

The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics

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I. INTRODUCTION

The United States Sentencing Commission (“the Commission”) is responsible for promulgating the Federal Sentencing Guidelines (“the Guidelines”) for transmission to Congress.¹ The Commission operates under the authority and guidance of the Sentencing Reform Act of 1984.² The Commission has many additional statutory responsibilities, including collecting federal sentencing data, analyzing this data and other information to evaluate the Guidelines’ impact on the prison system, assessing the need for amendments to the Guidelines, and advising Congress on criminal policy.

I became quite familiar with the Guidelines first by using them as a district court judge to sentence convicted defendants, and later by reviewing their application by other judges. However, it was only on becoming Chair of the Commission that I became aware of the wide impact the Guidelines have on organizations. This impact extends far beyond their use in the context of criminal cases. As indicated by the table below, of all the federal sentences imposed during the past five years, fewer than one percent were imposed on organizations. Nevertheless, these sentences impact many individual employees as well as the practices and culture of organizational defendants.

NUMBER OF INDIVIDUALS AND ORGANIZATIONS SENTENCED³

FISCAL YEAR	INDIVIDUALS	ORGANIZATIONS (NO. OF EMPLOYEES)
2000	59,846	304 (84,516)
1999	55,557	255 (388,242)

1. See 28 U.S.C. § 994(a) (1994) (directing Commission to promulgate sentencing guidelines); 28 U.S.C. § 994(p) (1994) (providing for amendments to the Guidelines). For a comprehensive discussion of the history behind the United States Sentencing Commission, its function and role within the federal government, as well as its constitutionality, see *Mistretta v. United States*, 488 U.S. 361, 362-70 (1988). For a brief overview of the Guidelines, see U.S. SENTENCING COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (1998), available at <http://www.ussc.gov/pdf/glovrbw.pdf>.

2. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as 18 U.S.C. §§ 3551-3742 (1994) and 28 U.S.C. §§ 991-998 (1994)) (also known as Title II of the Comprehensive Crime Control Act of 1984).

3. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls. 1, 51 (1996-2000); U.S. SENTENCING COMM’N, ORGANIZATIONAL DATASETS (1996-2000), available at <http://www.ICPSR.umich.edu/NACJD/archive.html> (Inter-University Consortium for Political and Social Research at the University of Michigan). As employee data exist only for a fraction of all organizations sentenced in a given year, the total number of employees for the organizations sentenced is greater than the numbers reported here. Employee data existed only for 60% of the organizations sentenced in 1996, 63% in 1997, 65% in 1998, 56% in 1999, and 61% in 2000. U.S. SENTENCING COMM’N, ORGANIZATIONAL DATASETS (1996-2000).

1998	50,754	213 (170,598)
1997	48,848	220 (115,569)
1996	42,436	157 (40,879)
TOTALS	257,441	1,149 (799,804)

Moreover, the small number of organizations sentenced each year does not reflect the harm caused by the criminal conduct of organizations. Some commentators believe that crimes committed by organizations may cause more damage to society than crimes committed by individuals.⁴

As this Article discusses, the organizational guidelines provide incentives for far reaching compliance programs and have produced a new occupation that advises organizations on how to build effective programs that promote ethical behavior. Furthermore, by promoting compliance and ethics programs, the organizational guidelines not only provide incentives for substantial changes in organizational behavior, but also further some of the main goals of the Sentencing Reform Act: the prevention and deterrence of criminal conduct.⁵

In addition, the organizational guidelines have also made responsible individuals in organizations aware of potential personal liability if they fail to support and involve themselves in programs and procedures designed to prevent and deter violations of the law. The purpose of this Article is to provide a brief history of the organizational guidelines, review their impact on sentencing and corporate law over the past decade, and examine some recent suggestions for amending the organizational guidelines.

II. CREATION OF THE ORGANIZATIONAL SENTENCING GUIDELINES

The organizational guidelines were not part of the original set of guidelines the Commission sent to Congress on May 1, 1987. The first set of guidelines applied only to individual offenders.⁶ The Commission deferred

4. See, e.g., David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 637 (1999) (reporting that "corporate financial crime costs \$200-\$565 billion [annually]"); Emmitt H. Miller, III, *Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197, 198-99 (1993) ("In terms of the numbers of human lives and the amounts of property involved, the social harm caused by organizations greatly exceeds the harm that individuals cause."); *id.* at 199 n.5 ("Corporate crime costs far more than street crime—all the street crime in the U.S. in a given year is estimated to cost around \$4 billion, much less than 5% of the average take from corporate crime.") (citations omitted). Congress also has recognized that "offenses typically perpetrated by organizations" often result in "greater financial harm to victims" and "greater financial gain to the criminal" than those offenses perpetrated by individuals. S. REP. NO. 98-225, at 66-67 (1984).

5. See 18 U.S.C. § 3553(a)(2)(B) (1994) (stating that sentences should "afford adequate deterrence to criminal conduct"); see also 28 U.S.C. § 994(g) (1994) (requiring the Commission to promulgate guidelines "to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18").

6. There was one exception. The original version of the Guidelines contained provisions for sentencing organizations convicted of antitrust violations. See U.S. SENTENCING GUIDELINES

drafting and implementing organizational guidelines mainly “[d]ue to the complexity of the subject matter and the tight deadlines imposed by the Sentencing Reform Act.”⁷ The Commission nonetheless believed that the Act and its legislative history permitted it to address sentencing for organizations.⁸ Indeed, the United States Criminal Code specifically provides for the sentencing of organizations,⁹ which are defined simply as persons other than individuals.¹⁰

The Commission undertook research regarding organizational sentencing practices as early as 1986.¹¹ The Commission found that a wide disparity in sentencing practices for organizations existed¹² and also found a significant lack of consensus among academics regarding how organizations should be sentenced.¹³ The Commission also was aware that many members of Congress, as well as the general public,¹⁴ perceived the sentences imposed on white collar criminals and organizations as unduly lenient.¹⁵ Judge

MANUAL, § 2R1.1(c) (1987); 52 FED. REG. 18046, 18,049 (May 13, 1987). Although promulgated on May 1, 1987, the original guidelines became effective on November 1, 1987. See 28 U.S.C. § 994(p) (1994) (providing that Commission amendments to guidelines must be submitted to Congress no later than May 1 of any given year, and may take effect “no earlier than 180 days after being so submitted”).

7. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS I (1991) [hereinafter SUPPLEMENTARY REPORT].

8. See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 213-14 (1993).

9. See 18 U.S.C. § 3571(c) (1994) (providing statutory maximum fines for organizations for all felonies and misdemeanors).

10. See 18 U.S.C. § 18 (1994) (“As used in this title, the term ‘organization’ means a person other than an individual.”). Organizations thus include not only corporations, but also partnerships, nonprofit entities, educational institutions, labor unions, and even municipalities.

