[The following is excerpted from Chapter Two of the Sentencing Commission's 2002 *Annual Report*.]

Organizational Guidelines Ad Hoc Advisory Group

In February 2002, the Commission established an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations. The Commission has asked the group to place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law. With the arrival of the tenth anniversary of the organizational guidelines, the Commission decided to form the ad hoc advisory group after soliciting public comment on the need, scope of work, and membership of the group. The advisory group – composed of industry representatives, scholars, and experts in compliance and business ethics – will serve for 18 months and will make at least one interim report to the Commission in the course of its work. Mr. B. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, is serving as chair of the group.

[The following is excerpted from Chapter Four of the Sentencing Commission's 2002 *Annual Report*.]

Organizational Sentencing Practices

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.[119] The organizational guidelines establish fine ranges to deter and punish illegal conduct; require full 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.[120] 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 offenses.[121] In addition, the sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations.[122]

The organizational guidelines do not presently contain fine provisions for most offenses

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119 *See Guidelines Manual*, Chapter Eight–Sentencing of Organizations.

120 *See* USSG §8A1.1.

121 *See* USSG §8C2.1.

122 *See* USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d).

involving environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice and perjury), and national defense.[123] 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.

In 2002, the Commission received information on 252 organizations that were sentenced under Chapter Eight, a 5.9 percent increase from 2001 and a 17.1 percent decrease from 2000.[124] Fines were imposed on 166 organizations. The sentenced organizations pled guilty in 94 percent of the cases; 6 percent were convicted after trial. See Tables 51 and 53 of the *2002 Sourcebook of Federal Sentencing Statistics*.

Changes from Prior Annual Reports

The organizational sentencing data reported in the *2000 Annual Report* marked the beginning of a new system for recording organizational sentencing data, including the capturing of new data, such as the frequency with which courts ordered organizations to implement effective compliance programs as a term of probation. Also, beginning with that report, the Commission instituted new designations for some offense types. The offense type designations continue to be refined to more accurately report the data captured. Consequently, some direct comparisons of the *2002 Annual Report* to prior annual reports may not be possible.

Offense Characteristics

As in 2001, fraud remained the most frequent offense committed by an organization, accounting for 102 of the 252 cases sentenced (40.5%). Other significant offense categories included – environmental pollution (17.9%),[125] antitrust (9.1%), money laundering (7.5%), and food, drugs, agricultural and consumer products (7.5%). See Table 51 of the *2002 Sourcebook of Federal Sentencing Statistics*.

Offender Characteristics

In those cases in which the offender organization both has the ability to pay, and the fine provisions of section 8C2.1 apply to the offense, the court calculates a culpability score that may reduce or increase the applicable offense level. Culpability score calculation data is obtained from

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[123] *See* USSG §8C2.1.

[124] 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. See page 42.

[125] Environmental pollution offenses refer to the aggregate of “Environmental-Water,” “Environmental-Air,” and “Environmental-Hazardous/Toxic Pollutants.”

the sentencing court's Judgment of Conviction and/or the probation office's Presentence Report. Of the 252 cases sentenced in 2002, the court applied the fine provisions of section 8C2.1 to calculate the fine in 162 cases. The Commission received detailed culpability score information for 143 of those cases. See Table 54 of the *2002 Sourcebook of Federal Sentencing Statistics.*

In numerous cases, the organization's culpability score was reduced based on the presence of certain culpability factors. Of the 143 cases with detailed culpability score calculations, none of the organizations received a reduction in its culpability score for having in place an "effective program to prevent and detect violations of law."[126] In contrast, once under investigation by the authorities, 73 organizations (51.0%) were given credit at sentencing for cooperating with the government's investigation,[127] and another 49 organizations (34.3%) were given credit for accepting responsibility for their wrongdoing.[128] One organization received full credit for reporting the offense to governmental authorities,[129] cooperating with the investigation, and accepting responsibility for the offense. Additionally, 20 organizations (14.0%) received no mitigating credit inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 of the *2002 Sourcebook of Federal Sentencing Statistics.*

In several cases, the organization's culpability score also was increased based on the presence of culpability factors. Specifically, the culpability score of one organization was increased, pursuant to section 8C2.5(c) of the sentencing guidelines, because it had a history of prior criminal or administrative offenses. No organization received an increase under 8C2.5(d) for having violated a judicial order, injunction, or condition of probation; and 15 organizations (10.5%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in increased culpability scores for sentencing purposes. See Table 54 of the *2002 Sourcebook of Federal Sentencing Statistics.*

Sanctions Imposed

The largest fine in 2002, $290 million, was imposed on a pharmaceutical company for conspiracy to violate the Prescription Drug Marketing Act. The second highest fine in 2002, $54 million, was imposed for bid-rigging in violation of the Sherman Act. The third highest was $27.5 million in a consumer wire fraud case. In addition, the largest restitution order imposed in 2002, $569,000,000, was imposed in a securities fraud case. For the 252 cases overall, restitution was ordered in 112 cases, and a fine was imposed in 166 cases. The mean restitution ordered was $6,292,650, and the mean fine imposed was $2,815,154. See Tables 51 and 52 of the *2002 Sourcebook of Federal Sentencing Statistics.*

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[126] USSG §8C2.5(f).

[127] *See* USSG pursuant to §8C2.5(g)(2).

[128] *See* USSG §8C2.5(g)(3).

[129] *See* USSG §8C2.5(g)(1).

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 252 cases sentenced pursuant to Chapter Eight, 187 (74.2%) received one month or more of probation. Of the 251 cases with court-ordered compliance program information available, 38 (15.1%) were ordered to make some sort of "ethics"-related or "compliance"-related improvement. See Table 53 of the *2002 Sourcebook of Federal Sentencing Statistics*.