

# The Complete Compliance and Ethics Manual 2023

## The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs

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On November 1, 1991, the Federal Sentencing Guidelines for Organizations (found in “Chapter Eight: Sentencing of Organizations” in the 2018 Guidelines Manual) went into effect. The United States Sentencing Commission (hereinafter referred to as the Commission or the USSC) promulgated the original set of organizational guidelines after several years of study, and the organizational guidelines have been amended comprehensively only twice in their 31-year history.<sup>[2]</sup>

This paper traces the historical development of the organizational guidelines, with particular emphasis on the development of organizational sentencing policy relating to effective compliance and ethics programs. The carrot-and-stick philosophy that undergirds the organizational guidelines rests on the realization that corporations can, and should, be incentivized to self-police, and with respect to compliance and ethics, the organizational guidelines have ushered in an unprecedented era of corporate responsibility. Over time, compliance programs have had an impact that extends well beyond the criminal justice arena. A fundamental understanding of the historical development of the organizational guidelines not only provides a foundation for the consideration of future changes to those guidelines, it also aids organizations in the adoption of standards for effective compliance and ethics programs.

Part I of this paper provides a brief discussion of the events leading to the creation of the USSC and its statutory mandates from Congress. Parts II, III, and IV document three distinct stages in the USSC’s efforts to promulgate the initial set of organizational guidelines. Part V discusses the events leading to the comprehensive guideline changes made to Chapter Eight in 2004, including the elevation of the criteria for an effective compliance and ethics program from the commentary into a separate guideline. Part VI discusses the next set of comprehensive changes made in 2010. Finally, Part VII summarizes the organizational guidelines’ impact outside the criminal justice arena.

### **I. Enactment of the Sentencing Reform Act and Creation of the Commission**

The Commission authored the original organizational guidelines amid calls for general sentencing reform and in the wake of significant statutory changes regarding the manner in which federal judges sentence defendants in criminal cases. Prior to the Sentencing Reform Act of 1984,<sup>[3]</sup> federal district court judges possessed almost unlimited authority to fashion a sentence within a broad statutorily prescribed range. In each case, sentencing was limited only by the statutory minimum and maximum, and each individual district court judge exercised discretion to determine “the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”<sup>[4]</sup> Because each judge was “left to apply his own notions of the purposes of sentencing,” sentences for similar criminal conduct varied dramatically. It was widely believed that the federal sentencing system exhibited “an unjustifiably wide range of sentences [for] offenders convicted of similar crimes.”<sup>[5]</sup>

The Sentencing Reform Act of 1984 (hereinafter referred to as the Act), which was the culmination of lengthy

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bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities that unregulated sentencing had created.<sup>[6]</sup> To this end, as part of the Act, Congress created the Commission as an independent agency within the judicial branch of the federal government and tasked it with the responsibility of developing federal sentencing policy.<sup>[7]</sup> By statute, the Commission comprises seven voting members (including the chair) that the resident appoints “by and with the advice and consent of the Senate.”<sup>[8]</sup> The Act provides that “[a]t least 3 of the [Commission’s] members shall be Federal judges” and that no more than four members of the Commission can be members of the same political party.<sup>[9]</sup> Moreover, the attorney general (or the attorney general’s designee) and the chair of the United States Parole Commission<sup>[10]</sup> are designated as ex officio nonvoting members of the Commission.

In addition to establishing the USSC itself, the Act directed the USSC to promulgate guidelines that federal judges would use for selecting sentences within the prescribed statutory range.<sup>[11]</sup> The statutory purposes of the Commission, among others, are to establish sentencing policies and practices for the federal criminal justice system that:

- Assure the meeting of the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2);
- Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
- Reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.<sup>[12]</sup>

Although enactment of the Act appears to have been largely motivated by concerns about disparities in the sentencing of *individual* defendants, the Act also made changes that affected the sentencing of organizations.<sup>[13]</sup> The Act specified that an organization may be sentenced to a term of probation or a fine, or a combination of these sanctions,<sup>[14]</sup> and required that “[a]t least one of such sentences must be imposed.”<sup>[15]</sup> Additionally, the Act made clear that an organization could “be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.”<sup>[16]</sup>

