OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AND CORPORATE COMPLIANCE PROGRAMS

LAWRENCE D. FINDER
HAYNES AND BOONE, LLP

A. MICHAEL WARNECKE
HAYNES AND BOONE, LLP

SYNOPSIS

The United States Sentencing Guidelines for Organizations ("the Guidelines") were promulgated in 1991 to ensure that organizations cannot profit from wrongdoing and to encourage organizations to implement appropriate compliance programs to prevent wrongdoing from occurring in the first place.

While there are some major exceptions, the basic mechanical structure of the Guidelines determines an appropriate monetary fine through means of a mathematical formula: assigning a dollar figure to the seriousness of the offense and multiplying that number by a figure representing the culpability level of the organization. The Guidelines’ drafters intend to influence corporate behavior – both before and after wrongdoing occurs – by providing various adjustments to the determination of the seriousness of the offense and of the organization’s culpability.

On November 1, 2004, prompted by the Sarbanes-Oxley Act, certain clarifying revisions to the Guidelines became effective, including an overhaul of the adjustment for organizations with qualifying compliance programs. Generally, the recent changes to the Guidelines for organizations provide more detail regarding the requirements a compliance program must meet before qualifying the organization for a potential fine reduction. Overall, the changes require more high-level oversight of the compliance program together with more training, monitoring, and emphasis on creating an ethical working environment.

Creating a compliance program that meets the Guidelines’ requirements is not only difficult, but arguably has only limited effect on the ultimate amount of monetary penalty an organization may face. Nevertheless, undergoing a serious, good faith effort to implement a compliance program may provide many benefits to an organization above and beyond the direct effect on the mathematical fine calculation. Mostly notably, a well-designed and well-implemented program should reduce instances of misconduct from occurring. Even when it fails

Mr. Finder is a partner in the white collar and antitrust section of Haynes and Boone, LLP. He was a former United States Attorney for the Southern District of Texas. He has been named a "Texas Super Lawyer" by his peers. He has extensive experience representing companies and individuals facing government investigations and prosecutions.

Mr. Warnecke is also a partner in the white collar and antitrust section of Haynes and Boone, LLP and has been named a "Texas Rising Star" by his peers. He frequently conducts internal investigations concerning possible criminal misconduct.

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to prevent misconduct, having such a program can play a role in influencing prosecutors to
decline indictment. Finally, recognizing the potential benefits of compliance programs, some
courts have suggested that careful evaluation of their utility may be part of management’s duty
of care to the corporation.

As widely expected, in January 2005, the United States Supreme Court declared the
remedy was, however, surprising. In essence, the Court determined that the Guidelines could be
saved by severing the provision of the federal sentencing statute that made the guidelines
mandatory and by declaring the Guidelines to be advisory. The Court otherwise left the
Guidelines intact and held that a sentencing court is still required to consider the Guidelines’
range when determining a sentence, but the sentencing court is now permitted to tailor the
sentence in light of other concerns as well. Accordingly, sentencing courts will still consult all
of the Guidelines’ factors and considerations in reaching a sentence. This article will present the
overall framework and structure a court must use to arrive at a sentence under the Guidelines.
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LAWRENCE D. FINDER
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas  77010
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

A. MICHAEL WARNECKE
HAYNES AND BOONE, LLP
901 Main St., Suite 3100
Dallas, TX 75202
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

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I. EXECUTIVE SUMMARY.

The United States Sentencing Guidelines for Organizations (“the Guidelines”) were promulgated in 1991 to ensure that organizations cannot profit from wrongdoing and to encourage organizations to implement appropriate compliance programs to prevent wrongdoing from occurring in the first place.

While there are some major exceptions discussed herein, the basic mechanical structure of the Guidelines determines an appropriate monetary fine through means of a mathematical formula: assigning a dollar figure to the seriousness of the offense and multiplying that number by a figure representing the culpability level of the organization. The Guidelines’ drafters intend to influence corporate behavior – both before and after wrongdoing occurs – by providing various adjustments to the determination of the seriousness of the offense and of the organization’s culpability. On November 1, 2004, certain clarifying revisions to the Guidelines became effective, including an overhaul of the adjustment for organizations with qualifying compliance programs.

As discussed below, creating a compliance program that meets the Guidelines’ requirements is not only difficult, but arguably has only limited effect on the ultimate amount of monetary penalty an organization may face. Nevertheless, undergoing a serious, good faith effort to implement a compliance program may provide many benefits to an organization above and beyond the direct effect on the mathematical fine calculation. Mostly notably, a well-designed and well-implemented program should reduce instances of misconduct from occurring. Even when it fails to prevent misconduct, having such a program can play a role in influencing prosecutors to decline indictment. Finally, recognizing the potential benefits of compliance programs, some courts have suggested that careful evaluation of their utility may be part of management’s duty of care to the corporation.

II. THE HISTORY OF THE GUIDELINES.

For decades, federal judges exercised tremendous discretion in sentencing convicted organizations and individuals to any sentence within the statutory minimums and maximums. In the Sentencing Reform Act of 1984, Congress curtailed that discretion by creating the United States Sentencing Commission as an independent agent within the federal judiciary.¹ The Commission’s charge was to create sentencing guidelines to limit judicial discretion and to ensure that defendants with similar prior criminal records who committed similar offenses received similar sentences. In 1987, the Commission promulgated guidelines for sentencing individuals. In 1991, the Commission promulgated guidelines for sentencing organizations. Both sets of Guidelines are contained in the same manual which is updated by the Commission annually. The most recent changes became effective November 1, 2004. With respect to the changes to the Guidelines for organizations (Chapter 8 of the manual), the changes were largely prompted by Section 805(a) of the Sarbanes-Oxley Act. Pursuant to this statutory instruction, the Commission amended the Guidelines to ensure they deter and punish organizational misconduct sufficiently, given Congress’s frustration that such serious corporate scandals had occurred recently even though the Guidelines for organizations existing since 1991.

The Commission concluded that the widespread misconduct occurring at some of the nation’s largest corporations was perpetrated by high-level individuals and occurred despite the existence of corporate compliance programs. In brief, the recent changes to the Guidelines for organizations provide more detail regarding the requirements a compliance program must meet before qualifying the organization for a potential fine reduction. Overall, the changes require more high-level oversight of the compliance program together with more training, monitoring, and emphasis on creating an ethical working environment. The mathematical amount of reduction for having a qualifying program remains unchanged, however.

Of course, as widely expected, on January 12, 2005, the United States Supreme Court declared the Guidelines unconstitutional. The Court’s ruling in Booker was a natural progression from its recent ruling requiring that any fact-finding (other than a prior conviction) necessary to the determination of a sentence be admitted by the defendant or found by the jury beyond a reasonable doubt. Because the Guidelines were mandatory and because the Guidelines allowed courts to make sentencing determinations based on judicial fact finding, the Court held that the Guidelines violated a defendant’s Sixth Amendment right to a jury.

The Court’s remedy was, however, surprising. In essence, the Court determined that the Guidelines could be saved by severing the provision of the federal sentencing statute that made the guidelines mandatory (18 U.S.C.A. § 3553(b)(1)) and by declaring the Guidelines to be advisory. The Court otherwise left the Guidelines intact and held that a sentencing court is still required to consider the Guidelines’ range when determining a sentence, but the sentencing court is now permitted to tailor the sentence in light of other concerns as well. In essence, the Court reasoned that, while it would be unconstitutional to mandate that court use a system that permitted judicial fact-finding, it would not be unconstitutional for courts to consult such a system when setting a sentence within their discretion.

Thus, judges can consult the Guidelines, be guided or advised by them, but they are not bound by them. Accordingly, sentencing courts will still consult all of the Guidelines’ factors and considerations in reaching a sentence.

Immediately following the Booker/Fanfan decisions, the Department of Justice (“DOJ”) reaffirmed its policy of tracking judges who do not apply the Guidelines strictly and directed that all federal prosecutors must still consult the Guidelines at the charging stage and must seek sentences within the range established by the Guidelines in all but extraordinary cases. In other words, in DOJ’s view, the Guidelines are still to be treated as mandatory. Therefore, the Guidelines remain relevant to the sentencing process.

It must be noted at the outset that the Guidelines are difficult to apply to hypothetical situations. Because the application of the Guidelines depends on numerous variables that only become known after a criminal conviction, it is not possible to determine potential sentencing outcomes in the abstract. Even when there is an existing criminal investigation into a specific issue, it is not possible to calculate a sentence in advance of sentencing - given that so much of

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the sentencing calculus depends on (a) what specific crimes and how many counts the prosecutor decides to charge; (b) which of those crimes and counts a jury convicts upon, (c) which sentencing enhancements and reductions the probation officer and the prosecutor request, and, finally, (d) how the court decides to exercise its fact-finding role and other sentencing discretion. Attempting to determine a possible sentence in advance of conviction usually leads to an evaluation of the possible sentencing range under the potentially applicable statutory minimums and maximums. Even those statutory minimums and maximums, however, have their own complications and room for maneuvering by the prosecutor, probation officer, and the sentencing court. Unfortunately, even an analysis of the statutory minimums and maximums cannot provide a definitive or precise sentencing range.

As will become clear, rather than discuss possible sentencing outcomes for common business crimes, this article must necessarily confine its scope to presenting the overall framework and structure a court must use to arrive at a sentencing under the Guidelines.

III. THE MECHANICS AND FRAMEWORK FOR SENTENCING ORGANIZATIONS.

A. Statutory Maximums.

In prosecutions of organizations, there are often several scenarios under which a court could impose a fine at the upper limit set by the statutory maximum. In order to attempt to set some basic parameters around a possible fine, the applicable statutory maximums must be reviewed. As just mentioned, however, even an analysis of the statutory maximums does not yield concrete parameters. There are three main reasons for this lack of definitiveness. First, there are actually several different statutory maximums that could apply in any given case. Second, the statutory maximums are dependent on factual findings the court must make after conviction during the sentencing phase. Third, the maximums are further dependent on which particular crimes the prosecutor chooses to include in the indictment and upon which of those counts the jury convicts.

Statutory maximums may be found either in the specific offense statute or in the default provision of Title 18 of the United States Code. Specific criminal offense statutes may specify their own minimums and maximums, sometimes in terms of a minimum and/or maximum fine for each day the violation persists. Criminal provisions in environmental statutes are typical examples. The default provision in 18 U.S.C. § 3571 sets forth two other possible maximum fines.