11. See SUPPLEMENTARY REPORT, *supra* note 7, at 1 (noting that “[t]hroughout the period from 1986 to 1991 . . . the Commission conducted empirical research and analysis on organizational sentencing practices.”).

12. See Mark A. Cohen et al., *Report on Sentencing of Organizations in the Federal Courts, 1984-1987*, in U.S. SENTENCING COMM’N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS 10 (1988) [hereinafter DISCUSSION MATERIALS] (finding a “large amount of disparity” in study of pre-Guidelines sentences for organizations).

13. See Nagel & Swenson, *supra* note 8, at 214 (“In the decade preceding the Commission’s work on organizational sanctions, the relevant literature clearly illustrated a lack of consensus among academics regarding corporate sentencing.”).

14. See BUREAU OF JUSTICE STAT., U.S. DEP’T OF JUSTICE, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 162 (1985) (indicating that 65% of Americans viewed sentences for white collar defendants as too lenient).

15. See Nagel & Swenson, *supra* note 8, at 21, who note that

[w]hile the Commission’s own research focused on unwarranted disparity among corporations convicted of similar offenses, it also recognized that some members of Congress, and a majority of the public, perceived an unwarranted disparity in the severity of sentences meted out to white collar offenders when compared to the severity of sentences meted out to non-white collar offenders.

Gerald Heaney of the United States Court of Appeals for the Eighth Circuit articulated what he and others saw as a fundamental limitation in pre-Guidelines organizational sentencing:

The present practice of punishing corporate crime with fines paid to the United States Treasury has done little to deter corporate crime. Once the payment is made to the Treasury, the public promptly forgets the transgression, and the corporation continues on its way, with its reputation only slightly tarnished by what it usually describes as a “highly technical violation.”¹⁶

Questions were raised during the process not only as to whether fines alone could be effective as punishment, but also as to how to determine appropriate levels for fines. The Commission believed “that corporate offenders were neither exempt nor should be exempted from Congress’ scheme for sentencing reform.”¹⁷ The Commission decided “that drafting workable and reasonable corporate sentencing rules would serve its broader mandate of establishing sound and effective sentencing policies for the federal courts.”¹⁸

On May 1, 1991, after many years of research, debate, and input from several advisory working groups,¹⁹ various federal agencies,²⁰ and the general

16. *United States v. Mo. Valley Constr. Co.*, 741 F.2d 1542, 1551 (8th Cir. 1984) (Heaney, J., concurring and dissenting). According to the Senate Report accompanying the Sentencing Reform Act of 1984, many judges shared Judge Heaney’s concern:

Under the present Federal law, fines are specified as an authorized form of sentence for virtually all offenses. It is recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual Federal Offenders. The authorized maximum limits, however, are generally very low. *Complaints that current fine levels are insufficient to accomplish the purposes of sentencing are being voiced by Federal judges with increasing regularity.*

S. REP. NO. 98-225, at 104 (1983) (emphasis added).

17. Nagel & Swenson, *supra* note 8, at 259.

18. *Id.*

19. From late in 1988 to April 1991, three advisory groups were created to advise the Commission on drafting sentencing guidelines for organizational defendants. They were composed of federal judges, probation officers, and private defense attorneys. See SUPPLEMENTARY REPORT, *supra* note 7, at 2 (discussing the composition and function of various advisory groups to the Commission).

The Commission also has regularly had input from expert staff, outside experts, its Probation Officers Advisory Group, <http://www.ussc.gov/POAG/POAGindex.html>, and the Practitioners Advisory Group, <http://members.aol.com/usscpag/>. When considering the applicability of the organizational guidelines to environmental offenses, the Commission convened an Advisory Working Group on Environmental Offenses. U.S. SENTENCING COMM’N, REPORT FROM ADVISORY GROUP ON ENVIRONMENTAL SANCTIONS, at <http://www.ussc.gov/environ.pdf>. Similarly, the Commission has created working groups on Money Laundering offenses, Food and Drug offenses, Telemarketing Fraud, Computer Fraud, and Manslaughter. See generally U.S. SENTENCING COMM’N, PUBLICATIONS, at <http://www.ussc.gov/research.htm>

public,²¹ the Commission promulgated an entirely new chapter to the Guidelines that applied specifically to organizational offenders.²²

III. A NOVEL SENTENCING APPROACH

A. PURPOSES

An organization is not the typical offender.²³ It is therefore not surprising that the organizational guidelines²⁴ have a unique approach.²⁵ The guidelines for individuals, according to some commentators, focus on punishment and incapacitation.²⁶ They provide a method for determining

(providing reports of various working groups).

20. See SUPPLEMENTARY REPORT, *supra* note 7, at 2 (noting that the Commission solicited views from the Council of Economic Advisers, the Departments of Justice, Defense, Health and Human Services, and Interior, the Environmental Protection Agency, the Securities and Exchange Commission, and the Federal Trade Commission). The Commission also received input from the Business Roundtable. See generally THE BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE (1997), at <http://www.brtable.org/pdf/11.pdf>.

21. Public hearings regarding major drafts of the organizational guidelines were held on October 11, 1988, in New York City; December 2, 1988, in Pasadena, California; and on February 14 and December 13, 1990, in Washington, D.C., SUPPLEMENTARY REPORT, *supra* note 7, at 3.

22. See U.S. SENTENCING GUIDELINES MANUAL app. C. amend. 422 (effective Nov. 1, 1991). In July 1988, the Commission distributed "discussion materials . . . to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes." Introductory Letter from the Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission, to general public, in DISCUSSION MATERIALS, *supra* note 12. Although these discussion materials never were officially adopted by the Commission, they stated reasons for taking "a distinct approach to sentencing organizations:" (1) organizations cannot be imprisoned, (2) organizations can act only through agents, and (3) criminal prosecution is not the only mechanism of federal law enforcement. See DISCUSSION MATERIALS, *supra* note 12, at § 8.1.

23. As Baron Thurlow famously stated, "[C]orporations have neither bodies to be punished, nor souls to be condemned." THE OXFORD DICTIONARY OF QUOTATIONS 550 (3d ed. 1979) (quoting Edward, First Baron Thurlow). The United States Supreme Court has pointed out, however, that although "[a] corporation cannot be arrested and imprisoned in either civil or criminal proceedings, . . . its property may [nevertheless] be taken either as compensation for a private wrong or as punishment for a public wrong." N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909).

24. See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2001) [hereinafter U.S.S.G.] (setting forth the sentencing guidelines for organizations).

