 percent employed at least 1,000 individuals.

Consistent with the Chapter Eight definition of "organization,"[8] non-corporate organizational entities sentenced in 1997 included partnerships (a law firm and a consulting firm), a family-held real estate trust, an agricultural cooperative, a non-profit tax-exempt health care provider (with more than 4,000 employees), and three municipal governments (which were convicted of environmental waste discharge offenses).

A total of 344 individuals were sentenced in connection with the same offense conduct as 162 of the organizational cases reported for 1997.[9] Occupational information was provided for 297 of these individuals. These data reflect that 104 were owners of their respective organizations and 39 were officers.

Only one of the organizations sentenced in 1997 had in place an "effective program to prevent and detect violations of law"; as provided by §8C2.5(f) of the sentencing guidelines, that

---

7 *See* Table 51 in accompanying *1997 Sourcebook of Federal Sentencing Statistics*.

8 For sentencing guideline purposes, "organization" means "a person other than an individual" pursuant to 18 U.S.C. § 18, and includes corporations, partnerships, associations, governments, political subdivisions, unions, trusts, pension funds, and joint stock companies. *See* USSG §8A1.1.

9 If an individual was still awaiting sentence as of September 30, 1997 (the end of fiscal year 1997), that information is not reflected in this data.

organization received the benefit of a reduction in its culpability score for sentencing purposes.[10] Once under investigation by the authorities, 52.2 percent of the organizations were given credit for cooperating with the government's investigation, and another 23.9 percent were given credit for accepting responsibility for their wrongdoing. One organization received credit, pursuant to a negotiated plea agreement, for self-reporting. Five organizations had a history of prior criminal or administrative offenses in the past ten years, which resulted in increased culpability scores for sentencing purposes.[11]

Sanctions Imposed

The largest organizational fine in 1997 – $100 million – was imposed for an antitrust conspiracy. The second largest organizational fine of $37,372,826 was imposed for smuggling and excise tax evasion. The largest fine imposed for fraud-related offense conduct occurred in connection with a Medicare fraud case; the fine amounted to $35,273,141. The largest fine for an environmental/waste discharge offense, which is not determined in accordance with the Chapter Eight fine tables, was $3 million. In five instances, the fines imposed on closely held organizations were offset by the fines imposed on their respective owners in connection with related criminal convictions.[12]

Restitution was imposed as part of the defendant organization's sentence in 70 of the 222 reported cases (31.5%), and ranged from a high of $20,625,000 in connection with a fraud conviction to a low of $40 for the unauthorized sale of prescription drugs. The average restitution amount for fraud offenses was $1,177,878, an increase of 139.0 percent from 1996.[13] Restitution was imposed in 14 (31.1%) of the environmental/waste discharge cases sentenced in 1997, and public notices of apologies to the communities affected by the waste discharge were required as part of the criminal sentence in two (4.4%) instances.

In addition to monetary penalties and restitution, defendants sentenced under the organizational guidelines were subject to other sanctions. Specifically, 63.0 percent of the organizations were placed on probation,[14] which is required if an organization has at least 50

---

[10] The defendant, a privately-held corporation, which has 100 full-time employee positions, was convicted of making false statements in connection with the importation and distribution of seafood. Consistent with federal regulations, the corporation employed a full-time FDA inspector at its facility, a factor that was noted in giving the organization credit for an effective compliance program.

[11] *See* USSC §8C2.5(c). Additional information about offender characteristics is found at Table 52 in the accompanying *1997 Sourcebook of Federal Sentencing Statistics*.

[12] *See* USSC §8C3.4.

[13] When restitution or remedial costs were paid prior to criminal conviction or in connection with a prior or subsequent civil or administrative action, that information is not necessarily furnished to the Commission.

[14] Conditions of probation imposed in connection with organizational sentencing in 1997 included ordering the defendant organization to: implement a compliance program; notify victims of the

employees at the time of sentencing and does not already have in place an effective program to prevent and detect violations of law.[15]

Significant Case Law

A significant issue relating to the application of the organizational sentencing guidelines was recently addressed in *United States v. Sun-Diamond Growers of California*.[16] In appealing convictions stemming from charges of making illegal gifts to a Cabinet member and illegal campaign contributions, Sun-Diamond, a large agricultural cooperative, successfully challenged the district court's decision that reporting requirements imposed as a condition of probation upon the defendant, Sun-Diamond, also extended to all of its member cooperatives.

The appellate court was not persuaded by the government's argument that Sun-Diamond, the charged defendant, was merely the *alter ego* of the various member cooperatives. Finding that "the member cooperatives have their own corporate identities, boards of directors, employees, assets and liabilities," the appellate court observed that "their power to control Sun-Diamond seems no greater than the power of ordinary shareholders to control a corporation."[17] Accordingly, the D.C. Circuit concluded that the sentencing court could not impose probationary conditions on the defendant's member cooperatives because they had not been named defendants in the prosecution nor had they received an opportunity to be heard.

---

conviction; make a public apology through newspaper advertisements; dissolve or sell the organization; and, refrain from certain types of business activities (typically related to the offense conduct) for designated time periods.

[15] *See* USSG §8D1.1(a)(3).

[16] *United States v. Sun-Diamond Growers of California*, 138 F. 3d 961 (D.C. Cir. 1998).

[17] *Id.* at 977.