It takes several steps to determine which of these three possible statutory maximums applies. First, one must determine whether there are any applicable statutory minimums and maximums in the substantive criminal statutes upon which the jury convicted. (Analysis of such minimums and maximums is beyond the scope of this article.) Second, one must determine the maximum fine amount authorized by subpart (c) of 18 U.S.C. § 3571. Third, one must determine the maximum fine amount authorized by subpart (d) of 18 U.S.C. § 3571. The greatest of these three applies unless the specific criminal statute analyzed under step one explicitly precludes application of the penalties in 18 U.S.C. § 3571(c) or (d).

6 See 18 U.S.C. § 3571(c), (e).
Under subpart (c) of 18 U.S.C. § 3571, an organization may not be fined more than $500,000 per count for which the jury returned a guilty verdict. Under subpart (d), an organization may not be fined more than twice the gain to the defendant from the offense or twice the loss to the victim. Logically and by analogy to other sentencing principles, a strong argument could be made that, since the offense conduct is viewed broadly in determining the gain or loss under subpart (d), then subpart (d) should apply to the offense conduct broadly. Therefore, subpart (d) should cap the fine at twice the gain or loss - regardless of the number of counts of conviction. At least in the antitrust context, it appears the DOJ has been applying subpart (d) to determine the fine without regard to the number of counts of conviction.

Under subpart (d), the fine could be as high as twice the gain or loss caused by the offense. The “offense” means the offense of conviction and all “relevant conduct.” Relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant […] and that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”

Relevant conduct for purposes of sentencing accountability may encompass acts and omissions beyond those upon which the jury returned a guilty verdict. In other words, sentencing accountability is broader than criminal liability. Relevant conduct includes all conduct for which the defendant should be held responsible in terms of setting the sentence – regardless of whether the defendant’s conviction was based precisely on such conduct. Relevant conduct includes any conduct which the prosecutor and the probation officer wish to bring to the court’s attention and argue its relevance to the offense. In other words, relevant conduct need not be vetted through the grand jury during the process of creating the indictment. Rather, relevant conduct can include matters raised for the first time during sentencing. The scope of relevant conduct ultimately rests with the discretion of the probation officer, the prosecutor, and

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7 Because the statutory maximum and other sentencing calculations are dependent on what particular crimes and how many counts of each the prosecutor asks the grand jury to include in the indictment, one of the largest criticisms of the Guidelines is that their implementation merely transferred the sentencing discretion from the court to the prosecutor.

8 See Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?, Remarks at the Twelfth Annual National Institute on White Collar Crime (Mar. 6, 1998), available at http://www.usdoj.gov/atr/public/speeches/1583.htm; Gary R. Spratling, The Trend Toward Higher Corporate Fines: It’s a Whole New Ballgame, Remarks at the Eleventh Annual National Institute on White Collar Crime (Mar. 7, 1997), available at http://www.usdoj.gov/atr/public/speeches/4011.htm. By contrast, the Alaskan district court handling the Exxon Valdez civil suit stated (in dicta in support of the court’s finding that the jury’s $5 billion punitive damage award did not violate due process) that Exxon could have been fined in its criminal case up to twice the gain or loss multiplied by the number of counts of conviction pursuant to 18 U.S.C. § 3571(d). In re Exxon Valdez, 236 F. Supp. 2d 1043, 1066-67 (D. Alaska 2002). In an earlier reversal in the Exxon Valdez case, the Ninth Circuit, also in dicta, mentioned 18 U.S.C. § 3571(d) in a way that suggests the twice gain or loss penalty could not be multiplied by the number of counts. In re Exxon Valdez, 270 F.3d. 1215, 1245 (9th Cir. 2001).


11 USSG § 1B1.3(a).

12 See, e.g., USSG § 1B1.3, Application Note 1.
the court. Even with respect to the more narrow concept of criminal liability, the government takes the position that an organization is criminally liable for all acts of all its employees as long as such acts were performed within the scope of employment or apparent authority – regardless of whether such acts were against the organization’s instructions or policies.13

While “loss” is not defined in 18 U.S.C. § 3571(d), the Guidelines do provide a definition which courts may apply in interpreting “loss” under 18 U.S.C. § 3571(d). Chapter 8 of the Guidelines states that “pecuniary loss” is equivalent to “loss” as used in Chapter 2 of the Guidelines.14 The Application Notes to Chapter 2B1.1 define loss as the greater of (1) the actual loss – the reasonably foreseeable pecuniary harm that resulted from the offense, or (2) the intended loss – the pecuniary harm intended to result from the offense.15 Loss does not include interest of any kind, finance charges, late fees, penalties or costs.16 In determining loss, the sentencing court need make only a reasonable estimate of loss, based on available information.17

“Gain” is also derived from 18 U.S.C. § 3571(d), but not defined there. Instead, pecuniary gain is defined in the Guidelines to mean the “additional before tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings.”18

Determining gain or loss in complex business crimes can be difficult. The Guidelines and 18 U.S.C. § 3571(d) both state explicitly that, if calculation of gain or loss would complicate or delay sentencing, then the court should not use it as a basis for determining the fine.19 If the sentencing court does decide to perform such a calculation, twice the amount of gain or loss will often set the upper limit on the fine. Obviously, a figure that is twice the gain or loss in complex business crimes could often be much greater than any applicable statutory per diem penalty or $500,000 multiplied by the number of counts of conviction. Because the prosecutor’s and the probation officer’s positions on the amount of gain or loss and the court’s ultimate calculation are all unknowable, it is difficult to set reliable parameters on a possible maximum fine for an organization in advance of the sentencing process. Stated differently, there is perhaps little standing in the way of a court setting an organization’s fine at astronomical levels.

In one of the first opportunities given to a jury to make the factual calculations of gain or loss, the jury in the Merrill Lynch barge trial rejected both the prosecutor’s and the defendants’

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14 USSG § 8A1.2, Application Note 3(i).
15 USSG § 2B1.1, Application Note 3(A).
16 See USSG § 2B1.1, Application Note 3(D); United States v. West Coast Aluminum Heat Treating Co., 265 F.3d 986, 990-91 (9th Cir. 2001).
17 See USSG § 2B1.1, Application Note 3(C); see also West Coast Aluminum, 265 F.3d at 990-91 (holding that district courts should take a realistic, economic approach to determine what losses the defendant truly caused or intended to cause). While the question is not settled, the more logical reading of the relationship between the definitions in the Guidelines and the use of similar terms in 18 U.S.C. § 3571(d) leads to the conclusion that interest would not be included in a loss calculation for purposes of setting a fine under 18 U.S.C. § 3571(d).
18 USSG § 8A1.2, Application Note 3(h).
19 USSG § 8C2.4(c); 18 U.S.C. § 3571(d).
loss calculations. The government had argued that the fraudulent $12 million barge transaction allowed Enron to avoid missing its consensus earnings estimate, thereby preventing its stock from falling precipitously as the market (over)reacted to slightly under-consensus earnings. The government argued the loss from the crime was $43.8 million. The defendants argued the loss was less than $200,000. The jury found the loss to be $13.7 million, presumably based on the fact that the offense allowed Enron to overstate its earnings by $12 million.

B. Components of a Federal Sentence.

1. Overview.

There can be several components to a criminal sentence for an organization, including a fine, restitution, remedial orders, and probation. While this article will identify each of these components below, it will focus first on how fines may be calculated.

Given that the Guidelines are amended annually, determining which version of the Guidelines applies is the first step. Unless there is an ex post facto problem, the Guidelines in effect at the time of sentencing apply. If the Guidelines in effect at the time of sentencing produce a sentence that is more onerous than the sentence would be under the Guidelines in effect on the date the latest count of conviction was committed, then the Guidelines in effect on the date of commission of the latest offense committed apply.

2. The Fine.

a) The Different Methods of Determining a Fine.

The first inquiry to make in determining the fine concerns whether the defendant has the ability to pay any money beyond restitution. The primary goal of the sentencing process is to ensure that appropriate restitution is paid. If the organization has no ability to pay more than the restitution amount, then no fine will be imposed. Alternatively, the fine will be reduced to an amount the organization can pay without impairing its ability to make restitution.

With respect to setting the fine for an organization, Chapter 8 of the Guidelines provides two separate mechanisms. The first mechanism provides the sentencing court with almost total

20 This case was tried during after the Supreme Court started indicating that there might be problems with the Guidelines in Blakely and Apprendi but before the Court had issued the Booker/Fanfan opinions. In that interim period, some courts were submitting all facts (other than prior convictions) necessary to support sentencing to the jury in anticipation of the Court requiring such a procedure. Now that the Court has ruled the Guidelines to be advisory, such a procedure should no longer be necessary and courts may resume making their own factual determinations for sentencing purposes. Therefore the Merrill Lynch barge trial may be both one of the first and last examples of using the jury in this manner.


22 USSG § 1B1.11. Subject to the same ex post facto restrictions, the court must also consider any amendments made to such guidelines by act of Congress regardless of whether such amendments have yet to be incorporated by the Sentencing Commission. 18 U.S.C. § 3553(a)(4)(A)(i).

23 USSG § 8C3.3.

24 If the court determines that the organization “operated primarily for a criminal purpose or primarily by criminal means,” then the Guidelines specify a third mechanism — “the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.” USSG § 8C1.1.
discretion to impose any fine (within the applicable statutory minimums and maximums). This
first mechanism directs the court to set the fine after considering various enumerated factors such
as the defendant’s income, the size of the defendant organization, the seriousness of the offense,
the amount of restitution, the need for adequate deterrence, and the need to sentence defendants
with similar criminal records and offenses to similar fines.\textsuperscript{25} The statutory provisions listing
these factors are attached as Exhibits A and B. The Guidelines specify whether the first or
second mechanism applies. For example, environmental crimes are generally to be sentenced
under this first mechanism whereas economic crimes are generally to be sentenced under the
second mechanism.\textsuperscript{26} Also, many racketeering offenses (RICO) and export control violations are
also generally sentenced under this first mechanism.\textsuperscript{27}

The second mechanism purports to have more mathematical structure and less judicial
discretion, though even this second mechanism requires the sentencing court to make many
factual determinations and judgment calls.\textsuperscript{28} Under this second method, the fine is generally a
function of (1) the “seriousness” of the offense and (2) the “culpability” of the organization.
Seriousness can be based upon a table in Chapter 8 or upon the pecuniary gain to the
organization or the pecuniary loss to the victims (if such loss resulted from intentional, knowing
or reckless acts by the organization). The culpability calculation is determined by the totality of
various specified aggravating and mitigating factors, as will be discussed below.