25. See U.S.S.G. ch. 2 (setting forth the sentencing guidelines for individuals).

26. See Karen Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 143 (1993) (stating that retribution and incapacitation are "heavily favored in the Guidelines" and noting criticism that the Guidelines "favor the principles of retribution and deterrence") (citations omitted); Paul J. Hofer & Mark H. Allenbaugh, *The Federal Sentencing Guidelines: Still Incoherent after All These Years?* 26 (Apr. 26, 2001) (unpublished manuscript presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Okla., on file with the United States Sentencing Commission) (arguing that "[d]esert theory forms the primary rationale" for the main structure of the Guidelines); see also United States v. Dyer, 216 F.3d 568, 570 (7th Cir. 2000) ("The

the appropriate range of imprisonment in proportion to the offense.²⁷ Conversely, the organizational guidelines focus on providing restitution and an appropriate fine range for the offender organization through far reaching probation provisions.²⁸ Perhaps more importantly, however, these guidelines are geared toward deterrence, and they provide sentencing benefits for organizations that have an “effective program to prevent and detect violations of law.”²⁹

The organizational guidelines give organizations an incentive to have in place an *effective* compliance program.³⁰ They not only encourage corporations to exemplify “good corporate citizenship,”³¹ but also provide a means to “rehabilitate” corporations that have engaged in criminal conduct by requiring them, as a term of probation, to institute and maintain effective compliance programs.³² The organizational guidelines provide that “[t]he hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”³³

The organizational guidelines set forth these minimum criteria for a program to be deemed effective:

- (1) Compliance standards and procedures must be established to deter crime.
- (2) High-level personnel must be involved in oversight.
- (3) Substantial discretionary authority must be carefully delegated.
- (4) Compliance standards and procedures must be communicated to employees.

principal objectives of criminal punishment that guide the design and application of the federal sentencing guidelines are retribution, deterrence, and incapacitation.”); Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 348 (1995) (stating that the Sentencing Reform Act “fundamentally altered the nation’s sentencing goals and practices” by rejecting rehabilitation and embracing a “shift toward deterrence and incapacitation”).

27. See U.S.S.G. ch. 5, pt. A (detailing a sentencing table in months of imprisonment).

28. See *id.* § 8C1.1 (setting forth provisions for determining the fines for organizations).

29. *Id.* § 8A1.2, cmt. n.3(k).

30. See Win Swenson, *The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance*, in CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 34-35 (1995) (discussing the Guidelines’ attempt to ensure that companies devise “compliance programs that actually work”), available at <http://www.ussc.gov>.

31. *Id.* at 34.

32. See U.S.S.G. ch. 8, introductory cmt. (“[P]robation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.” (emphasis added)).

33. *Id.* § 8A1.2, cmt. n.3(k).

(5) Steps must be taken to achieve compliance in establishment of monitoring and auditing systems and of reporting systems with protective safeguards.

(6) Standards must be consistently enforced.

(7) Any violations require appropriate responses, which may include modification of compliance standards and procedures and other preventive measures.³⁴

Of course, “[t]he precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors,” including the size of the organization, the nature of the organization’s business, and the organization’s prior history of misconduct (if any).³⁵ Still, the “applicable industry practice or the standards called for by any applicable government regulation” should assist an organization in determining how to implement an effective compliance program.³⁶ Indeed, under the organizational guidelines, failure to follow industry practice or government regulations “weighs against a finding of an effective program to prevent and detect violations of law.”³⁷

B. PROCEDURES

The organizational guidelines differ significantly from the individual guidelines with respect to sentencing procedure. The following table provides a rough comparison of the procedures for individuals and organizations under the Guidelines. Note, for example, how restitution is to be ordered first under the organizational guidelines and is not to be viewed as punishment,³⁸ whereas restitution is ordered last under the individual guidelines, with the punishment provisions coming first.

34. *Id.*

35. *Id.*

36. *Id.*

37. U.S.S.G. § 8A1.2, cmt. n.3(k).

38. *See id.* ch. 8, introductory cmt. (stating that “resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused”).

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COMPARING SENTENCING PROCEDURES FOR INDIVIDUALS AND ORGANIZATIONS

INDIVIDUAL GUIDELINES (U.S.S.G. § 1B1.1)	ORGANIZATIONAL GUIDELINES (U.S.S.G. § 8A1.2)
Determine guideline applicable to offense of conviction.	Determine remedy for harm, e.g., restitution, remedial orders, community service.
Determine base offense level from applicable guideline.	Determine whether organization has ability to pay fine.
Apply adjustments. <i>Aggravators:</i> <ul style="list-style-type: none"> • Hate crime or vulnerable victim. • Official victim. • Restraint of victim. • Terrorism. • Leadership role in offense. • Abuse of position of trust or use of special skill. • Use of a minor to commit crime. • Obstruction of justice. • Reckless endangerment. <i>Mitigators:</i> <ul style="list-style-type: none"> • Minor or minimal role in the offense. • Acceptance of responsibility. 	If organization has ability to pay fine, determine base fine amount. ³⁹
Group multiple counts of conviction.	Determine culpability score: <i>Aggravators:</i> <ul style="list-style-type: none"> • Involvement or tolerance of criminal activity. • Prior history. • Violation of an order. • Obstruction of justice.

39. Section 8C2.4(a) of the Guidelines provides that the base fine for organizations shall be the greatest of either (1) the amount determined by reference to an offense level fine table, (2) the pecuniary gain, or (3) the pecuniary loss. The amount determined by reference to the offense level fine table requires cross-reference to the applicable Chapter Two guideline and Chapter Three adjustments (including grouping for multiple counts). *See id.* § 8C2.3. Quite often, the pecuniary loss is determined to be the greatest, so that resort to the offense level fine table—which requires applying the most relevant individual guidelines to the organization’s criminal conduct—is unnecessary.

	<p><i>Mitigators:</i></p> <ul style="list-style-type: none"> • Effective program to prevent and detect violations of law. • Self-reporting violations of law. • Cooperation with authorities. • Acceptance of responsibility.
Determine adjusted offense level.	Multiply base fine by culpability score to obtain guideline fine range.
Determine offender's criminal history.	Require implementation of effective compliance program if one does not exist already.
Combine adjusted offense level and criminal history to obtain final guideline sentencing range.	
Determine guideline sentencing range from offense level.	
Order fines or restitution.	

The organizational guidelines require that courts ensure, if at all possible, that organizations remedy the harm that resulted from their criminal conduct.⁴⁰ The Guidelines emphasize, however, that amounts used “to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.”⁴¹

Punishment is thus not the ultimate purpose of the organizational guidelines. If imposition of a fine would preclude an organization from making restitution or otherwise remedying the harm it caused, the fine is to be waived.⁴² Rather, their ultimate purpose is the promotion of good corporate citizenship through encouraging implementation of effective compliance programs, which—it is hoped—will prevent crime.⁴³ Not unlike the United States Constitution, the organizational guidelines contain simple

40. See *id.* ch. 8, introductory cmt. (“[T]he court must, whenever possible, order the organization to remedy any harm caused by the offense.”).