The Senate report accompanying the Act explained Congress’ intent regarding the sentencing of organizations. It stated that “[c]urrent law...rarely distinguishes between individuals and organizations for sentencing purposes[; t]hus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterize[s] offenses typically perpetrated by organizations.”<sup>[17]</sup> The report also noted concerns that white collar criminals were being sentenced to minimal fines, creating “the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.”<sup>[18]</sup>

In its statutory direction to the USSC, Congress placed no limitations on the USSC’s authority to act in the arena of organizational sentencing. Indeed, Congress expected that the USSC would “include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing.”<sup>[19]</sup>

## **II. The Commission’s Early Efforts to Develop Organizational Sentencing Policy**

### **1986 Public Hearing on Organizational Sanctions**

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Although the primary focus of the Commission’s early work was the development of guidelines to be used in sentencing individual offenders, it nevertheless included consideration of appropriate organizational sanctions in its deliberations. On June 10, 1986, one year after the appointment of its first members, the Commission held a public hearing devoted exclusively to consideration of organizational sanctions.<sup>[20]</sup> Witnesses included representatives from the Department of Justice (DOJ) and the American Bar Association, corporate defense attorneys specializing in tax and antitrust offenses, and a law professor.<sup>[21]</sup> The institution of compliance programs was not the subject of this hearing. Rather, the testimony at the hearing “focus[ed] on the sanctions available and appropriate for the corporation, business, union or other organization convicted of a federal crime.”<sup>[22]</sup> Notably, the witnesses recognized the significance of “tone from the top,” and many specifically asserted that criminal misconduct manifested itself in organizations where upper management “created an atmosphere in which they encouraged this type of behavior, and they absolutely looked the other way when it was going on.”<sup>[23]</sup>

Witnesses raised the subject of compliance programs only in the context of the role of probation as an organizational sanction. Several witnesses mentioned the institution of compliance programs as a condition of probation for an organization convicted of an antitrust violation.<sup>[24]</sup> Another expressed his “tremendous respect” for antitrust compliance programs and the belief that such programs have an impact on deterring future violations.<sup>[25]</sup> No one yet expressed the view that compliance programs should be adopted as a prospective means of preventing criminal misconduct by organizations. Nor did anyone identify the presence of a preexisting compliance program as a factor to consider in mitigation of punishment.

Following the June 1986 hearing, the USSC continued to receive and consider public comment about the guidelines generally, including organizational sanctions. The USSC also established advisory and working groups to assist in the development of sentencing guidelines.<sup>[26]</sup> The USSC invited representatives of each group to participate in working sessions with commissioners and staff to examine early drafts of guidelines and air many of the important issues facing the USSC. In addition, the USSC received written comments and critiques from the members of these groups.<sup>[27]</sup>

The USSC obtained feedback about the guidelines as a whole—including organizational sanctions—from other sources as well. The USSC solicited information from federal agencies about the specific nature and number of offenses occurring within their areas of responsibility.<sup>[28]</sup> Commissioners and staff traveled across the country to obtain information relevant to development of the guidelines and also to give presentations regarding the efforts of the USSC.<sup>[29]</sup> For example, USSC representatives met with United States probation officers at 10 regional seminars and district-wide staff meetings. Through these meetings, the USSC received input and advice from officers in the majority of federal judicial districts.

The USSC also conducted regular meetings about guideline development, which were open to the public. “Although most of the work involved in drafting the preliminary guidelines necessarily was accomplished in informal working groups, the [USSC]...used its meetings to set an overall agenda and direction for the development of the guidelines, as well as to discuss, revise, and approve working group drafts.”<sup>[30]</sup> The USSC established a research program to assist in the development of the guidelines, including organizational sanctions, and the research staff collected detailed information on past sentencing and correctional practices and conducted empirical research. In addition, the research staff reviewed criminal justice research and advised the USSC about the application of scientific theory and knowledge to sentencing practices.<sup>[31]</sup>

Commission staff also visited a number of states and communities in which a variety of sentencing options other

than imprisonment were being used. The USSC studied the fine collection and community service programs of a number of state probation departments. Moreover, “[i]n its efforts to establish reasonable and collectable fines and to determine an offender’s likelihood and ability to pay fines, Commission staff met with officials of several banking and financial institutions.”