\textbf{b) Determining the “Base Fine” Under the Second Method.}

The first step in determining a fine under the more mathematical approach is to undergo a
series of steps to determine the “base fine” to which the culpability multipliers will later be
applied. The first step requires consulting the chapter of the Guidelines that would apply to
individuals if they had committed the type of offense at issue. For many specified statutes
commonly invoked in business crimes,\textsuperscript{29} Chapter 8 directs the sentencing court to apply the
guidelines for fraud by individuals found in Chapter 2, Part B (“Basic Economic Offenses”).\textsuperscript{30}

\textsuperscript{25} USSG § 8C2.10 (directing the court to consider the factors listed in 18 U.S.C. §§ 3553 and 3572).

\textsuperscript{26} USSG § 8C2.1, and Application Notes, and Background.

\textsuperscript{27} Cf., e.g., USSG §§ 2E1.1-1.2 (Guidelines for generic RICO offenses) and USSG § 2M5.1 (Guideline for evasion
of export controls) with USSG § 8C2.1 (listing the Guidelines applicable to the second method of fine determination
but not listing the RICO or expert control guidelines).

\textsuperscript{28} USSG §§ 8C2.3-2.9.

\textsuperscript{29} See, e.g., 18 U.S.C. § 1001 (false statement); 18 U.S.C. § 1341 (mail fraud); and 18 U.S.C. § 1343 (wire fraud).

\textsuperscript{30} The Guidelines, however, direct the sentencing court to use the first sentencing mechanism even for these fraud-
type statutes if the underlying conduct is more apply covered by another section of the Guidelines, such as the one
for environmental crimes. For example, an environmental case may involve false statement and wire fraud counts
but be sentenced under the first mechanism because, overall, the case concerns environmental discharges of which
the associated false reports were only one aspect of the criminal conduct. See USSG § 8C2.1, Application Notes 1
and 2, and Background; USSG § 2B1.1(c)(3); and USSG § 2B1.1(c)(3), and Application Note 15. If a court viewed
a case as having counts triggering both a specific calculation under a particular chapter of the Guidelines as well as
triggering the more discretionary method of 18 U.S.C. §§ 3553 and 3572 (such as a case with both direct monetary
fraud and environmental damage aspects), then the court is directed to use both mechanisms and to sentence each
part separately. In such cases, the court is directed to consider the fine imposed for the fraud part when setting the
fine for the environmental part. USSG § 8C2.10, Background.
Applying the applicable guideline for individuals instructs the court how to determine the numeric “offense level.” This number is meant to reflect the seriousness of the crime relative to other offenses. The first guideline in Part B of Chapter 2 concerns most fraud.\textsuperscript{31} This section generally provides a base offense level of 6 and then directs the court to increase the offense level by various points - if the court makes certain factual findings. For example, the larger the loss or the more victims, the larger the offense level will be.\textsuperscript{32} As another example, if a substantial part of the scheme was committed outside the United States or otherwise involved “sophisticated means,” the offense level must be increased by 2 levels.\textsuperscript{33}

Chapter 8 also requires that the offense level for organizations be computed by using the “grouping rules” that apply to individuals. These rules are designed to increase the offense level when the defendant is convicted of several distinct crimes. These rules are also designed to prevent the offense level from increasing solely because the prosecutor indicted numerous related crimes all arising from a single criminal episode. Whether different counts of conviction should be considered in the same or different groups generally depends on whether those counts caused the same harm (i.e. same victim, same transaction, etc.). Once the groupings have been determined, the offense with the highest offense level is the starting point. If there are other groups of counts of conviction, these additional groups will generally increase the total offense level above that starting point.\textsuperscript{34}

Once the total offense level has been computed pursuant to a particular Guideline for sentencing individuals, Chapter 8 then requires that this total offense level be compared to a table in order to convert the numeric offense level into a dollar amount of fine.\textsuperscript{35} The “base fine” amount is the greatest of the fine amount from (a) the table just discussed converting offense points to dollar amounts, (b) the defendant’s gain (or cost savings) from the offense, or (c) the loss caused or intended to be caused by the offense - if the loss was caused intentionally, knowingly, or recklessly.\textsuperscript{36}

\textsuperscript{31} USSG § 2B1.1.
\textsuperscript{32} USSG §§ 2B1.1(b)(1) and (2).
\textsuperscript{33} USSG § 2B1.1(b)(9). This provision also specifies that if, after increasing the offense level by 2 points, the total offense level is less than 12, the offense level must be increased until it reaches 12 points.
\textsuperscript{34} See, generally, USSG § 3D. Because these grouping rules do not restrict which criminal statutes a prosecutor chooses to include in an indictment, the grouping rules do nothing to minimize the power of prosecutors to influence the ultimate sentence by electing statutes with certain mandatory minimums or maximums. The grouping rules also do not restrict a prosecutor’s ability to divide an arguably single offense into several discrete counts of mail fraud, for example. By doing so, the prosecutor can raise the ceiling on the statutory maximum fine because each count of conviction raises the maximum by $500,000 under 18 U.S.C. § 3571(c).
\textsuperscript{35} For individuals, by contrast, the “offense level” score would then be subject to additional adjustments depending on various findings by the court during sentencing such as whether the victim was “vulnerable” or whether the defendant was an organizer or leader of the criminal activity, for example. USSG Chapter 3. The final offense tally is then compared to a chart which specifies the permissible range of imprisonment depending on the defendant’s prior criminal conviction history. USSG Chapter 5, Part A.
\textsuperscript{36} USSG § 8C2.4(a); USSG § 8A1.2, Application Notes 3(h) and (i).
c) Determining the Culpability Score and Multipliers Under the Second Method.

Next the court must determine the organization’s culpability score. The Guidelines express three rationales for the enumerated culpability factors. First, an organization has more culpability when higher level personnel have participated in the wrongdoing. Second, as organizations become larger, their management becomes more professional so participation by management in wrongdoing is increasingly a breach of trust or abuse of position. Finally, as organizations become larger, there is more risk that other wrongdoing, separate from the instant offense, has or could occur if management’s tolerance of wrongdoing is pervasive.37 These policy rationales underlie the numeric effect of the various culpability score adjustments.

To begin the calculation, every organization is given an initial culpability score of 5.38 As will be discussed next, four factors may increase the score: (1) the organization’s involvement in or tolerance of criminal activity as measured by the organization’s size and the seniority of the wrongdoers, (2) the organization’s prior history of misconduct, (3) the organization’s violations of existing court orders, and (4) the organization’s attempts to obstruct justice. Two factors may decrease the score: (1) having an effective compliance program and (2) cooperating with the government to varying degrees. Once the culpability score is determined, it is compared to a table to determine the minimum and maximum multipliers. These multipliers (ranging from 0.05 to 4.00) are then multiplied to the base fine (as calculated above) to determine the fine range. The court then has discretion to consult various enumerated factors in setting the fine within this range. Under certain conditions discussed below in Section III.B.2.e., the court can impose a sentence above or below the guideline range, though such a fine must still be within the applicable statutory minimums and maximum.39

The first potential increase to the culpability score involves the size of the organization and the seniority of the individuals involved in the wrongdoing. If the organization (or any reasonably distinct operational unit thereof) had 5,000 or more employees and an individual within high-level personnel of the organization (or unit thereof) participated in, condoned, or was willfully ignorant of the offense, 5 points are added to the culpability score.40 “High-level personnel of the organization” means individuals who have substantial control over the organization (or a unit thereof) or policy-making authority within the organization (or unit thereof).41 Similarly, if tolerance of the offense by “substantial authority personnel” was pervasive throughout the organization or unit, 5 points are added.42 “Substantial authority personnel” means individuals who exercise substantial discretion in acting on behalf of an organization or unit thereof. Substantial authority personnel include both “high-level personnel” and others who exercise substantial discretion even if they are not part of management.43

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37 USSG § 8C2.5, Background.
38 USSG § 8C2.5(a).
39 USSG §§ 8C4.1-4.11.
40 USSG § 8C2.5(b)(1), and Application Note 2.
41 USSG § 8A1.2, Application Note 3(b); USSG §8C2.5, Application Note 3.
42 USSG § 8C2.5(b)(1).
43 USSG § 8C2.5, Application Note 1; USSG §8A1.2, Application Note 3(c).
organizations and any reasonably distinct operational unit thereof with 1,000 to 4,999
employees, there are identical directives to increase the culpability score by 4 points.\textsuperscript{44} For
organizations and any reasonably distinct operational unit thereof with 200 to 999 employees,
there are identical directives to increase the culpability score by 3 points.\textsuperscript{45} For even smaller
organizations (but not units thereof), there are similar directives to add 1 or 2 points.\textsuperscript{46}

If an organization or separately managed line of business\textsuperscript{47} committed any part of the
instant offense less than 10 years after a criminal adjudication of similar misconduct, or less than
10 years after a civil or administrative adjudication based on at least two instances of similar
misconduct, 1 point is added. If less than 5 years has passed since such events, then 2 points are
added.\textsuperscript{48}

If the offense violated a judicial order or injunction, 2 points are added. If the offense
violated a condition of probation 1 point is added unless the violation is similar to the
misconduct for which probation was given - in which case 2 points are added.\textsuperscript{49}

If the organization obstructed or attempted to obstruct justice or, with knowledge thereof,
failed to take reasonable steps to prevent such obstruction or attempt, 3 points are added.\textsuperscript{50} This
adjustment applies only when the obstruction is committed on behalf of the organization. It does
not apply when individuals attempt to conceal their misconduct from the organization.\textsuperscript{51}

If the offense occurred even though the organization had a qualifying or “effective”
compliance and ethics program at the time of the offense, 3 points are subtracted.\textsuperscript{52} This
reduction does not apply if “the organization unreasonably delayed reporting the offense to
appropriate governmental authorities.”\textsuperscript{53} The organization is granted a reasonable time to
conduct an internal investigation and no reporting is required if the organization had reasonably
concluded, based on the information then available, that no offense had occurred.\textsuperscript{54} This
reduction also does not apply if a high-level individual within the organization (or within a 200