41. *Id.*

42. See U.S.S.G. ch. 8, pt. B, introductory cmt. (“As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense.”); *id.* § 8C3.3(a) (“The court shall reduce the fine below that otherwise required . . . to the extent that imposition of such fine would impair its ability to make restitution to victims.” (emphasis added)).

43. Some have praised the spirit of the Guidelines for “encourag[ing] organizations to establish, monitor, and enforce programs that detect and prevent violations of the law.” Dan R. Dalton et al., *The “New” U.S. Sentencing Commission Guidelines: A Wake-Up Call for Corporate America*, in *ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH* 275 (Thomas Donaldson & Patricia H. Werhane eds., 6th ed. 1999).

statements of general principles that permit its application to varied and changing circumstances.

IV. THE IMPACT OF THE ORGANIZATIONAL GUIDELINES

Prior to the implementation of the organizational guidelines, there was already a movement promoting ethical and compliant corporate conduct,⁴⁴ to which the Guidelines undoubtedly have added momentum. Because of their novel approach, the organizational guidelines have attracted a great deal of attention. By May 2001, nearly five hundred law review articles and over three hundred newspaper articles had addressed them, and nearly three hundred individual websites have been created that discuss some aspect of the organizational guidelines.⁴⁵ Moreover, according to a recent literature review conducted by a major university, “18,381 current articles relat[e] to compliance programs, corporate compliance effectiveness, corporate integrity agreements, and federal sentencing guidelines.”⁴⁶ The volume of scholarly commentary regarding the organizational guidelines is reflective of the impact those guidelines have had. That impact has been most significant in four areas: sentencing, corporate culture, government enforcement and regulation, and corporate law.

A. THE IMPACT ON SENTENCING

The deterrent effect of sentencing under the organizational guidelines stems from both the large fines that may be imposed⁴⁷ and the possibility

44. See MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT 153-56 (1983) (setting forth criteria promoting self-auditing and ethical conduct); *Origins and Development of the Defense Industry Initiative*, in 2000 DEF. INDUS. INITIATIVE ANN. REP. 4-10 (discussing development of Defense Industry Initiative in the pre-Guidelines era), available at <http://www.dii.org/annual/2000/origins.html>. The Defense Industry Initiative (DII) was created in the mid-1980s to create a “heightened standard of ethical conduct . . . in the defense industry,” promote self-policing to ensure compliance with ethical standards “even when they exceed legal requirements,” and create a forum to “share best practices in dealing with ethics and business conduct.” *Id.* at 4. In its 2000 Annual Report, DII also stated that “[t]he overarching principle of corporate self-governance, the bedrock of what DII is all about is embedded in the U.S. Sentencing Commission’s sentence guidelines for corporations.” *Id.* at 10.

45. On May 2, 2001, a search of the Westlaw “JLR” database revealed 477 law review or law journal articles that contain either the phrase “corporate sentencing guidelines,” or “organizational sentencing guidelines.” The same search protocol performed in the Westlaw “ALLNEWSPLUS” database uncovered 317 newspaper articles. Two searches on the internet search engine “Google.com” uncovered 136 websites containing the phrase “corporate sentencing guidelines” and 158 containing the phrase “organizational sentencing guidelines.”

46. Press Release, PricewaterhouseCoopers Announces First Empirical Analysis of Healthcare Compliance Effectiveness Identifies Key Indicators, BUS. WIRE, May 14, 2001.

47. For an example of such large fines, see U.S.S.G. § 8C2.4; § 8C2.6 (allowing for fines as great as four times pecuniary gain to the organization, or loss caused by it). *But cf.* 18 U.S.C. § 3571(d) (1994) (capping maximum fine on individual count at “no more than the greater of twice the gross gain or twice the gross loss”). Thus, there is no *numerical* ceiling on the amount

that a sentencing court may impose restrictive probation conditions such as appointment of a special master⁴⁸ or creation of auditing and monitoring groups.⁴⁹ The table below compares the fine amounts for the three years immediately preceding the implementation of the organizational guidelines to the most recent three-year period. One can see that although the number of organizations sentenced has remained approximately the same, the fine amounts imposed have increased significantly in the Guidelines era.

COMPARISON OF FINE AMOUNTS PRE AND POST ORGANIZATIONAL GUIDELINES⁵⁰

YEAR	Mean	Median	YEAR	Mean	Median
1988 Cases = 328	\$155,916	\$17,500	1998 Cases = 154	\$1,762,250	\$64,000
1989 Cases = 273	174,037	30,000	1999 Cases = 200	6,136,576	75,000
1990 Cases = 173	177,990	15,000	2000 Cases = 219	1,595,836	100,000
TOTAL Cases = 774	167,214	20,000	TOTAL Cases = 573	3,225,462	90,000

an organization can be fined. The higher fines imposed under the organizational guidelines represent a substantial departure from pre-Guidelines sentencing practice for organizations and white collar offenders where fines often were so low, that, as Congress recognized in the legislative history to the Sentencing Reform Act, they easily could "be written off as a cost of doing business." *See* S. REP. NO. 98-225, at 76 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259.

48. Section 3601 of Title 18 of the United States Code requires that "[a] person who has been sentenced to probation . . . shall . . . be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court." (1994). Federal Rule of Civil Procedure 53 permits appointment of special masters by courts to assist judges in certain circumstances. *See* *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) ("The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." (citation and internal quotations omitted)). According to Rule 53, special masters can "include[] a referee, an auditor, an examiner, and an assessor." FED. R. CIV. P. 53. As a result, special masters may be appointed as de facto probation officers in order to supervise organizations on probation. Indeed, the organizational guidelines recommend that a court require an organization on probation to report periodically to the court, the probation officer, "or any expert engaged by the court," so that the court may gauge the status of the organization's efforts to comply with the law and the terms of probation. U.S.S.G. § 8D1.4(b)(2), (c)(4).

49. *See, e.g.*, *United States v. Am. Airlines, Inc.*, Case No. 99-00902-CR (S.D. Fla. Dec. 16, 1999) (requiring defendant organization to hire a court-approved outside auditor); *United States v. Robert Mondavi Corp.*, No. 98CV01819 (D.D.C. July 21, 1998) (requiring a corporation as part of settlement to engage in a \$30,000 public education campaign focusing on government ethics).

50. *See* SUPPLEMENTARY REPORT, *supra* note 7, at 25 tbl.1; U.S. SENTENCING COMM'N, 1988-2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.52. The cases analyzed represent only those organizations that received a fine and for which fine data was available. It should be noted that the increase in the mean fine amounts is due to the issuance of a few significant fines, and should not therefore be considered indicative of common fine amounts.

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Ten years of sentencing under the organizational guidelines have created some remarkable statistics. For example, of the nearly 1500 cases sentenced under the organizational guidelines, a total of \$2.3 billion in fines, nearly \$279 million in restitution, and over 3000 years of probation have been imposed.⁵¹ The table below reflects some of these statistics and the types of organizations that have been sentenced under the Guidelines. As this table illustrates, the impact on sentencing of the organizational guidelines has been significant and widespread.