## 1986 Release of the Preliminary Draft

On October 1, 1986, the USSC published in the *Federal Register* the “Preliminary Draft of the Sentencing Guidelines.”<sup>[32]</sup> In the draft, which contained guidelines for the sentencing of individual defendants, the USSC specifically requested “comment on the appropriate sentencing of organizational offenders.” The USSC identified for public comment “key questions it has yet to resolve in this area.” The first was the “appropriate role of fines as organizational sanctions.” The USSC noted the competing concerns raised by two of the statutory purposes of sentencing: just punishment and deterrence.<sup>[33]</sup> Just punishment concerns might compel imposition of a fine based on a percentage of the organization’s wealth or income, thereby possibly leading to different fine amounts for organizations of differing sizes and income who committed similar offenses. By contrast, deterrence concerns might result in a fine being calculated based upon the injury resulting from the criminal offense and the difficulty in discovering the crime. The USSC sought public comments on “whether its approach to fines should emphasize the organization’s culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection.”<sup>[34]</sup> The USSC also asked for the public to comment on how the “size of an organization” should be considered in sentencing.<sup>[35]</sup>

The second key question raised in the USSC’s early deliberations about organizational sanctions related to the proper use of a term of probation as part of an organizational sentence. The USSC sought public input on the circumstances justifying the use of a term of probation in lieu of a fine and those justifying imposition of both types of sanctions. The USSC also identified the mandatory and discretionary conditions of probation authorized by statute,<sup>[36]</sup> and it sought comment about the types of probation conditions that might be imposed on an organization and the circumstances justifying their imposition. The early list of possible conditions of probation did not specifically include development of a compliance program; rather, the identified conditions included “the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization’s misdeeds and subsequent corrective action.”<sup>[37]</sup>

The preliminary draft then laid out two possible approaches to the development of organizational sanctions based on the just punishment and deterrence philosophies. The just punishment approach emphasized an organization’s culpability and its ability to pay a fine,<sup>[38]</sup> while the deterrence approach focused on the harmfulness of an organization’s conduct and the likelihood of detection of the crime. Although neither approach specifically identified the existence of a compliance program as a possible mitigating factor to be considered in fashioning punishment, each seemed to recognize that steps taken by an organization in response to a criminal offense might lead to mitigation of punishment. For example, the just punishment approach provided that adjustments to the established offense value could be made if “the organization took steps to discipline responsible employees prior to indictment.”<sup>[39]</sup> The deterrence approach also permitted for the lowering of any applicable fine if “the organization notified authorities immediately upon learning of the crime,” and if “the responsible employees had been identified and punished.”<sup>[40]</sup>

The complexity of the subject matter and tight deadlines imposed by the Act<sup>[41]</sup> led the USSC to decide “in 1986 to defer the drafting of organizational guidelines for offenses...until after it had developed and implemented the

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first iteration of guidelines for individual defendants.”<sup>[42]</sup> Although the public discussion of organizational sanctions ceased until 1988, the USSC continued to work behind the scenes on the issue, by “conduct[ing] empirical research and analysis on organizational sentencing practices.”<sup>[43]</sup>

### **III. The Commission’s Renewed Focus on Organizational Sentencing Policy**

On April 13, 1987, the Commission submitted the initial sentencing guidelines and policy statements for individual defendants to Congress.<sup>[44]</sup> In early 1988, the USSC once again turned its attention to corporate sanctions. The USSC “generally agreed that the staff should collect data and report on areas of difficulty,” and that those reports “should include public comment, actual cases, and background law.”<sup>[45]</sup> The USSC directed the staff not to present revised guideline proposals “until an adequate amount of information has been collected,”<sup>[46]</sup> and in the following months, the USSC decided to devote additional time to the consideration of the theories and principles underlying a staff draft proposal. The USSC ultimately decided to release the proposals regarding organizational sanctions to the public and to set hearings on the proposals. Thereafter, Commission staff continued developing a staff working paper on sentencing policy for organizations, a report on current organizational sentencing practices, and a simplified proposal for organizational guidelines. In addition, one commissioner was working to develop an alternative proposal for probation, with the assistance of a law professor with an expertise in corporate governance.<sup>[47]</sup>