\textsuperscript{44} USSG § 8C2.5(b)(2).
\textsuperscript{45} USSG § 8C2.5(b)(3).
\textsuperscript{46} USSG §§ 8C2.5(b)(4) and (5).
\textsuperscript{47} A “separately managed line of business” means a subpart of a for-profit organization that has its own
management, has a high degree of autonomy from higher managerial authority, and maintains its own separate
books of accounts, such as is often the case with corporate subsidiaries and divisions. Only prior misconduct from
the same separately managed line of business is to be considered for purposes of the prior history adjustment.
USSG § 8C2.5, Application Note 5. The definition of “separately managed line of business” appears to require a
greater degree of separation than the definition of “unit of the organization.” \textit{Cf.} USSG § 8C2.5, Application Notes
2 and 5.
\textsuperscript{48} USSG § 8C2.5(c).
\textsuperscript{49} USSG § 8C2.5(d).
\textsuperscript{50} USSG § 8C2.5(e).
\textsuperscript{51} USSG § 8C2.5, Application Note 9.
\textsuperscript{52} USSG § 8C2.5(f)(1). While the November 2004 amendments substantially revised the discussion of compliance
programs, none of the revisions changed the 3-point value of having an effective compliance program.
\textsuperscript{53} USSG § 8C2.5(f)(2).
\textsuperscript{54} USSG § 8C2.5, Application Note 10.
or more person culpable unit thereof) participated in, condoned, or was willfully ignorant of the offense.\(^{55}\) Similarly, there is a rebuttable presumption that the organization’s compliance program does not qualify for the reduction if a high-level individual within an organization with fewer than 200 employees at the time of the offense, or an individual within “substantial authority personnel” of any sized organization participated in, condoned, or was willfully ignorant of the offense.\(^{56}\)

An organization may qualify for a 1, 2, or 5-point reduction depending on the level of cooperation given to the government. If the organization clearly accepts responsibility (which usually means pleading guilty prior to trial), 1 point is subtracted.\(^{57}\) If the organization accepts responsibility and fully cooperates in the investigation, then a total of 2 points are subtracted.\(^{58}\) Cooperation “should include the disclosure of all pertinent information known by the organization” which means the information should be “sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”\(^{59}\) If the organization accepts responsibility, and fully cooperates, and reports the offense to appropriate government authorities prior to an imminent threat of disclosure or of a government investigation, then 5 points are subtracted.\(^{60}\)

d) Applying the Culpability Multipliers to the Base Fine.

Once the final culpability score is determined, the court looks to a chart to translate that culpability score into minimum and maximum “multiplier” numbers ranging from 0.05 to 4.00. The minimum and maximum multipliers are then multiplied by the “base fine” (as discussed above) to produce the acceptable range of the fine.\(^{61}\) For example, if the offense level is 19, a chart translates that level to a base fine of $500,000.\(^{62}\) If the culpability score is 5, a chart translates that score into a minimum multiplier of 1.00 and a maximum multiplier of 2.00.\(^{63}\) Multiplying the base fine by the multipliers yields an acceptable fine range of $500,000 to $1,000,000.\(^{64}\) By consulting various policy statements listed in Chapter 8, the court may

\(^{55}\) USSG § 8C2.5(f)(3). The reduction also does not apply if the individuals involved in the implementation or oversight of the compliance program participated in, condoned, or were willfully ignorant of the offense. USSG § 8C2.5(f)(3); USSG § 8B2.1(b)(2)(B) and (C).

\(^{56}\) USSG § 8C2.5(f)(3)(B).

\(^{57}\) USSG § 8C2.5(g)(3), and Application Note 13.

\(^{58}\) USSG § 8C2.5(g)(2).

\(^{59}\) USSG § 8C2.5, Application Note 12. Whether this disclosure may include a waiver of privilege is discussed below in Section IV.C.

\(^{60}\) USSG § 8C2.5(g)(1). In addition to the Guideline’s incentive to report misconduct, other government agencies and programs provide independent incentive to report, such as DOJ’s Antitrust Division’s amnesty program and the Environmental Protection Agency’s voluntary disclosure program.

\(^{61}\) USSG §§ 8C2.6-2.7.

\(^{62}\) USSG § 8C2.4(d). This example assumes that the fine amount generated by the offense level conversion chart is greater than either the gain to the organization or any loss caused by the organization intentionally, knowingly, or recklessly. See, e.g., USSG § 8C2.4(a) and (c).

\(^{63}\) USSG § 8C2.6.

\(^{64}\) USSG § 8C2.7.
exercise its discretion in setting the fine anywhere from $500,000 to $1,000,000. The court should compare this fine amount to the defendant’s gain to ensure that the fine, together with any restitution or payments for other remedial measures, is at least as much as that gain. If not, the court shall increase the fine to the amount necessary to disgorge any illegal gain. Similarly, the court must reduce the fine to the extent it would impair the organization’s ability to make restitution. Finally, the court must ensure that the fine is within the statutory minimums and maximums as discussed above.

Of course, if the base fine is determined by the amount of gain or loss (rather than the table in Chapter 8), then the maximum multiplier would always be 2.0 under 18 U.S.C. §3571 (which limits the statutory maximum to twice the gain or loss). The possibility that a fine could be based on gain or loss (and hence limited to a maximum 2.0 multiplier) further minimizes the potential benefits of reducing culpability scores through compliance programs or cooperation. In fact, the maximum multiplier for an organization with a culpability score of 5 (which is the starting point for all organizations) is already 2.0. Therefore, in fine calculations based on gain or loss for organizations with over 5,000 employees (or with a culpable business unit with over 5,000 employees) in which high-level personnel or substantial authority personnel had the requisite level of involvement in the offense, having either a qualifying compliance program or obtaining the greatest allowable reduction for cooperation will have no effect on the maximum multiplier since it will already be capped at 2.0 under 18 U.S.C. §3571. In fact, with respect to the 3-point reduction for qualifying compliance programs, any organization (or culpable unit) with merely 200 employees (and assuming the requisite involvement of high-level personnel or substantial authority personnel) will see no reduction of the maximum multiplier of 2.0 in situations where the fine is based on gain or loss. A court may, of course, credit the organization’s laudatory efforts in deciding where to set the fine within the range set by the multipliers. (The minimum multiplier does not become 2.0 until the culpability score becomes 10, so the existence of a qualifying compliance program and cooperation would still reduce the lower limit above which the court must set the fine in these hypothetical examples.)

e) Upward and Downward Departures From the Guideline Fine.

Similar to the sentencing mechanism for individuals, the Guidelines for organizations allow the court to depart from the guideline fine range (up or down) if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should

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65 USG § 8C2.8.
66 USG § 8C2.9.
67 USG § 8C3.3.
68 USG § 8C3.1, and Background.
69 USG § 8C2.5(a); USG § 8C2.6; see also THE REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES, UNITED STATES SENTENCING COMMISSION, Section VII.D (Sentencing Data), pp.24-28 (October 7, 2003), available at http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm (recognizing this problem and recommending further review by the Sentencing Commission).
70 The November 2004 amendments expressly added that, when setting the fine within the permissible range, the court should consider “whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of § 8B2.1.” USG § 8C2.8(a)(11) (emphasis added).
result” in a different sentence than suggested by the Guidelines. The non-exclusive lists of policies that may justify an increased sentence include whether: (a) the offense risked death or bodily injury, (b) constituted a threat to national security, (c) constituted a threat to the environment, (d) posed a risk to the integrity of a market, or (e) involved bribery of public officials. Also, if an organization implemented a compliance program in response to a court order and the court granted a 3-point reduction in the culpability score for having that program, the Guidelines recognize that an upward departure may be warranted to offset, in whole or in part, the effect of the 3-point reduction. Similarly, if the organization was required by law to have a compliance program at the time of the offense, but did not, an upward departure may be warranted. The non-exclusive list of factors for downward departures includes whether: (a) the organization provided substantial assistance to the government in prosecuting another organization, (b) the organization is a public entity, (c) the organization’s members or beneficiaries (other than shareholders) are already victims of the offense, and (d) the organization will pay remedial costs that greatly exceed the ill-gotten gain. Finally, if the organization’s culpability score was exceedingly low, a downward departure may be warranted and if the score was exceedingly high, an upward departure may be warranted.

3. Other Possible Components of an Organizational Sentence.

Regardless of which determination method applies to the fine, criminal sentences for organizations may always include one or more of the following additional components: (a) restitution, (b) remedial orders, (c) community service, (d) notice to victims, (e) probation, and (f) special assessments, forfeiture, and costs.

a) Restitution.

In the case of an identifiable victim, the court shall enter a restitution order for the full amount of the victim’s loss. Restitution is not necessary if the number of victims is so large as to make restitution impracticable or if determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to such a

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71 USSG § 8C4, Introductory Commentary. These departures (or most of them) arguably apply to all methods of fine calculation for organizations. USSG § 8A1.2

72 See, e.g., USSG §§ 8C4.2, 4.3, 4.4, 4.5, 4.6.

73 USSG § 8C4.10. The November 2004 amendments added the specific reference to an upward departure in situations where the organization did not have a compliance program despite being legally required to have one.

74 See, e.g., USSG §§ 8C4.1, 4.7, 4.8, 4.9.

75 In fact, former Attorney General John Ashcroft has issued two very strongly worded directives to prosecutors aimed at increasing sentences. Among other things, prosecutors are instructed to scrutinize strictly and to limit as much as possible any culpability score reductions and downward departures. See Memorandum from Attorney General John Ashcroft, Subject: Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals, at 3 (July 8, 2003); Memorandum from Attorney General John Ashcroft, Subject: Department Policy Concerning Charging Criminal Offenses, Dispositions of Charges, and Sentencing, at § II.C(D) (Sept. 22, 2003). In January 2005, Deputy Attorney General James B. Comey issued a similar statement reiterating these directives even in the aftermath of the Booker/Fanfan opinions by the Supreme Court. See Memorandum from James B. Comey, Dep. Atty. Gen. To All Fed. Prosecutors, Department Policies and Procedures Concerning Sentencing (January 28, 2005), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf

76 USSG § 8A1.1, Application note 2.
degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process.\footnote{77 USSG § 8B1.1.}

\begin{itemize}
  \item \textbf{b) Remedial Orders.}

  To the extent a restitution order is insufficient, a court may impose a remedial order as a condition of probation. For example, a clean-up order for an environmental violation may be appropriate.\footnote{78 USSG § 8B1.2.}

  \item \textbf{c) Community Service.}

  If community service is reasonably designed to repair the harm caused by the offense, it may also be included as a condition of probation.\footnote{79 USSG § 8B1.3.}