U.S. SENTENCING COMMISSION DATA ON ORGANIZATIONAL SENTENCES:
TEN-YEAR RETROSPECTIVE⁵²

Total Cases	1494
<i>EMPLOYEES</i>	
Cases with Employee Information Available	933 (62.52%)
Median No. of Employees	20
Aggregate Total No. of Employees	837,137
<i>FINES</i>	
Cases with Fines Imposed	1138 (76.17%)
Average Fine	\$2,069,675
Median Fine	\$68,000
Highest Fine	\$500,000,000
Lowest Fine	\$1
Aggregate Total of All Fines	\$2,355,290,713
<i>RESTITUTION</i>	
Cases with Restitution Imposed	423 (28.31%)
Average Restitution	\$658,780
Median Restitution	\$87,652
Total Restitution	\$278,664,021
<i>PROBATION</i>	
Cases with Probation Imposed	940 (62.92%)
Median Term of Probation	36 months
Overall Total Months Probation Imposed	3178 years, 2 months
<i>TYPES OF ORGANIZATIONS</i>	
State or Local Government/Public Administration	12

51. U.S. SENTENCING COMM'N, ORGANIZATIONS CONVICTED IN FEDERAL CRIMINAL COURTS 1991-2000, available at <http://www.ICPSR.umich.edu/NACJD/archive.html> (Inter-University Consortium for Political and Social Research at the University of Michigan).

52. *Id.*

Natural Resources/Mining	49
Industrial Commodities/Construction and Related Contracting Services	220
Services Including Health and Human Services	251
Consumer Commodities/ Manufacturing, Production, Design, Inspection, Sales & Distribution	268
Organizations, Associations, and Charities	3

B. THE IMPACT ON CORPORATE CULTURE

The organizational guidelines have been credited with helping to create an entirely new job description: the Ethics and Compliance Officer.⁵³ Such officers develop and manage an organization's ethics and compliance programs.⁵⁴ The Ethics Officer Association (EOA) recently completed a survey indicating that the organizational guidelines influenced many corporations to adopt compliance programs. Nearly half of those surveyed responded that the organizational guidelines had "a lot of influence" on an organization's commitment to ethics as manifested through the adoption of a compliance program.⁵⁵ In another survey by the EOA, a substantial majority (60%) of respondents believed that ethical dilemmas are not the "unavoidable consequence of business," in contrast to the prevailing public opinion of the 1970s and 1980s that "business ethics" was a contradiction in

53. For example, shortly after the promulgation of the organizational guidelines, the Ethics Officer Association was formed with just twelve members. Since that time, it has grown to over 720 members. ETHICS OFFICER ASSOCIATION, WELCOME (2001), available at <http://www.eoa.org> (on file with the *Iowa Law Review*). The Ethics Officer Association is a non-profit, nonconsulting professional association "for managers of ethics, compliance, and business conduct programs" that serves "as a forum for the exchange of information and strategies among individuals responsible for setting the ethics, compliance and business conduct programs in their organizations." ETHICS OFFICER ASSOCIATION, MISSION, VISION, & VALUES (2001), available at <http://www.eoa.org> (on file with the *Iowa Law Review*). Many other organizations like the Ethics Officer Association also are in existence. For a list of several such organizations, see U.S. SENTENCING COMM'N, ORGANIZATIONAL SENTENCING GUIDELINES BIBLIOGRAPHY (2001), available at <http://www.ussc.gov/orgguide.htm> (on file with the *Iowa Law Review*).

54. ETHICS OFFICER ASSOCIATION, MISSION, VISION, & VALUES (2001), *supra* note 53. For a profile of compliance officers in the health care industry, see HEALTH CARE COMPLIANCE ASS'N & WALKER INFORMATION, 2001 PROFILE OF HEALTH CARE COMPLIANCE OFFICERS, available at http://www.hcca-info.org/documents/hcca_report.pdf (on file with the *Iowa Law Review*).

55. See ETHICS OFFICER ASSOCIATION, 1997 MEMBER SURVEY 9 (2000) (reporting that 47% responded that the organizational guidelines had "a lot of influence" on the organization's decision to adopt a compliance program), available at <http://www.eoa.org> (on file with the *Iowa Law Review*).

terms.⁵⁶ According to the EOA, “[T]his survey . . . shows that today, a majority of workers believe that business and ethics can mix and that ethical dilemmas can be reduced.”⁵⁷

One of the areas in which compliance programs and organizations have grown immensely is in the health care industry. The Health Care Compliance Association (HCCA), like the Ethics Officer Association, is an organization designed to “promote quality compliance programs” consistent with the seven minimum criteria of the organizational guidelines.⁵⁸ According to Roy Snell, its founder, HCCA membership has grown from two members in 1996 to over 2000 members currently.⁵⁹ He credits the organizational guidelines as being a significant impetus to that growth.⁶⁰ As Dr. Robert Olson, Executive Director of the Alliance for Health Care Integrity, has stated, “[M]ore than any other public or private initiative, the Guidelines have motivated stakeholders in the health care industry to take seriously the importance of compliance with federal statutes and regulations, especially those related to the prevention of fraud, waste, and abuse.”⁶¹

C. THE IMPACT ON GOVERNMENT ENFORCEMENT AND REGULATION

Professor Pamela Bucy argues that the corporate ethos—“the dynamic of many individuals working together toward corporate goals”—should be used as the standard for determining organizational criminal liability inasmuch as “organizations possess an identity that is independent of specific individuals who control or work for the organization.”⁶² She believes that the organizational guidelines can influence the corporate ethos for the better.⁶³

56. AM. SOC’Y OF CHARTERED LIFE UNDERWRITERS & CHARTERED FIN. CONSULTANTS AND ETHICS OFFICER ASS’N, SOURCES & CONSEQUENCES OF WORKPLACE PRESSURE 7 (1997).

57. *Id.*

58. HEALTH CARE COMPLIANCE ASS’N, CORPORATE COMPLIANCE FOR THE HEALTH CARE PROFESSIONAL, at <http://www.hcca-info.org/html/compliance.html> (on file with the *Iowa Law Review*).

59. HEALTH CARE COMPLIANCE ASS’N, HISTORY OF THE HEALTH CARE COMPLIANCE ASSOC., at <http://www.hcca-info.org/html/history.html> (on file with the *Iowa Law Review*).

60. Meeting between Judge Diane E. Murphy, chair, U.S. Sentencing Commission, John Steer, Vice Chair, U.S. Sentencing Commission, and representatives of the Health Care Compliance Association, in Minneapolis, Minn. (Nov. 29, 2000).