#### **Public Release of Discussion Materials on Organizational Sanctions**

The USSC continued its consideration of an internal working draft of guidelines for organizational defendants in the summer of 1988.<sup>[48]</sup> The USSC also debated “the appropriate length of the guidelines for organizational defendants.”<sup>[49]</sup>

In July 1988, the USSC publicly released the *Discussion Materials on Organizational Sanctions* “to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes.”<sup>[50]</sup> The Commission explained that it had not yet had a detailed discussion of any particular approach to the sentencing of organizations, including those suggested by the materials, nor had it arrived at any agreement upon a particular approach. Rather, the USSC intended to “provide a vehicle for stimulating the broadest possible range of public input” with the release of these materials.<sup>[51]</sup> The USSC noted that its work had “benefitted greatly from extensive public comment” up to that point, and it looked forward “to a continuation of that tradition” as the USSC moved ahead with its deliberations “on the important subject of organizational sanctions.”<sup>[52]</sup> The discussion materials included a discussion draft of sentencing guidelines and policy statements for organizations, a draft proposal on standards for organizational probation, a preliminary report to the USSC on sentencing of organizations in the federal courts from 1984 to 1987, and a Commission staff working paper on criminal sentencing policy for organizations.

#### **Approaches to Organizational Sentences Set Forth in the *Discussion Materials on Organizational Sanctions***

The discussion draft of sentencing guidelines and policy statements for organizations computed applicable fines based upon the “offense loss” (or total harm) caused by the offense multiplied by the “offense multiple,” which was intended to approximate the “difficulty of detecting and punishing the offender.”<sup>[53]</sup> Although this approach did not identify the existence of a compliance program as a mitigating factor to reduce the monetary sanction, the “reasonable, good faith efforts by the organization’s management to prevent an occurrence of the type of

offense involved” was an offense characteristic that would decrease the “offense multiple.”<sup>[54]</sup>

Unlike the Preliminary Draft of the Sentencing Guidelines released in 1986, the discussion draft included a compliance plan as a condition of probation. Development of a compliance plan was a required condition of probation for certain felony offenses if “the senior management of the organization participated in or encouraged the offense[s],” and “the organization or its senior management [had] a criminal history of one or more felony convictions of the same or similar type,” and “the organization [was] unlikely to avoid a recurrence of the criminal behavior despite the imposition of a fine.”<sup>[55]</sup> In such an instance, the organization would be required “to develop and submit for approval by the court a plan for avoiding a recurrence of the type of felony offense or offenses of which it was convicted in the instant case or appearing in the criminal history of the organization or its senior management.”<sup>[56]</sup> Thus, to a limited extent, this discussion draft recognized compliance programs as a possible measure to prevent additional criminal misconduct by organizations. However, the draft also suggested that such preventive probation “must be approached with caution” and that the court should determine that “the preventive benefits of the sentence outweigh the obvious costs of judicial oversight of private business operations.”<sup>[57]</sup>

The draft proposal on standards for organizational probation suggested that probation should be used “to minimize the prospect of a repetition of the same or similar criminal behavior.”<sup>[58]</sup> In advocating for this role for probation, the drafters recognized that the organization, rather than the court, would be better positioned to identify the necessary internal controls to prevent criminal behavior. They explained that:

The central aim of these guidelines is to improve the corporation’s own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed.<sup>[59]</sup>

This draft proposal authorized imposition of a term of probation in several instances, including where the “management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely.”<sup>[60]</sup> If probation was imposed under such circumstances, this approach also provided that, as a special condition of probation, the court could order the organization to develop a compliance plan. That plan might require:

- “[T]he conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;
- “[T]he appointment of independent counsel or the use, if available, of a special committee of independent directors;
- “[T]he hiring and use of special consultants;
- “[T]he adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;
- “[T]he designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offense[s];

