[The following is excerpted from Chapter Two of the Sentencing Commission's 2003 *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 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 – presented its final report to the Commission on October 8, 2003. While the report concludes that the organizational guidelines have induced many organizations to focus on compliance and to create programs to prevent and detect violations of the law, it also recommends amending the existing organizational guidelines in order to reflect contemporary legislative, regulatory, and corporate governance requirements. Mr. B. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, served as chair of the group.

[The following is excerpted from Chapter Four of the Sentencing Commission's 2003 *Annual Report*.]

Organizational Guidelines Training

During the year, the Commission co-sponsored with the Ethics Officer Association (EOA), the ninth regional workshop on the implications of the organizational sentencing guidelines for business ethics and compliance. The EOA is a nonprofit organization that comprises more than 1,000 ethics and compliance officers who have as their designated mission the sharing of "best practices" for compliance and ethics within organizations.

The daylong event, with more than 100 participants, featured a keynote luncheon address by Vice Chair John Steer on the role of the organizational sentencing guidelines in influencing corporate conduct and governance. Commission staff delivered several presentations and participated in panel discussions (with representatives from the Department of Justice and the private business sector) on effective strategies for compliance, the regulatory response to the organizational sentencing guidelines, and the roles of internal auditors and boards of directors in shaping corporate compliance.

Throughout the year, the Commission and staff also participated in a variety of other symposia and programs on compliance and business ethics, discussing the proposed amendments to Chapter Eight and the significance of their application to corporations and other organizations.

[The following is excerpted from Chapter Five of the Sentencing Commission's 2003 *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 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 offenses.[3] In addition, the sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations.[4]

The organizational guidelines do not presently contain fine provisions for most offenses 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.[5] 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 2003, the Commission received information on 200 organizations that were sentenced under Chapter Eight, a 20.6 percent decrease from 2002 and a 16.0 percent decrease from 2001.[6] Fines were imposed on 134 organizations. The sentenced organizations pled guilty in 91.0 percent of the cases; 9.0 percent were convicted after trial. See Tables 51 and 53 of the *2003 Sourcebook of Federal Sentencing Statistics*.

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

2 *See* USSG §8A1.1.

3 *See* USSG §8C2.1.

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

5 *See* USSG §8C2.1.

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. *See* page 34.

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 *2003 Annual Report* to prior annual reports may not be possible.

Offense Characteristics

As in 2002, fraud remained the most frequent offense committed by an organization, accounting for 63 of the 200 cases sentenced (31.5%). Other significant offense categories included environmental pollution (20.0%),[7] food, drugs, agricultural and consumer products (7.0%), antitrust (6.5%), and money laundering (6.5%). See Table 51 of the *2003 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 the sentencing court's Judgment and Commitment Order and/or the probation officer's Presentence Report. Of the 200 cases sentenced in 2003, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 99 cases. The Commission received detailed culpability score information for 90 of those cases. See Table 54 of the *2003 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 90 cases with detailed culpability score calculations, no organizations received reductions in their culpability scores for having in place an "effective program to prevent and detect violations of law."[8] Once under investigation by the authorities, 36 organizations (40.0%) were given credit at sentencing for cooperating with the government's investigation,[9] and another 37 organizations (41.1%) were given credit for accepting responsibility for their wrongdoing.[10] One organization received full credit for reporting the offense to

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7 Environmental pollution offenses refer to the aggregate of "Environmental-Water," "Environmental-Air," and "Environmental-Hazardous/Toxic Pollutants."

8 USSG §8C2.5(f).

9 *See* USSG pursuant to §8C2.5(g)(2).

10 *See* USSG §8C2.5(g)(3).

governmental authorities,[11] cooperating with the investigation, and accepting responsibility for the offense. Sixteen organizations (17.8%) received no mitigating credit inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 of the *2003 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 scores of three organizations (3.3%) were increased, pursuant to section 8C2.5(c) of the sentencing guidelines, because they had a history of prior criminal or administrative offenses. One organization received an increase under section 8C2.5(d) for having violated a judicial order, injunction, or condition of probation; and three organizations (3.3%) 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 *2003 Sourcebook of Federal Sentencing Statistics*.

Sanctions Imposed

The largest fine in 2003, approximately $63.87 million, was imposed on a pharmaceutical manufacturing company for conspiracy to violate the Prescription Drug Marketing Act. The second highest fine in 2003, $32.5 million, was imposed on a medical technology company for interstate shipment of a misbranded medical device and failure to report to the Food and Drug Administration. The third highest fine was $28.5 million in an antitrust case. In addition, the largest restitution order imposed in 2003, $36.8 million, was imposed in two related trademark infringement cases in which companies smuggled into the United States and trafficked in counterfeit goods. For the 200 cases overall, restitution was ordered in 83 cases, and a fine was imposed in 134 cases. The mean restitution ordered was $2,256,237, and the mean fine imposed was $1,702,897. See Tables 51 and 52 of the *2003 Sourcebook of Federal Sentencing Statistics*.

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 200 cases sentenced pursuant to Chapter Eight, 148 (74%) received one month or more of probation, and 24 (12.0%) were ordered to make some sort of "ethics"-related or "compliance"-related improvement. See Table 53 of the *2003 Sourcebook of Federal Sentencing Statistics*.

[11] *See* USSG §8C2.5(g)(1).