61. Letter from Robert Olson, Executive Director, Alliance for Health Care Integrity, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 1 (Feb. 21, 2001) (on file with the United States Sentencing Commission).

62. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991).

63. Professor Bucy’s article was published shortly before the organizational guidelines became effective. In it, she noted the following:

[T]he corporate ethos standard is similar to sentencing guidelines the United States Sentencing Commission recently sent to Congress. Under this sentencing

The organizational guidelines also have influenced the prosecutorial policy of the Department of Justice so that an effective compliance program may defer federal prosecution or mitigate any criminal penalty. In a June 16, 1999 memorandum providing guidance to prosecutors in deciding whether to charge an organization, the Deputy Attorney General listed a number of factors for consideration. The factors include: “[t]he existence and adequacy of the corporation’s compliance program,” and whether “[t]he corporation’s remedial actions, includ[ed] any efforts to implement an effective corporate compliance program or to improve an existing one.”⁶⁴ The memorandum cited the organizational guidelines and noted that “in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”⁶⁵

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. . . . The fundamental questions any prosecutor should ask are: “Is the corporation’s compliance program well designed?” and, “Does the corporation’s compliance program work?”⁶⁶

An effective compliance program is a factor that may both defer federal prosecution of and mitigate the criminal penalty imposed on an

proposal, the amount of fine levied against the convicted corporation depends upon whether the corporate defendant utilized many of the internal controls discussed herein. Thus, both the corporate ethos standard and the United States Sentencing Commission’s proposal, with the promise of more lenient treatment from the criminal justice system, encourage corporations to voluntarily implement internal controls that will reduce corporate crime. The sentencing proposal is commendable from this public policy point of view.

Id. at 1159-60; *see also* U.S.S.G. § 8C2.5(f) (providing fine mitigation “[i]f the offense occurred despite an effective program to prevent and detect violations of law”); Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252, 1263 (1996) (stating that “commentators have suggested that holding corporations criminally liable for the acts of their agents will create incentives for corporations to supervise more effectively their employees’ activities”).

64. Memorandum from Deputy Attorney General Eric Holder, to All Component Heads and United States Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (on file with the *Iowa Law Review*).

65. *Id.* (citing U.S.S.G. § 8C2.5, cmt. n.4).

66. *Id.*

organization for its criminal conduct. The mere presence of a compliance program, however, “does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law.”⁶⁷

The organizational guidelines have influenced the policies not only of the Department of Justice, but also of various regulatory agencies. There is a growing body of policy statements issued by regulatory agencies that provide incentives to organizations to develop effective compliance programs. Indeed,

the criminal conviction of a company doing business with the government may have consequences more severe than the penalties imposed under the [organizational] guidelines. In general, companies believed to have engaged in serious criminal conduct are not considered to be suitable to contract with the government for goods or services.⁶⁸

These regulatory policies may impose significant penalties including barring or suspending an organization from government contracts.⁶⁹ A number of mitigating factors may be considered, such as whether the organization has implemented “effective standards of conduct and internal control.”⁷⁰

Recently, the Federal Acquisition Regulations Council proposed a rule suggesting that government contracting officials may judge a prospective contractor’s “basic honesty, integrity and trustworthiness” based upon that contractor’s record of complying with the law.⁷¹ Not only can effective compliance programs mitigate or even preclude the imposition of criminal and civil sanctions, but they also can provide affirmative evidence to the government of a contractor’s good character.

D. THE IMPACT ON CORPORATE LAW: IN RE CAREMARK

The organizational guidelines also have had a significant impact on corporate law, in that they greatly expanded corporate directors’ potential

67. United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989).

68. H. Lowell Brown, *The Corporate Director’s Compliance Oversight Responsibility in the Post-Caremark Era*, 26 DEL. J. CORP. L. 1, 26 (2001).

69. See, e.g., Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995); OFFICE OF INSPECTOR GENERAL, DEP’T OF HEALTH & HUMAN SERVS., VOLUNTARY DISCLOSURE PROGRAM GUIDELINES (1995); ANTITRUST DIV. OF THE DEP’T OF JUSTICE, ANTITRUST DIVISION CORPORATE AMNESTY POLICY (1993); Office of Enforcement and Compliance Assurance, Env’t. Protection Agency, *Memorandum on Operating Principles for Common Sense Initiative* (Oct. 31, 1994).

70. See Brown, *supra* note 68, at 101 (citations and internal quotations omitted).

71. Federal Acquisition Regulation, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, FAR 9.104-3(c), 65 Fed. Reg. 80,255 (Dec. 20, 2000) (to be codified at 48 C.F.R. pts. 9, 14, 15, 31, 52), *stayed indefinitely* 66 Fed. Reg. 17,758 (Apr. 3, 2001) (staying rule indefinitely to allow for further public comment).

liability to their shareholders. *In re Caremark*,⁷² a landmark case in the world of corporate compliance, was issued in 1996 by the influential Delaware Court of Chancery. That court credited the organizational guidelines with providing “powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to make prompt, voluntary remedial efforts.”⁷³ The *Caremark* decision expanded potential liability for board members by holding that a corporate director has a good faith duty to see that adequate information and reporting systems are established within the organization.⁷⁴

Citing *Caremark*, the Fourth Circuit recently ruled in *Dellastitious v. Williams*⁷⁵ that directors can avoid liability in shareholder derivative suits by showing a good faith attempt to create “an adequate corporate information-gathering and reporting system.”⁷⁶ The Sixth Circuit held in *McCall v. Scott*,⁷⁷ another derivative suit in the *Caremark* line, that directors can breach their fiduciary duty if they intentionally or recklessly disregard “red flags” that should alert them to fraudulent practices within the organization.⁷⁸ According to the court in *McCall*, even “[u]nconsidered inaction can be the basis for director liability because . . . ordinary business decisions . . . can significantly injure the corporation and make it subject to criminal sanctions.”⁷⁹ It has thus become critical for corporate directors to make sure that their organization has implemented effective programs for “legal and regulatory compliance.”⁸⁰

V. IS ETHICS PART OF EFFECTIVENESS?

Although the term “ethics” does not occur anywhere within the organizational guidelines, opinions differ regarding whether ethical considerations always have been an implicit component of effective compliance programs, or whether ethics should now explicitly be incorporated into the compliance program criteria in the organizational guidelines.⁸¹ Dr. Stephen Cohen of the University of New South Wales calls

72. 698 A.2d 959 (Del. Ch. 1996).

73. *Id.* at 969.

74. *Id.* at 970 (“[A] director’s obligation [to the corporation] includes a duty to attempt in good faith to assure that a corporate information and reporting system . . . exists, and that failure to do so . . . may . . . render a director liable for losses caused by non-compliance with applicable legal standards.”).

75. 242 F.3d 191 (4th Cir. 2001).

76. *Id.* at 196.

77. 239 F.3d 808 (6th Cir. 2001).