- “[T]he revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including the board of directors.”<sup>[61]</sup>

This draft proposal also required that any proposed compliance plan identify “the names of the organizational officers responsible for its preparation and describe the investigation and other procedures employed in its development.”<sup>[62]</sup> The plan should also “be signed by the chief executive, the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate [its terms] to all organizational members whose conduct is affected thereby.”<sup>[63]</sup> Finally, the plan should be presented to the board of directors.<sup>[64]</sup>

The Commission’s staff working paper on criminal sentencing policy for organizations recognized that internal organizational controls on employee behavior are crucial because of the unique nature of the organizational crime (which involves a principal-agent relationship).<sup>[65]</sup> Thus, the paper maintained that the penalty system needed to “provide organizations with incentives for compliance expenditures.”<sup>[66]</sup> Accordingly, the paper put forward the premise that “[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts.”<sup>[67]</sup>

## 1988 Public Hearings on Organizational Sanctions

Following the public release of the *Discussion Materials*, the USSC conducted two public hearings. The first was held on October 11, 1988, in New York City.<sup>[68]</sup> At the hearing, the USSC announced that it was in “the very preliminary stages of debating, working out, and discussing the appropriate approach to organizational sanctions, and that [it] intend[ed] to follow the same process . . . [as] in the past and that is to receive as much public input as is possible on each issue [it] must resolve before [it] promulgate[s] the guideline for organizations and submit them to Congress.”<sup>[69]</sup> The witnesses at the hearing included representatives from the president’s Council of Economic Advisers, staff from the Securities and Exchange Commission, academics, and others.<sup>[70]</sup>

During this hearing, an underlying theme developed through the witnesses’ testimony: the importance of internal corporate monitoring as a means of deterring organizational crime. One witness opined that “there is a strong argument for prosecuting a corporation because the organization can best monitor its own agents than can the state, at lower cost.”<sup>[71]</sup> Others agreed that internal corporate monitoring could be an effective means to prevent criminal behavior by employees.<sup>[72]</sup> Yet another agreed that internal controls were important because “deterrence in a corporate environment comes more from making the environment at the top one that calls out for law enforcement rather than, as in some corporations recently, creating an atmosphere where low-level employees feel that it would be welcome by its higher-ups to cheat or bribe or get extra percentage points by kiting money, things of that sort.”<sup>[73]</sup>

The USSC continued the public discussion about the development of guidelines for sentencing organizations with another public hearing in Pasadena, California, on December 2, 1988.<sup>[74]</sup> The witnesses at this hearing represented a broad spectrum of stakeholders interested in organizational sentencing policy, including federal and state agencies, probation officers, academics, the corporate sector, and special interest groups.<sup>[75]</sup>

Compliance programs in the context of probation continued to be a topic of discussion at this hearing.<sup>[76]</sup> For the most part, the witnesses favored involving the organization in the development of a compliance plan. At least

one expressed doubts, however, about the utility of such involvement: “[o]ne of the central aims of the guidelines is to encourage voluntary compliance; and you indicate it is anticipated that the corporation will normally take a leading role in proposing the conditions and internal controls that should be imposed. In my opinion, this is an overly optimistic view.”<sup>[77]</sup>

This hearing marked the first public discussion of compliance programs as a factor that should be considered in mitigation of punishment. One witness suggested that in considering sentences “there should be taken into account the extent to which a corporation through its internal governance processes has taken on the responsibility at the highest level to forestall criminal activity.”<sup>[78]</sup> This witness also talked about creating “a value system within the corporation that says...it is more important to stop criminal activity than it is to maximize profits.”<sup>[79]</sup> The commissioners’ comments and follow-up questions in response to this testimony indicated considerable interest in these ideas.<sup>[80]</sup> Another witness agreed that there should be a difference in the sanction for a corporation that instituted a compliance program with internal audits and internal accounting procedures that were state of the art, conducted surprise audits and inspections to ensure that the procedures were followed, and had no reason to believe that they were not, compared to the sanction for a corporation that did none of those things.<sup>[81]</sup> This witness also thought that penalties should distinguish between a situation where an employee covered his criminal activity to avoid discipline versus one where the employee acted pursuant to company policy and practice.<sup>[82]</sup>

