ORGANIZATIONAL SENTENCING PRACTICES

[The following is excerpted from **Chapter Four** of the Sentencing Commission's 2006 *Annual Report*:]

Organizational Guidelines Training

Throughout fiscal year 2006, commissioners and staff participated in a variety of symposia and programs on compliance and business ethics. In more than 22 seminars and briefings, with 4,286 participants, commissioners and staff discussed the 2005 amendments to Chapter Eight of the sentencing guidelines and the significance of their application to corporations and other organizations.

[The following is excerpted from **Chapter Five** of the Sentencing Commission's 2006 *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 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, the statutory provisions of sections 3553 and 3572 of title 18, United States Code, govern the determination of an appropriate fine.

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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.

In 2006, the Commission received information on 217 organizations that were sentenced under Chapter Eight, a 16 percent increase from 2005 and a 67 percent increase from 2004.[6] The sentenced organizations pled guilty in 197 (90.8%) of the cases; nineteen (8.8%) were convicted after a jury trial. See Table 53 of the *2006 Sourcebook of Federal Sentencing Statistics*.

Changes from Prior Annual Reports

The organizational sentencing data reported in the *2000 Sourcebook* 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 make compliance and ethics-related improvements as a condition of probation. Also beginning with the *2000 Sourcebook*, the Commission instituted new designations for some offense types, which continue to be refined to more accurately report the data captured. Consequently, some direct comparisons of the *2006 Annual Report* to prior annual reports may not be possible.

Offense Characteristics

As in 2005, fraud was the most frequent type of offense committed by an organization sentenced in federal court, accounting for 71 (32.7%) of the 217 cases sentenced. Other significant offense categories included environmental pollution (18.4%)[7], drugs (8.8%), import and export (8.3%), and antitrust (7.4%). See Table 51 of the *2006 Sourcebook of Federal Sentencing Statistics*.

Offender Characteristics

In those cases in which the fine provisions of section 8C2.1 apply to the offense and the offender organization has the ability to pay, the court calculates a culpability score that may decrease 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 217 cases sentenced in 2006, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 122 cases (56.2%). The Commission received detailed culpability score information for 111 of those cases.[8] See Table 54 of the *2006 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 108 cases with complete detailed culpability score calculations, no organization received a reduction in its culpability score for having in place an "effective compliance and ethics program."[9] Of the 111 cases with detailed culpability score information on self-reporting, cooperation and acceptance of responsibility, 87 organizations (78.3%) received reductions in their

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[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 32.

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

[8] In three of the 111 cases, detailed information was reported for the acceptance of responsibility but not the other culpability factors.

[9] *See* USSG §8C2.5(f).

culpability scores, pursuant to section 8C2.5(g), for either self-reporting, cooperating, or accepting responsibility. Fifty-four organizations (48.6%) received reductions in their culpability scores for cooperating with the government's investigation[10] and another 32 organizations (28.8%) received reductions for accepting responsibility for their wrongdoing.[11] One organization received the full five-point reduction in its culpability score for reporting the offense to governmental authorities,[12] cooperating with the investigation, and accepting responsibility for the offense (0.9%). Twenty-four organizations (21.6%) received no culpability score reductions inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 of the *2006 Sourcebook of Federal Sentencing Statistics*.

In a number of cases, the organization's culpability score was increased based on the presence of culpability factors. Among those 108 cases with complete detailed culpability score calculations, nine organizations (8.3%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in an increased culpability score for sentencing purposes. One organization (0.9%) received an increase under section 8C2.5(c) (for a history of prior criminal or administrative offenses within five years), and two organizations (1.8%) received an increase under section 8C2.5(d) (for violation of a judicial order, injunction, or condition of probation). See Table 54 of the *2006 Sourcebook of Federal Sentencing Statistics*.

Sanctions Imposed

Of the 217 cases sentenced in Fiscal Year 2006, restitution was ordered in 61 cases (28.1%), and a fine was imposed in 162 cases (74.7%). See Table 52. The mean restitution ordered was $1,976,593 and the mean fine imposed was $5,890,259[13]. See Table 52 of the *2006 Sourcebook of Federal Sentencing Statistics*.

The highest fine in 2006 was imposed on two related corporations to jointly and severally pay a $300 million fine for violation of the Sherman Antitrust Act. The corporations were convicted of fixing the prices of a product that they produced and sold. The second highest fine, $136.9 million, was imposed on a corporation for conspiracy to violate provisions of the Food Drug and Cosmetic Act and the Anti-Kickback Act. The third highest fine, $136.9 million, was imposed on a corporation for price-fixing and bid-rigging. The largest restitution order in 2006, $39.8 million, was imposed on a nonprofit organization for money laundering and aiding and abetting mail fraud.

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 217 cases sentenced pursuant to Chapter Eight, 162 (74.7%) received one month or more of probation, and 41 (19.8%) were ordered to make compliance or ethics-related improvements. See Table 53 of the *2006 Sourcebook of Federal Sentencing Statistics*.

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[10] *See* USSG §8C2.5(g)(2).

[11] *See* USSG §8C2.5(g)(3).

[12] *See* USSG §8C2.5(g)(1).

[13] In cases of joint and several fines or restitution orders, the full amount of each fine or restitution order is attributed to each offender, which may result in overinflation of the total amount of fines or restitution reported for all offenders. An example of such a case is the Sherman Antitrust Act fine discussed directly below.