78. *Id.* at 819.

79. *Id.* at 817.

80. Brown, *supra* note 68, at 144.

81. See *Bringing Carrots and Sticks in House: The Role of Ethics, Incentives, and Private “Inspectors General” in Achieving “Effective” Compliance*, in U.S. SENTENCING COMM’N, CORPORATE CRIME IN

ethics the next step: “We are now at a point where a further step is recognised for compliance; and that step is ‘ethics’. This is now clearly part of the brief of compliance departments. And, as with the earlier evolution, the inclusion of ethics requires articulation and then expertise.”⁸²

Others speak about interlocking ethics and compliance programs:

Experience suggests that good ethics programs and good compliance programs are interdependent; each is incomplete without the other. A good compliance program must emphasize values and moral responsibility, because this increases the program’s effectiveness among employees. A good ethics program must help employees to know and obey the law if it is to have any relevance to the company in its actual environment.

Training in the law or training in ethics will be equally ineffective without full organizational commitment to the program, and each one will be useless if it is presented without the essential infrastructure to assure that managers have the necessary support mechanisms and strategies to make the program work.⁸³

Compliance is more than looking to the letter of the law: “It is a management function that calls for skill and diligence in managing the ways in which a business conducts its daily affairs.”⁸⁴ It should incorporate “policy development, communications, . . . [assessment of] vulnerabilities,” as well as the success of ethics programs.⁸⁵ Indeed, many organizations that have compliance programs already describe them as ethics *and* compliance programs and also employ “ethics officers.”⁸⁶ One organization which suggests that compliance programs will be more effective if set within “the

AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 217-40 (1995) (giving a transcript of panelists’ discussion on the role of ethics in compliance programs); *Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference*, in U.S. SENTENCING COMM’N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 375-90 (1995) (transcript of panelists’ discussion on role of ethics in compliance programs).

82. Stephen Cohen, Compliance, Corporate Governance, and Ethics: The New Regime 2 (Mar. 2001) (unpublished manuscript presented at the American Association of Professional and Practical Ethics, on file with the United States Sentencing Commission), available at s.cohen@unsw.edu.au.

83. Dawn-Marie Driscoll et al., *Business Ethics and Compliance: What Management Is Doing and Why*, 1999 BUS. SOC’Y REV. 35, 39 (emphasis added).

84. John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 DRAKE J. AGRIC. L. 305, 308-09 (2000).

85. *Id.*

86. For examples of organizations with such policies, see HCA THE HEALTH CARE COMPANY, ETHICS, COMPLIANCE & CORPORATE RESPONSIBILITY, at <http://ec.hcahealthcare.com/Ethics/Default.htm>; HONEYWELL, CODE OF BUSINESS CONDUCT, at http://www.honeywell.com/about/page1_3.html; RAYTHEON CORP., RAYTHEON ETHICS, at <http://www.raytheon.com/ethics/>; REGENCE BLUESHIELD OF IDAHO, ETHICS & COMPLIANCE, at <http://www.id.regence.com/CompanyNews/EthicsCompliance.shtml>.

broader context of organizational integrity” is the Alliance for Health Care Integrity.⁸⁷ According to the Alliance, such programs not only are more extensive, but have longer perspectives than those based on compliance alone.⁸⁸

It is questionable whether a compliance program can be truly effective if it does not have an ethics component. William George, the former chief executive of Medtronic,⁸⁹ cultivated a company wide emphasis on values and ethics⁹⁰ and frequently talked about his termination of a key sales employee for violating company standards by making payments to foreign officials to ensure sales. Making such an example and communicating it widely can ensure that a corporation may not be subject to prosecution for the acts of an agent who believed he was acting in the corporation’s best and most profitable interest.⁹¹

Is an ethical organization something more than a compliant one? The answer to that question must be yes. An ethical organization will develop ways in which ethical dilemmas are to be resolved by management and employees. An ethical organization will also foster and protect reporting mechanisms and reward ethical conduct.

VI. RECENT SUGGESTIONS

During the last year, a number of specific suggestions have been made for possible amendments to the organizational guidelines. These suggestions are a reflection of a growing interest in improving the organizational guidelines.

One such suggestion was made by the Health Care Compliance Association, which asked the Commission to consider an amendment to define appropriate compliance “standards and procedures” and also to consider providing a method to measure the effectiveness of compliance programs.⁹² This would be no easy task since the guidelines must be general enough to be used by all types of organizations engaged in a wide variety of activities. The standards and procedures for effective compliance programs

87. Letter from Robert Olson, Executive Director, Alliance for Health Care Integrity, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission 2 (Feb. 21, 2001) (on file with the United States Sentencing Commission) (citing Lynn Sharp Paine, *Managing Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106-17).

88. *Id.*

89. For Medtronic’s mission statement, see MEDTRONIC, OUR MISSION, at <http://www.medtronic.com/corporate/mission.html>.

90. See MEDTRONIC, OUR CODE OF CONDUCT, at <http://www.medtronic.com/corporate/codeofconduct.html> (setting forth criteria for proper employee conduct).

91. See *supra* Part IV.C (discussing the government policy on deferring prosecution due to the presence of ethics and compliance programs).

92. Meeting between Judge Diana E. Murphy, Chair, U.S. Sentencing Commission, and John Steer, Vice Chair, U.S. Sentencing Commission, and representatives of the Health Care Compliance Association, in Minneapolis, Minn. (Nov. 29, 2000).

in one industry may not be the same in another.⁹³

Others recently have undertaken a two year study to work on “an industry standard for effective compliance in healthcare organizations” that will measure the effectiveness of compliance programs in hospitals and that may stimulate further developments.⁹⁴ The Practising Law Institute also poses the question in connection with its compliance seminars whether the Commission should revise its criteria for adequate and effective compliance programs.⁹⁵

The Alliance for Health Care Integrity is another organization that has offered suggestions to the Commission for changes to the organizational guidelines. It would like guideline amendments to require (1) that compliance programs be part of a broader integrity-based ethics program, (2) that requirements be set for training of ethics officers, (3) that comprehensive employee training be undertaken, (4) that compliance be based on industry wide standards, (5) that such standards be used by organizations in an annual evaluation, and (6) that “violations of ethical standards carry penalties similar to the violation of regulatory standards.”⁹⁶

The Commission also has received suggestions for an amendment that would set criteria for a “presumptive ‘safe harbor’” that would protect employees who report violations from retribution.⁹⁷ According to Mr. Charles L. Howard, of Shipman & Goodwin, LLP, creation of a neutral ombuds office to receive employee complaints can do much to develop more effective compliance programs.⁹⁸ He says such an office should be separate from the compliance system itself and would encourage reporting by maintaining employee confidentiality.⁹⁹

Since environmental offenses are the second most common federal

93. See THE BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 4 (1997) (“Good corporate governance is not a ‘one size fits all’ proposition, and a wide diversity of approaches to corporate governance should be expected and is entirely appropriate. Moreover, a corporation’s practices will evolve as it adapts to changing situations.”).