Another witness agreed with the notion that having instituted a compliance program should be recognized in the sentencing process, and he testified that such recognition would provide an incentive for organizations to adopt compliance programs.<sup>[83]</sup> This witness’s written statement went even further, providing a framework for analyzing the key objectives and elements of a compliance program (factors that would render such a program *effective* and thus, in his view, worthy of mitigation credit). He laid out four program objectives: (1) regular, timely, and uniform reporting from the operating line through senior management to the board of directors; (2) prompt identification and resolution of environmental issues; (3) establishment of preventive programs and procedures; and (4) identification of developing issues or trends.<sup>[84]</sup>

## Public Comment and Working Group Materials

The Commission continued to receive public comment on the issue of compliance programs in the months following publication of the *Discussion Materials*. One of the witnesses from the December 2, 1988, public hearing submitted two proposals for incorporating “affirmative governance” factors into the guidelines:

[The first] would entitle a convicted corporation to a one-level reduction in the applicable fine range for having had an affirmative governance program and internal controls in place at the time of the criminal conduct at issue. The second proposal would permit the court to impose strict conditions of probation on a corporation whose criminal conduct was found to have been encouraged or facilitated by the lack of a compliance program and internal controls.<sup>[85]</sup>

Additional public comment agreed with the idea that corporate compliance efforts should operate to mitigate punishment.<sup>[86]</sup> At least one commentator contended that “[s]ubstantial mitigation should be provided for a corporation that has a meaningful compliance program.”<sup>[87]</sup> Others suggested that probation should be readily available as a sentencing option in cases where “a corporate culture...encourages the maximization of profits through the payment of bonuses without establishing legally acceptable guidelines for obtaining such



profits,”<sup>[88]</sup> and that such probation should include a requirement to institute a system of “management controls” designed to promote high standards.<sup>[89]</sup>

Late in 1988, the USSC formed a working group of private defense attorneys “to develop for the Commission’s consideration a set of practical principles for sentencing organizations.”<sup>[90]</sup> This attorney working group met biweekly and attended commission meetings and briefings.<sup>[91]</sup> In May of 1989, the attorney working group “submitted to the Commission its ‘*Recommendations Regarding Criminal Penalties for Organizations.*’”<sup>[92]</sup> The working group asserted that “organizational sanctions should serve dual purposes”: “to punish for violations of societal norms” and to “serve a deterrence purpose...[by] provid[ing] incentives for organizations to take optimal steps to prevent crimes.”<sup>[93]</sup> As a result, the working group identified a number of factors that should ameliorate the criminal fine amount, including “if an organization maintained and enforced effective policies and practices reasonably designed to prevent crimes and if the illegal conduct was unknown (and reasonably unknown) by high-level management.”<sup>[94]</sup>

## The 1989 Draft of Proposed Organizational Guidelines

The USSC’s work on organizational sanctions continued throughout 1989. The USSC received several briefings from the DOJ<sup>[95]</sup> and its internal staff working group.<sup>[96]</sup> Informed by these briefings, public comment, and its empirical research, the USSC continued to debate the underlying principles while generating another draft of proposed guidelines for organizations.<sup>[97]</sup> In October, the USSC unanimously agreed to “distribute the revised organizational sanctions draft to judges and other interested parties” and to publish the draft in the *Federal Register* with a minimum of sixty days for public comment.<sup>[98]</sup>

On November 8, 1989, the USSC published the proposed guidelines, policy statements, and accompanying commentary and requested public comment “on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”<sup>[99]</sup> The *Federal Register* notice indicated that the USSC was considering the submission of these amendments to Congress on or before May 1, 1990, and explained that the proposal was “the culmination of an extended period of analysis, consultation, and public comment.”<sup>[100]</sup> The proposed guidelines were “presented as a new chapter to the *United States Sentencing Commission Guidelines Manual: Chapter Eight—Sentencing of Organizations*” and included two options for the guideline section that would determine the guideline fine range for most organizational defendants (USSG §8C2.1).<sup>[101]</sup>