  \item \textbf{d) Notice to Victims.}

  In the case of fraud or other intentionally deceptive practices, the court may order that the defendant pay up to $20,000 of the costs of notifying the victims.\footnote{80 USSG § 8B1.4.}

  \item \textbf{e) Probation.}

  In the case of a felony, probation must be at least one year long but no more than five years.\footnote{81 USSG § 8D1.2.} Probation is mandatory under several circumstances: (1) if necessary to secure payment of restitution, enforce a remedial order, or ensure completion of community service; (2) if a monetary penalty (e.g. fine or restitution) has been imposed and it is not paid in full at the time of sentencing and restrictions are needed to safeguard the organization’s ability to make payments; (3) if, at the time of sentencing, an organization with 50 or more employees (or otherwise required by law to have a compliance program\footnote{82 The November 2004 amendments added the provision mandating probation for companies required by law to have a compliance program at the time of sentencing (but did not) to the previous directive for probation for companies with 50 or more employees at the time of sentencing without a compliance program at the time of sentencing.}) does not have a qualifying compliance program; (4) if, at any time within five years prior to sentencing, the organization engaged in similar misconduct for which a criminal adjudication has occurred and some part of the instance offense occurred after that prior adjudication; (5) if, at any time within five years prior to sentencing, a person within high-level personnel of the organization or a unit thereof engaged in similar misconduct for which a criminal adjudication has occurred and that person participated in the instant misconduct and some part of it occurred after that prior adjudication; (6) if probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; (7) if no fine was imposed; or (8) if necessary to accomplish one or more purposes of sentencing as specified in 18 U.S.C. § 3553(a)(2).\footnote{83 USSG § 8D1.1. 18 U.S.C. § 3553(a)(2) provides: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct;
Chapter 8 of the Guidelines also provides both a list of mandatory conditions of probation and a list of recommended conditions. Pursuant to the mandatory list, probation must include a condition forbidding the organization from committing another federal, state, or local crime during the term of the probation.\footnote{USSG § 8D1.3(a).} In the case of a felony conviction, the probation order must also include one or more of the following: (1) restitution, (2) notice to victims, or (3) a directive to reside or refrain from residing in a specified area.\footnote{USSG § 8D1.3(b).} (Amendments to statutory cross-references may have unintentionally replaced the more logical previous three alternatives: (1) a fine, (2) restitution, or (3) community service.\footnote{USSG § 8D1.3(b), Note; see also USSG § 8D1.4(a)(1) and (2) (specifying that four of the circumstances where probation is mandatory include when probation is necessary to secure payment of restitution, enforce a remedial order, ensure completion of community service, or to safeguard payment of a monetary penalty over time).} The court may also impose other conditions that are both reasonably related the nature of the offense and involve only such restrictions as are necessary to effect the purposes of sentencing.\footnote{USSG § 8D1.3(c).} 87

Pursuant to the list of recommended conditions, if probation is imposed to safeguard the organization’s ability to pay a monetary penalty over time, the court may require the organization to submit to various reporting and auditing conditions. Specifically, the court may require the organization to make periodic reports of its financial condition and its disposition of funds. The court may also require the organization to submit to regular or unannounced examinations of its books and records (with all costs billed to the organization). The court may also require interrogation of individuals with knowledge of financial matters. Also, the court may require the organization to notify the court of material adverse changes or of the commencement of litigation and investigations.\footnote{USSG § 8D1.4(b).}

Also under the list of recommended conditions, if probation is imposed for reasons (3) through (6) above (the reasons generally involving the lack of a compliance program or prior misconduct), then the court may order the organization to propose a compliance plan and corresponding implementation schedule. Upon approval by the court, the organization may be required to notify its shareholders and employees of its criminal behavior and of its new compliance program. The court may also require periodic reporting on the progress of implementing the compliance program together with disclosure of all litigation and investigations initiated since the last report. In order to monitor the organization’s progress in implementing the program, the court may also require regular or unannounced examinations of books and records (with all costs billed to the organization) together with corresponding interrogation of individuals knowledgeable thereof.\footnote{USSG § 8D1.4(c).} These reporting and approval requirements could mean that the court and probation department may play an active role in some aspects of

\footnote{84 USSG § 8D1.3(a).}
\footnote{85 USSG § 8D1.3(b).}
\footnote{86 USSG § 8D1.3(b), Note; see also USSG § 8D1.4(a)(1) and (2) (specifying that four of the circumstances where probation is mandatory include when probation is necessary to secure payment of restitution, enforce a remedial order, ensure completion of community service, or to safeguard payment of a monetary penalty over time).}
\footnote{87 USSG § 8D1.3(c).}
\footnote{88 USSG § 8D1.4(b).}
\footnote{89 USSG § 8D1.4(c). The court should approve any compliance program that “appears reasonably calculated to prevent and detect criminal conduct…” USSG § 8D1.4, Application Note.}
managing the organization’s operations. The prospect of avoiding such supervision provides incentive to implement a compliance program prior to sentencing, if not prior to indictment.

If the court finds that the organization violated a condition of probation, the court may either extend the term of probation, impose more restrictive conditions, or revoke probation and resentencing the organization.90

f) Special Assessment, Forfeitures, and Costs.

If forfeiture is otherwise provided by statute, the court must impose forfeiture as required by that statute.91 The court may also order the defendant to pay the costs of prosecution.92 Finally, the court must impose a “special assessment” of $400 per count of felony conviction.93

IV. COMPLIANCE PROGRAMS.

A. The Likelihood of Having a Qualifying Program and Its Benefits.

Having a qualifying compliance program is difficult. While the specific requirements for a compliance program may sound reasonable, a couple of factors work against an organization seeking to obtain a culpability score reduction based upon such a program. First, if an organization is facing sentencing for a criminal conviction, the compliance program obviously did not work perfectly.94 Second, the court will make this determination with 20/20 hindsight after having heard all the evidence at trial regarding the organization’s wrongdoing. In other words, how will the fact of conviction influence the court in deciding whether the program was “effective”? Third, even if the organization’s program met each of the specific requirements (discussed below), the reduction would not apply under several scenarios.

The reduction does not apply if high-level personnel of an organization (or of a 200 or more employee unit thereof) or an individual involved in implementing the compliance program participated in, condoned, or were willfully ignorant of the offense. There is also a rebuttable presumption that the reduction does not apply if high-level personnel of an organization with less than 200 employees or within substantial authority personnel (but not also within high-level personnel) of any size organization participated in, condoned, or were willfully ignorant of the offense. The reduction also does not apply if the organization unreasonably delayed reporting the offense to the appropriate governmental authorities upon becoming aware of the offense.95

Given all these hurdles to obtaining the 3-point reduction, it might not be surprising that, according to the data available to the Sentencing Commission, only three organizations out of 812 (only 0.4%) who were sentenced based on culpability scores received credit for having an

90 USSG § 8F1.1.
91 USSG § 8E1.2; USSG § 5E1.4.
92 USSG § 8E1.3.
93 USSG § 8E1.1, and Application Notes.
94 The Guidelines state expressly, however, that a program may qualify for the 3-point reduction, even if the program failed to prevent the offense serving as a basis for conviction. USSG § 8B2.1(a).
95 USSG § 8C2.5(f).
effective compliance program. Furthermore, because fines are limited (to some limited extent) by the statutory maximums and by the organization’s ability to pay, the culpability score benefits of a compliance programs are, perhaps, not the most compelling reason to implement a program. Also, of course, benefits under the Guidelines come into play only after the organization has already suffered the negative business consequences of indictment, trial, and conviction.

Rather, deterrence, early detection, and influencing prosecutorial discretion to avoid indictment are perhaps more compelling reasons to implement a compliance program. In fact, in June 1999, former Deputy Attorney General Eric Holder issued DOJ’s first comprehensive, public effort to set forth criteria for prosecutors to consult in deciding whether to bring criminal charges against organizations (“the Holder Memo”). In January 2003, former Deputy Attorney General Larry Thompson issued a slightly revised and updated version of the Holder Memo (the “Thompson Memo”). Both the original Holder Memo and the more recent Thompson Memo note that the existence of a compliance program is a legitimate basis for prosecutors to decline prosecuting an organization. More specifically, these DOJ policy statements direct federal prosecutors to examine nine criteria when deciding whether to indict an organization:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
5. the existence and adequacy of the corporation’s compliance program;
6. the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

97 Id.
(7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;

(8) the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and

(9) the adequacy of remedies such as civil or regulatory enforcement actions. ¹⁰⁰

B. The Prerequisites to Having a Qualifying Compliance Program.

1. In General.

The most significant November 2004 changes to Chapter 8 of the Guidelines concern the treatment of compliance programs. These changes were prompted by section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, which directed the Sentencing Commission to revise the Guidelines as necessary to ensure that the provisions of Chapter 8 “are sufficient to deter and punish organizational criminal misconduct.”¹⁰¹ While the value of the culpability score reduction remains unchanged at 3 points,¹⁰² the most significant aspects of the recent amendments consist of: (1) elevating the importance of the discussion of compliance programs from an Application Note to a separately numbered Guideline; (2) emphasizing that programs must encourage “ethical conduct” and “a commitment to compliance the law” generally;¹⁰³ (3) placing additional responsibility upon directors and senior management to oversee the compliance program; and (4) generally providing more detail about the requirements for a qualifying program.

2. The Seven Minimum Due Diligence Requirements for Qualifying Compliance Programs.

To qualify, the Guidelines specify that a compliance program must meet seven minimum due diligence requirements:

¹⁰⁰ Cf. Holder Memo, at § II; and Thompson Memo, at § II (adding criteria number 8 regarding the adequacy of prosecuting individuals). The Holder and Thompson memoranda also mention that, in deciding whether to indict a company for antitrust violations, it is not necessarily appropriate to give positive consideration to the fact that the organization may have had a compliance program. As support for this comment, these memoranda reference the Antitrust Division’s firm policy of providing amnesty only to the first corporation to make full disclosure to the government. Unfortunately, these memoranda do not discuss the obvious distinction between mere positive consideration and legal amnesty. Holder Memo, at § III; Thompson Memo, at § III. Later both memoranda make the comment that “the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.” Holder Memo, at § VII; Thompson Memo, at § VII.

¹⁰¹ USSG § 8B2.1, Background.

¹⁰² The probation-related issues of compliance programs also remain generally unchanged. See USSG § 8D1.1(a)(3) (still mandating probation for an organization with more than 50 employees that did not have a compliance program at the time of sentencing but adding a mandate for probation for any size organization that was otherwise required to have a compliance program at the time of sentencing but did not).