94. Press Release, PricewaterhouseCoopers Announces First Empirical Analysis of Healthcare Compliance Effectiveness Identifies Key Indicators, BUS. WIRE, May 14, 2001. On May 14, 2001, PricewaterhouseCoopers and UCLA’s Department of Health Services announced a two-year, \$4 million research project “to measure [the] effectiveness of compliance programs in the nation’s hospitals.” *Id.* According to the press release, “[b]oth the [Department of Health and Human Services] and the U.S. Sentencing Commission will be invited to participate in discussions that seek to establish a minimum standard for effective compliance in healthcare organizations.” *Id.*

95. For information on the Practising Law Institute, see <http://www.pli.edu>.

96. Letter from Robert Olson, Executive Director, Alliance for Health Care Integrity, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission, *supra* note 87, at 2-3.

97. See Letter from Charles L. Howard, Shipman & Goodwin, LLP, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission 1 (Apr. 3, 2001) (on file with the United States Sentencing Commission).

98. *Id.*

99. *Id.* at 2.

crime committed by organizations after fraud,¹⁰⁰ some have suggested that the Commission revisit the issue of including provisions for environmental offenses in the organizational guidelines.¹⁰¹ Although an early draft of the organizational guidelines applied to environmental offenses,¹⁰² the final, published version of the organizational guidelines explicitly stated that the organizational guidelines did not apply to such crimes.¹⁰³ The Commission chose not to include environmental offenses because, at the time the organizational guidelines were promulgated, it simply was unclear to the Commission whether environmental offenses fit well within the framework of Chapter Eight, or whether a new “Chapter Nine” was needed just for organizational environmental offenses.¹⁰⁴ Because environmental offenses may range from relatively innocuous permit violations¹⁰⁵ to massive oil spills endangering many lives,¹⁰⁶ devising an appropriate sentencing system for such a wide range of offense conduct would not be simple.

Accurate and informative data are of paramount importance to the work of the Commission, especially since they serve as bases for policy

100. See U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 52 (reporting that of a total of 304 organizations sentenced in 2000, 70 were sentenced for environmental pollution offenses, which was the next highest category after fraud with 105 convictions).

101. See Lucia Ann Silecchia & Michael J. Malinowski, *Square Pegs and Round Holes: Does Sentencing for Environmental Crimes Fit Within the Guidelines?*, 8 FED. SENTENCING REP. 230, 232 (1996) (arguing that because “Congress has criminalized the environmental offenses of corporations . . . courts deserve . . . a sentencing scheme tailored to organizational environmental offenses”); Mark H. Allenbaugh, Comment, *What’s Your Water Worth?: Why We Need Federal Fine Guidelines for Corporate Environmental Crime*, 48 AM. U. L. REV. 925, 931 (1999) (arguing that “the time is ripe for serious reconsideration of the adoption of federal fine guidelines for organizational environmental crime”).

102. See DISCUSSION MATERIALS, *supra* note 12, at § 8B2.5 (reproducing a draft of the organizational guidelines). According to the commentary to this section, environmental offenses include “offenses involving the mishandling or unlawful discharge, release, or emission into the environment of a hazardous or toxic substance, pesticide, or other environmental pollutant, but does not include simple recordkeeping or reporting offenses.” *Id.* at § 8B2.5, cmt. (“Guideline Coverage”).

103. See U.S.S.G. § 8C2.1, cmt. background (stating that the fine provisions of the organizational guidelines “do not apply to counts for which the applicable guideline offense level is determined under Chapter Two, Part Q (Offenses Involving the Environment)”).

104. For a history behind the debate surrounding the applicability of the organizational guidelines to environmental offenses, see Allenbaugh, *supra* note 101, at 932-41.

105. See Press Release, United States Environmental Protection Agency, Pennsylvania Company and Manager Charged (Feb. 22, 2001), available at <http://yosemite1.epa.gov/opa/admpress.nsf> (reporting that a company and its manager violated permit conditions by discharging pollutants into a municipal sewer system in excess of local limits and making false statements on its permit application); see also 33 U.S.C. § 1319(c)(1) (1994) (providing a criminal penalty for violations of permit requirements under the Clean Water Act).

106. See Allenbaugh, *supra* note 101, at 926-28 (discussing the effects of the *Morris J. Berman* and *Exxon Valdez* oil spills); see also Mark H. Allenbaugh, *Environmental Impact of Supertankers*, in 7 SCIENCE AND SOCIETY THROUGH TIME 504 (Neil Schlager ed., 2000) (discussing the potential catastrophic global impact of supertanker oil spills).

decisions, and we are always working to attain that quality. The data are used both by Commission staff and the general public to assess the effectiveness and impact of the sentencing guidelines, and to guide the Commission when promulgating and amending guidelines.¹⁰⁷ A recent article in the *Federal Sentencing Reporter* raises two points the authors think may undermine “the reliability and usefulness” of published data on organizational sentences.¹⁰⁸ The first point is that some organizational cases may be missing from the published dataset, i.e., the published dataset does not in fact contain information for every organizational offender sentenced in a given year.¹⁰⁹ The second point is that the Commission’s data may have incomplete information on the cases reported, i.e., some relevant information about organizational sentences are either not being recorded or not being captured during the data-entry process.¹¹⁰ Our staff will attend to these issues.

In light of these and other suggestions and expressions of interest, we are thinking about encouraging a discussion process for exploration and evaluation of such ideas.¹¹¹ It is possible that recommendations might emerge that the Commission will want to consider. We welcome attention to these matters.

VII. CONCLUSION

Some believe that the Federal Sentencing Guidelines for organizations represent a milestone both in federal criminal law and in organizational behavior. Their impact has been wide ranging. They are a real success story for the United States Sentencing Commission in its work to deter crime and encourage compliance with the law. Like any body of law, however, the organizational guidelines may need to be modified as circumstances change. In this tenth anniversary year for these guidelines, practitioners and industry representatives are encouraged to share their thinking about the organizational guidelines and their effect.

107. See 28 U.S.C. §§ 994(w), 995(a)(8) (1994) (stating that part of the Commission’s research task is to collect and disseminate sentencing data on all individual and organizational offenders sentenced under the Federal Sentencing Guidelines).

108. Cindy R. Alexander et al., *Evaluating Data on Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission’s Data?*, 13 FED. SENTENCING REP. 108, 112 (2000).

109. *Id.* at 109.

110. *Id.* at 111.

111. In September 2001, the Commission voted to publish a *Federal Register* notice that it was considering forming an ad hoc advisory group on the organizational guidelines and that it was requesting commentary on the scope, duration, and membership of such a group. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 48,306 (Sept. 19, 2001).