¹⁰³ USSG § 8B2.1(a)(2) (perhaps intended to expand the scope of compliance programs beyond merely detecting and preventing criminal conduct to ensuring compliance with civil and regulatory requirements as well).
(1) The organization must establish standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct and detecting it when it occurs.\textsuperscript{104}

(2) The board of directors or highest governing body of the organization must be knowledgeable about the content and operation of the program. The board must also exercise reasonable oversight with respect to the implementation and effectiveness of the program. The November 2004 amendments added this requirement for board involvement. While specific lower-level individuals within the organization may be assigned day-to-day operational responsibility for the compliance program, one or more specific individuals within high-level personnel must bear overall responsibility for the program’s operation. Any such designated high-level person must also “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”\textsuperscript{105} Individuals assigned operational responsibility must report periodically to high-level personnel and must report to the board regarding the program’s effectiveness at least annually. Individuals with operational responsibility must have adequate resources, authority, and direct access to the board of directors.\textsuperscript{106}

(3) The organization must use reasonable efforts to avoid having anyone within its substantial authority personnel whom the organization knew (or should have known) had engaged in illegal activities or other conduct inconsistent with having an effective compliance and ethics program.\textsuperscript{107}

(4) On a periodic basis, the organization must communicate the organization’s standards and procedures and other aspects of the program to all employees from the board, through management, down to rank and file employees and, as appropriate, to the organization’s outside agents. Previously, training was just one way that companies could communicate their compliance standards. With the November 2004 revisions, training is now an express requirement.\textsuperscript{108}

(5) The organization must take reasonable steps, such as periodic monitoring and auditing, to ensure that the program is being followed and to evaluate its effectiveness. The November 2004 amendments clarify that auditing and monitoring are now requirements, rather than just alternatives for achieving compliance with the organization’s standards. The amendments also specify that the monitoring needs to be periodic. The organization must also take reasonable steps to implement and publicize a reporting system. This reporting system must allow the organization’s employees and agents to report and to seek guidance with respect to suspected criminal conduct without fear of retaliation. The recent amendments added the language about being

\textsuperscript{104} USSG § 8B2.1(b)(1), and Application Note 1.

\textsuperscript{105} USSG § 8B2.1, Application Note 3.

\textsuperscript{106} USSG § 8B2.1(b)(2), and Application Notes 1 and 3.

\textsuperscript{107} USSG § 8B2.1(b)(3).

\textsuperscript{108} USSG § 8B2.1(b)(4).
able to “seek guidance” regarding “potential” criminal conduct without fear of retribution - thereby underscoring the Guideline’s emphasis on crime prevention.109

(6) The compliance program must be promoted and enforced consistently throughout the organization. The organization must utilize both appropriate incentives to perform in accordance with the program and appropriate discipline for participating in criminal conduct or for failing to prevent or to detect it. The specific mention of incentives to reward compliance is new with the recent amendments.110

(7) When criminal conduct is detected, the organization must respond reasonably to the misconduct and make reasonable efforts to prevent future similar offenses, including making any needed modifications to the compliance program.111

3. Additional Requirements and Restrictions.

In addition to the seven requirements discussed above, the Guidelines also require that an organization periodically assess the risk its employees will engage in criminal conduct. The assessment must consider: (1) the nature and seriousness of potential criminal conduct; (2) the likelihood that certain criminal conduct may occur because of the nature of the organization’s business; and (3) the prior history of the organization. As an example provided by the Guidelines, if an organization employs sales personnel who have flexibility to set prices, that organization shall establish compliance standards and procedures designed to prevent and detect price-fixing. After these periodic assessments, the organization must modify each of the seven aspects of the program discussed above, as needed, to reduce the identified risks. Priority should be given to making modifications tailored to the risk found most likely to occur.112 Rather than having a single compliance program, many larger organizations may need to have several programs, each one tailored to a particular line of business or operational function.

Another potentially important additional requirement lurks in a footnote: “An organization’s failure to incorporate and follow applicable industry practice or the standards called for by any applicable government regulation weighs against a finding of an effective compliance and ethics program.”113 In addition to any applicable regulatory structure, federal agencies have also been circulating model compliance programs for specific industries.114 Similarly, industry groups are circulating “best practices” suggestions. While it can certainly be argued that these suggested policies do not mandate what an organization must do to have a

109 USSG § 8B2.1(b)(5).
110 USSG § 8B2.1(b)(6).
111 USSG § 8B2.1(b)(7).
112 USSG § 8B2.1(c), and Application Note 6.
113 USSG § 8B2.1, Application Note 2(B).
qualifying program, these suggestions should be consulted when designing compliance programs. If nothing else, these model programs provide insight into what policies the government may look upon favorably.

Also, to qualify for the 3-point culpability score reduction, the organization must report any detected offense to the appropriate governmental entity within a reasonable time of discovery.\(^\text{115}\)

Finally, as discussed above, the culpability score reduction is not available if certain levels of individuals participated in, condoned, or were willfully ignorant of the offense.\(^\text{116}\)

Though written prior to the November 2004 amendments to the Guidelines, the Holder and Thompson memoranda provide additional insight regarding DOJ’s expectations with respect to compliance programs.\(^\text{117}\) The discussion in these two memoranda concerns whether prosecutors should indict an organization in the first instance whereas the Guidelines concern setting the fine for an organization that has already been convicted. That critical distinction must be kept in mind when comparing the Guidelines with these memoranda. Prosecutors should have more flexibility in considering a compliance program sufficient to justify a declination of prosecution than a sentencing court would have in determining whether to grant a 3-point culpability score reduction. When deciding whether to indict, however, prosecutors tend to place greater weight on their perception of the organization’s cooperation during their investigations than they do on their perception of the organization’s compliance programs.

The Holder and Thompson memoranda recognize that a compliance program cannot prevent all criminal conduct. The memoranda also note that a program that prohibits even the very misconduct at issue does not absolve the organization from criminal liability under the doctrine of respondeat superior.\(^\text{118}\)

After noting that DOJ has no “formal guidelines”\(^\text{119}\) for compliance programs, these memoranda pose two fundamental questions a prosecutor should ask in evaluating a program: Is it well designed? Does it work? In answering these two questions, prosecutors are instructed to consider the comprehensiveness of the program; the staff and resources devoted to the program, including auditing efforts; whether employees are adequately informed of the program and are convinced of the organization’s commitment to the program; whether the program is tailored to detect the types of misconduct most likely to occur in the organization’s line of business; the pervasiveness of the criminal conduct throughout the organization; the seriousness, duration, and frequency of the misconduct; any remedial efforts undertaken such as restitution, disciplinary action, and revisions to the compliance program; the promptness of any disclosure of the

\(^{115}\) USSG § 8C2.5(f)(2); see also USSG § 8C2.5, Application Note 10 (noting that “the organization will be allowed a reasonable period of time to conduct an internal investigation” and “no reporting is required […] if the organization reasonably concluded, based on the information then available, that no offense had been committed.”).

\(^{116}\) See Section III.B.2.c. above.

\(^{117}\) Holder Memo, at § VII; Thompson Memo, at § VII.

\(^{118}\) Holder Memo, at § VII; Thompson Memo, at § VII; see also Section III.A above (regarding the scope of “relevant conduct” for sentencing purposes).

\(^{119}\) These memoranda do, however, cite to the Guidelines’ discussion of compliance programs as providing detailed discussion of the factors mentioned in the memoranda. Holder Memo, p. 8 n.5; Thompson Memo, p. 10 n.6.
wrongdoing to the government; and the level of cooperation given during the government’s investigation. Ultimately the prosecutor must determine whether the compliance program is merely a “paper program” or “whether it was designed and implemented in an effective manner.” See also Section V below for more detail on comments the Thompson Memo added to the text of the original Holder Memo regarding officer and director responsibility with respect to compliance programs.

C. Privilege Waiver Concerns Persist.

In making his or her subjective determination of whether an organization has provided sufficient disclosure or cooperation, a prosecutor will weigh the organization’s willingness to waive its attorney-client and work product privileges. Both the Holder and Thompson memoranda and the Guidelines themselves state that such waiver is not required, however. Nevertheless, without a privilege waiver, there is a serious risk that the prosecutor will decide that the organization’s disclosure or cooperation has not been sufficient to avoid prosecution. Similarly, at sentencing, the prosecutor may argue that the organization’s cooperation and disclosure were not sufficient for the court to reduce the culpability score.

DOJ’s focus on seeking privilege waivers became evident in June 1999 with the issuance of the Holder Memo. The Holder Memo advised that the level of an organization’s cooperation during the investigation could mitigate against indictment. Further, the Holder Memo established that, in evaluating the level of cooperation, prosecutors were permitted to consider the organization’s willingness to disclose the complete results of any internal investigation and to waive its attorney-client and work product privileges. The Thompson Memo retained this discussion. Both the Holder and Thompson memoranda specified that waiver could be required in plea agreements.

Both the Holder and Thompson memoranda define “cooperation” and “disclosure” more broadly than do the Sentencing Guidelines. Under these expressions of DOJ policy, the initial disclosure of the wrongdoing is just the beginning. Prosecutors may decide that cooperation also requires: (a) identifying and terminating employees engaged in wrongdoing (“including senior executives”); (b) refusing to provide counsel to employees; (c) refusing to provide information about the government’s investigation to employees through joint defense agreements; and (d) making witnesses and documents available to government investigators without undue delay.

120 Holder Memo, p. 8; Thompson Memo, p. 10.
121 USSG § 8C4.11; see also footnote 75, above (regarding DOJ’s policy to resist downward departures and culpability score reductions).
122 Holder Memo, at § VI.
123 Holder Memo, at §§ II.A.4, VI, and XII.
124 Thompson Memo, §§ II.A.4, VI, and XII.
125 See Holder Memo, at § XII; Thompson Memo, at § XII.
126 Holder Memo, at § VI; Thompson Memo, at § VI (adding additional examples of conduct DOJ considers uncooperative).
Ultimately, it is the prosecutor herself who will judge whether the organization has been sufficiently cooperative and, therefore, standards vary by district and prosecutor.\(^{127}\)

The November 2004 amendments to the Guidelines arguably further encourage requests for privilege waivers. In a footnote regarding the ability of an organization to reduce its culpability score by cooperating, the Guidelines note that “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score […] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”\(^{128}\) While purporting to ensure that a waiver is not required, by tying the necessity of a waiver to an unspecified standard of “thoroughly” disclosing “all pertinent information” (language similar to that used in the Holder and Thompson memoranda), the November 2004 amendments give prosecutors even more encouragement for pursuing waivers.

Despite prosecutorial demands upon an organization to waive privilege, the decision must be evaluated carefully. Waiving privilege to the government will almost undoubtedly result in waiving privilege as to all other litigants in all other proceedings (e.g. class action lawsuits, grand jury proceedings, wrongful discharge claims, administrative actions by regulatory agencies, etc.).\(^{129}\) While there is a dissenting view in at least one federal court of appeals,\(^{130}\) and government agencies have attempted to argue that providing information to the government should not result in complete waiver as to other litigants,\(^{131}\) the organization must assume that, once it has waived privilege with respect to a government agency, that waiver will be deemed to apply in all other proceedings.\(^{132}\)


\(^{128}\) USSG § 8C2.5, Application Note 12 (emphasis added).

\(^{129}\) See, e.g., United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997); Genentech, Inc. v. United States ITC, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

\(^{130}\) See Diversified Indus. v. Meredith, 572 F.2d 596, 604 n.1 (8th Cir. 1977).

\(^{131}\) See, e.g., Seaboard Report (full cite in footnote 127) (suggesting that production of privileged information to the SEC should not constitute a waiver with respect to third parties or constitute a complete subject matter waiver).

\(^{132}\) See, e.g., McKesson HBOC, Inc. v. The Superior Court of San Francisco County, 9 Cal. Rptr. 3d 812, 821 (Ca. Ct. App. 2004) (holding that, under California law, the fact that a company had an agreement with the SEC (that producing privileged material to it should not constitute a waiver with respect to third parties) was not binding on those other litigants and, therefore, production had waived any privileges). The effect of such so-called “selective waivers” remains the subject of much debate. See generally In re Columbia/HCA Healthcare, 293 F.3d 289, 302-305 (6th Cir. 2002) (discussing various approaches to the issue and ultimately concluding that any form of selective waiver, even that which stems from a confidentiality agreement, completely waives privilege). Perhaps the best example of this uncertainty is the fact that different courts reviewing the McKesson facts have reached conflicting
Furthermore, of course, waiving privilege does not automatically protect an organization from prosecution. In fact, waiver often makes prosecution of the organization and its employees (including its attorneys) much easier. For example, after the Arthur Andersen trial, jurors mentioned an e-mail exchange with one of the firm’s in house attorneys as a crucial piece of evidence convincing them to convict. The government would not, presumably, have had access to this privileged document if Arthur Andersen had not “cooperated” with the government by waiving such privilege.

V. POTENTIAL FIDUCIARY DUTY OF CARE TO CONSIDER COMPLIANCE PROGRAMS.

An organization’s management may also evaluate the value of instituting a qualifying compliance program in terms of the common law fiduciary duty of care expected of officers and directors. In the context of a shareholder derivative suit, a Delaware court noted the possibility for directors to have limited the company’s potential criminal fine exposure under the Guidelines by having implemented a qualifying compliance program. This case discusses the ability of management to reduce an organization’s potential criminal exposure in the context of management’s common law fiduciary duty of care.

This case, Caremark, involved claims that members of Caremark’s board of directors allowed some corporate misconduct to develop to the point where the company was indicted, pled guilty, and paid $250 million in fines and reimbursement. Plaintiffs alleged that the directors had breached their fiduciary duty to monitor adequately the corporation’s performance and its compliance with state and federal laws applicable to its industry (health care). Plaintiffs sought to recover the fines and other payments from the individual members of the board of directors. In evaluating the terms of the settlement, the court considered the potential benefit under the Guidelines for compliance programs and noted “[a]ny rational person attempting in conclusions. Cf. Saito v. McKesson HBOC, Inc., 2002 WL 31657622 at *11 (Del. Ch. November 13, 2002) (holding that there was no waiver in producing documents to the SEC because of the confidentiality agreement); McKesson HBOC, Inc. v. Adler, 562 S.E.2d 809, 814 (Ga. Ct. App. 2002) (holding that privilege was waived despite the confidentiality agreement). Given the uncertainty and the varying treatment in different states, companies must assume that producing privileged information to the government will result in complete waiver of any privilege.

133 Holder Memo, at § VI (“Finally, a corporation’s offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents in lieu of its own prosecution.”); Thompson Memo, at § VI (same).


135 See In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, 967 (Del. Ch. 1996) (noting that directors may be liable for breach of the duty to exercise appropriate attention to potentially illegal corporate activities through either (a) an ill-advised board decision or (b) an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss); see also McCall v. Scott, 250 F.3d. 997, 999 (6th Cir. 2001) (following Caremark and listing Delaware Supreme Court cases for the proposition that the standard for liability for breach of the standard of care is gross negligence); LOUIS M BROWN, ANNE O. KANDEL & RICHARD S. GRUNER, THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 7:4 (2004) (providing a detailed discussion of Caremark and its progeny); Miller v. U.S. Foodservice, Inc., -- F. Supp. 2d --, No. Civ.A.CCB04-1129, 2005 WL 670558 (D. Md. Mar. 23, 2005) (denying summary judgment against a claim based on alleged failure to implement sufficient internal controls, to pay attention to warning signs, and to catch problems soon enough); Saito v. McCall, No. Civ.A.17132-NC, 2004 WL 3029876 (Del. Ch. Dec. 20, 2004) (same).
good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers." The court continued that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”

The reference in Caremark to the Guidelines might be isolated and insignificant but for the fact that the Thompson Memo cites to Caremark and makes additional comments about DOJ’s broad view of director and officer responsibilities. In particular, the Thompson Memo advises prosecutors: “In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation’s directors exercise independent review over proposed corporate actions rather than unquestionably ratifying officers’ recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonable designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization’s compliance with the law.”

VI. CONCLUSION.

The Sentencing Guidelines for Organizations purport to provide a systematic approach for sentencing organizations. While portions of the Guidelines provide a mathematical formula to calculate the appropriate fine, the interpretation of the input values to that formula require much discretionary fact-finding. Additionally, that formula does not apply in numerous situations, such as when restitution would deplete the organization’s resources and in the case of environmental offenses, RICO offenses, and other offenses. In those cases, the sentence is almost exclusively within the court’s discretion. Therefore, it is impossible to predict a sentence range in advance of the sentencing process. Similarly, because there are multiple statutory maximums and their application depends on unpredictable decisions by prosecutors, juries, and judges, it impossible to predict even a worst case sentence in advance of the sentencing process.

Perhaps the only action organizations can take in advance of prosecution to position themselves most favorably under the Guidelines is to institute a qualifying compliance program. Under the Guidelines, the two most specific benefits of having an effective compliance program are: (1) a possible 3-point reduction of the culpability score and (2) the possibility of avoiding probation. These benefits are not great because, first and foremost, organizations that are facing sentencing by court following a guilty plea or conviction will have an uphill climb in convincing

136 In re Caremark, 698 A.2d at 970.
137 Id. Similarly, at least one court has cited the existence of a corporate compliance policy (one against sexual harassment) as a basis for ultimately reducing a $50,000,000 punitive damage award to only $350,000. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 577-78 (8th Cir. 1997).
138 Thompson Memo, p. 10 (citing In re: Caremark, 689 A.2d 959 (Del. Chan. 1996)). These comments were not in the text of the original Holder Memo.
the court that their compliance program was effective and otherwise met the numerous requirements of the Guidelines. Second, even if such a hurdle is overcome, the mathematical effect of the 3-point reduction may not be significant – especially given all the other means by which a court may exercise its discretion to increase a fine. Third, the 3-point reduction does not apply to many crimes such as environmental offenses. Fourth, while probation is mandatory for organizations with 50 or more employees without compliance programs, there are several circumstances under which probation is mandatory - even if the organization had a qualifying compliance program.

Ultimately, the most important benefits of having a compliance program do not come from the specific provisions of the Guidelines. Rather there are several collateral incentives for implementing a program. First and foremost, an effective program may prevent any misconduct in the first instance. Similarly, an effective program may lead to the detection of wrongdoing at the earliest possible instance when its detrimental effect may be contained. In fact, as discussed above, a couple of courts have suggested that careful consideration of whether to implement a compliance program may be part of management’s responsibility to supervise and to protect the organization. Finally, in the event criminal conduct has occurred despite having a qualifying program, the existence of the program, together with the necessary cooperation with the government during the investigation, will provide a basis upon which the prosecutor could decide to decline prosecution – not only of the organization itself, but perhaps also of the individuals implicated in the misconduct. If a compliance program is implemented with these collateral goals in mind, rather than focusing exclusively on the strict letter of the Guidelines’ requirements, the program will likely be more successful in preventing misconduct and, with very little additional effort, meet the precise requirements of the Guidelines anyway.
EXHIBIT A

Effective: April 30, 2003

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
 nghi Chapter 227. Sentences (Refs & Annos)
ghi Subchapter A. General Provisions (Refs & Annos)

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not
greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in
determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

   (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for
       the offense;

   (B) to afford adequate deterrence to criminal conduct;

   (C) to protect the public from further crimes of the defendant; and

   (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional
       treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

   (A) the applicable category of offense committed by the applicable category of defendant as set forth in the
       guidelines--

       (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject
           to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have
           yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title
           28); and

       (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

   (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements
       issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into
       account any amendments made to such guidelines or policy statements by act of Congress (regardless of
       whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued
       under section 994(p) of title 28);

(5) any pertinent policy statement--

   (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject
       to any amendments made to such policy statement by act of Congress (regardless of whether such amendments
       have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title
       28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any
amendments to such guidelines or policy statements by act of Congress.

(e) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission., [FN1] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)


[FN1] So in original. The second comma probably should not appear.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports


References in Text

Federal Rule of Criminal Procedure 32, referred to in subsec. (c)(1), is set out in this title.

The Controlled Substances Act, referred to in subsec. (f), is Pub.L. 91-513, Title II, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. Sections 401, 404, 406, and 408 of such Act are classified to sections 841, 844, 846, and 848, respectively, of Title 21. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Controlled Substances Import and Export Act, referred to in subsec. (f), is Pub.L. 91-513, Title III, Oct. 27, 1970, 84 Stat. 1285, as amended, which is classified principally to subchapter II (section 951 et seq.) of chapter 13 of Title 21, Food and Drugs. Sections 1010 and 1013 of such Act are classified to sections 960 and 963, respectively, of Title 21. For complete classification of this Act to the Code, see Short Title note set out under section 951 of Title 21 and Tables.

Amendments

2003 Amendments. Subsec. (a)(4)(A). Pub.L. 108-21, § 401(j)(5)(A), rewrote subpar. (A), which formerly read: "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or".

Subsec. (a)(4)(B). Pub.L. 108-21, § 401(j)(5)(B), inserted ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)" following "United States Code".

Subsec. (a)(5). Pub.L. 108-21, § 401(j)(5)(C), rewrote par. (5), which formerly read: "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;".

Subsec. (b)(1). Pub.L. 108-21, § 401(a)(1), designated existing provisions as par. (1), and therein struck out "The court" and inserted the following:

"(1) In general.--Except as provided in paragraph (2), the court".


Subsec. (c). Pub.L. 108-21, § 401(c)(2), (3), rewrote the last paragraph of subsec. (c), which formerly read: "If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons."

Subsec. (c)(2). Pub.L. 108-21, § 401(c)(1), rewrote par. (2), which formerly read: "is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described."

2002 Amendments. Subsec. (e). Pub.L. 107-273, § 4002(a)(8), substituted "as a minimum sentence" for "as minimum sentence".


Pub.L. 104-294, § 601(b)(6), substituted "section 408 of the Controlled Substances Act" for "21 U.S.C. 848".

1994 Amendments. Subsec. (a)(4). Pub.L. 103-322, § 280001, designated all but the first 10 words of existing par. (4) as subpar. (A), added "or" following "sentenced;" in subpar. (A) as so designated, and added subpar. (B).


1988 Amendments. Subsec. (c). Pub.L. 100-690, § 7102, added "or other appropriate public record" following "provide a transcription", and substituted "The clerk of the court shall" for "The court shall".

1987 Amendments. Subsec. (b). Pub.L. 100-182, § 3(1), (2), substituted "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result".

Pub.L. 100-182, § 3(3), added sentence directing that, in determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

Pub.L. 100-182, § 16(a), in the provisions relating to sentencing in the absence of applicable sentencing guidelines, substituted two sentences providing, respectively, that the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2), but that, in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, for a former single sentence which had directed the court, without any distinction with regard to petty offenses, to impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2).

Subsec. (c)(1). Pub.L. 100-182, § 17, added provision that range exceeds 24 months.


Subsec. (b). Pub.L. 99-646, § 9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c). Pub.L. 99-646, § 8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

Subsec. (d). Pub.L. 99-646, § 80(a), struck out "or restitution" in subsection heading after "order of notice" and in text struck out "or an order of restitution pursuant to section 3556," after "section 3555,"


Effective and Applicability Provisions

1994 Acts. Section 80001(c) of Pub.L. 103-322 provided that: "The amendment made by subsection (a) [enacting subsec. (f) of this section] shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act [Sept. 13, 1994]."

1986 Acts. Section 8(c) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 9(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (b) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 80(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (d) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [set out as a note under this section]."

Section 81(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [set out as a note under this section]."

Section 1007(b) of Pub.L. 99-570 provided that: "The amendment made by this section [enacting subsec. (e) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

1984 Acts. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Report by Attorney General

Pub.L. 108-21, Title IV, § 401(l), Apr. 30, 2003, 117 Stat. 674, provided that:

"(1) Defined term.--For purposes of this section [section 401 of Pub.L. 108-21, amending this section, 18 U.S.C.A. § 3742, and 28 U.S.C.A. §§ 991 and 994, and enacting provisions set out as notes under this section and 28 U.S.C.A. §§ 991 and 994], the term 'report described in paragraph (3)' means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act [Apr. 30, 2003]--

"(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

"(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

"(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

"(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

"(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

"(2) Report required.--

"(A) In general.--Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of
the United States Sentencing Guidelines [set out in this title], the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

"(B) Contents.--The report submitted pursuant to subparagraph (A) shall set forth--

"(i) the case;

"(ii) the facts involved;

"(iii) the identity of the district court judge;

"(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

"(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

"(C) Appeal of the departure.--Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

"(3) Effective date.--Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act [Apr. 30, 2003], except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act [Apr. 30, 2003] the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3)."

Authority to Lower Sentences Below Statutory Minimum for Old Offenses


"(1) section 3553(e) of title 18, United States Code [subsec. (e) of this section];

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code [sections 991 et seq. of Title 28, Judiciary and Judicial Procedure],

shall apply in the case of an offense committed before the taking effect of such guidelines."
EXHIBIT B

§ 3572. Imposition of a sentence of fine and related matters

(a) Factors to be considered.--In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)--

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution.--If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) Effect of finality of judgment.--Notwithstanding the fact that a sentence to pay a fine can subsequently be--

(1) modified or remitted under section 3573;

(2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified under section 3742;

a judgment that includes such a sentence is a final judgment for all other purposes.

(d) Time, method of payment, and related items.--(1) A person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule.
(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.

(3) A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine. Upon receipt of such notice the court may, on its own motion or the motion of any party, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(e) Alternative sentence precluded.--At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) Responsibility for payment of monetary obligation relating to organization.--If a sentence includes a fine, special assessment, restitution, or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Security for stayed fine.--If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)--

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

(h) Delinquency.--A fine or payment of restitution is delinquent if a payment is more than 30 days late.

(i) Default.--A fine or payment of restitution is in default if a payment is delinquent for more than 90 days. Notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3613A.

CREDIT(S)


HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports


References in Text

The Federal Rules of Criminal Procedure, referred to in subsec. (c), are set out in Title 18.

Amendments

1996 Amendments. Subsec. (b). Pub.L. 104-132, § 207(b)(1), inserted "other than the United States," after "offense, ".

Subsec. (d)(1). Pub.L. 104-132, § 207(b)(2)(A), (B), designated existing provisions as par. (1), and, as so designated, inserted ", including restitution," following "or other monetary penalty", and struck out provision that if the judgment permitted other than immediate payment, the period provided for could not exceed five years, excluding any period served by the defendant as imprisonment for the offense.

Subsec. (d)(2), (3). Pub.L. 104-132, § 207(b)(2)(C), added pars. (2) and (3).

Subsec. (f). Pub.L. 104-132, § 207(b)(3), inserted "restitution" after "special assessment, ".

Subsec. (h). Pub.L. 104-132, § 207(b)(4), substituted "A fine or payment of restitution" for "A fine".

Subsec. (i). Pub.L. 104-132, § 207(b)(5), substituted "A fine or payment of restitution" for "A fine" and substituted provision that notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3613A of this title for provision that when a fine was in default, the entire amount of the fine was due within 30 days after notification of the default, notwithstanding any installment schedule.


Subsec. (a)(7), (8). Pub.L. 103-322, § 20403(a)(1), redesignated pars. (6) and (7) as (7) and (8), respectively.


1987 Amendments. Heading. Pub.L. 100-185 inserted "and related matters" after "fine".

Subsec. (a). Pub.L. 100-185 in the heading struck out "in imposing fines" after "considered" and in text inserted as additional factors to be considered the burden that the fine will impose on any other person, including a government, that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose, any pecuniary loss inflicted upon others as a result of the offense, the need to deprive the defendant of illegally obtained gains from the offense, and whether the defendant can pass on to consumers or other persons the expense of the fine and struck out provision that the court consider any other pertinent equitable consideration.

Subsec. (b). Pub.L. 100-185 substituted provision that a fine is not to impair the ability to make restitution for provision placing a limit on the aggregate of multiple fines.

Subsec. (c). Pub.L. 100-185 substituted in pars. (1) and (2) "under" for "pursuant to the provisions of", in par. (3) "under" for ", if outside the guidelines range, pursuant to the provisions of", and in provision following par. (3) "judgment that" for "judgment of conviction that" and "is" for "constitutes".
Subsec. (d).  **Pub.L. 100-185** in the heading substituted "Time, method of payment, and related items" for "Time and method of payment" and inserted in text provision that if the court provides installments, the installments be in equal monthly payments over a period provided by the court, unless the court establishes another schedule, and that if the judgment permits other than immediate payment, the period provided for not exceed five years, excluding any period served by the defendant as imprisonment for the offense.

Subsec. (e).  **Pub.L. 100-185** reenacted subsec. (e) without change.

Subsec. (f).  **Pub.L. 100-185** in the heading substituted "Responsibility for payment of monetary obligation relating to organization" for "Individual responsibility for payment" and in text included within the duty to pay special assessment or other monetary obligation, including interest, and inserted reference to a director, officer, or employee of an organization.

Subsec. (g).  **Pub.L. 100-185** redesignated former subsec. (h) as (g) and, in subsec. (g) as so redesignated, in the heading substituted "Security for stayed fine" for "Stay of fine pending appeal" and in text struck out requirement that the stay be of a fine pending appeal, that the amount be deposited in an escrow account in the registry of the district court, and that the assets restrained be sufficient, if sold, to meet the defendant's fine obligation, and inserted provision that other security of the defendant's could be required, and struck out former subsec. (g), which related to responsibility to provide a current address.

Subsec. (h).  **Pub.L. 100-185** redesignated former subsec. (i) as (h) and, in subsec. (h) as so redesignated, in the heading substituted "Delinquency" for "Delinquent fine" and in text substituted "a payment is more than 30 days late" for "any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule". Former subsec. (h) redesignated (g).

Subsec. (i).  **Pub.L. 100-185** redesignated former subsec. (j) as (i) and, in subsec. (i) as so redesignated substituted "if a payment is delinquent for more than 90 days" for "if any portion of such fine is more than ninety days delinquent", "a fine is" for "a criminal fine is", and "within 30 days after" for "with thirty of". Former subsec. (i) redesignated (h).

Subsec. (j).  **Pub.L. 100-185** redesignated former subsec. (j) as (i).

Effective and Applicability Provisions

1996 Acts. Amendment by **Pub.L. 104-132** to be effective, to the extent constitutionally permissible, for sentencing proceedings in cases in which the defendant is convicted on or after Apr. 24, 1996, see section 211 of **Pub.L. 104-132**, set out as a note under section 2248 of this title.

1984 Acts. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of **Pub.L. 98-473**, and except as otherwise provided for therein, see section 235 of **Pub.L. 98-473**, as amended, set out as a note under section 3551 of this title.

Prior Provisions

For a prior section 3572, applicable to offenses committed prior to Nov. 1, 1987, see note set out preceding section 3551 of this title.