“Option I would base the guideline fine range on the greater of loss, gain, or an amount specified based upon the applicable offense level, with percentage adjustments based upon applicable aggravating or mitigating factors.”<sup>[102]</sup> Option I also provided for specified fine reductions for compliance efforts under one of the following two circumstances: “If the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense,” then the sentencing judge was directed to “subtract 20%” of the previously determined fine amount.” Alternatively, the proposed guideline required the judge to subtract 10% “[i]f the organization has taken substantial steps to prevent a recurrence of similar offenses, such as, implementing appropriate monitoring procedures or disciplining any officer, director, employee, or agent of the organization responsible for the offense.”<sup>[103]</sup> Option I did not include any commentary defining the types of policies or procedures that would qualify for these reductions.

Option II proposed that the guideline fine range be based “entirely upon the applicable offense level, with

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offense level adjustments based upon applicable aggravating or mitigating factors.”<sup>[104]</sup> Option II provided for fine reductions based upon the same two compliance effort criteria set out for Option I, with the judge directed to “subtract 1 level” in either event.<sup>[105]</sup> Option II also did not include any commentary defining the types of policies or procedures that would qualify for these reductions. The USSC noted that “the two options may result in substantially different fine levels” and encouraged commentators “to evaluate and comment upon these two options or to suggest an alternative.”<sup>[106]</sup>

Similar to provisions in the earlier discussion materials, the “1989 Draft of Proposed Organizational Guidelines” also mentioned compliance programs in the context of conditions of probation. One proposed guideline required a sentence of probation if the offense occurred after “the organization or a member of its high-level management had a criminal conviction within the previous five years for [similar mis]conduct” or “the offense indicated a significant problem with the organization’s policies or procedures for preventing crimes.”<sup>[107]</sup> The proposed guideline also stated that problems with the organization’s policies and procedures might be evidenced by “(A) high-level management involvement in, or encouragement or countenance of, the offense; (B) inadequate internal accounting or monitoring controls; or (C) a sustained or pervasive pattern of criminal behavior.”<sup>[108]</sup>

If the court decided to impose a term of probation under such circumstances, then the proposed guideline recommended that the court impose special conditions requiring the organization to “develop and submit for approval by the court a compliance plan for avoiding a recurrence of the criminal behavior for which it was convicted,”<sup>[109]</sup> and upon approval of such compliance plan, to “notify its employees and shareholders of the criminal behavior and the compliance plan.”<sup>[110]</sup> The proposed guideline authorized the court to “employ appropriate experts to assess the efficacy of a submitted plan, if necessary,” and required approval of “any plan that appears reasonably calculated to avoid recurrence of the criminal behavior.”<sup>[111]</sup> The proposed guideline further provided that “[t]he organization shall not be required to adopt any compliance measure unless such measure is reasonably necessary to avoid a recurrence of the type of criminal behavior involved in the offense.”<sup>[112]</sup> This proposed guideline did not include any commentary identifying the elements of an effective compliance program.

## **February 14, 1990, Public Hearing**

The USSC continued to seek public input to inform the development of the organizational sentencing guidelines. On February 14, 1990, the USSC conducted a public hearing on “the proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”<sup>[113]</sup> Seventeen witnesses, with a diversity of backgrounds and interests, testified before the Commission about organizational sentencing policy.<sup>[114]</sup> Among the special interest groups represented were the National Association of Manufacturers, the American Corporate Counsel Association, the U.S. Chamber of Commerce, and the American Bar Association. Representatives from several federal agencies, academics, and the general counsels of various private businesses also appeared. The chair of the Commission’s attorney working group presented testimony on behalf of the working group.

The testimony covered many topics, including compliance programs. Many witnesses urged the USSC to postpone issuing organizational guidelines, and instead issue nonbinding policy statements.<sup>[115]</sup> At least one described probation as a “death sentence” for small to medium organizations.<sup>[116]</sup> Nevertheless, even witnesses opposing the issuance of organizational guidelines expressed the opinion that organizational sanctions should account for corporate compliance programs by providing for a substantial decrease in the fine amount imposed

on an organization with an effective compliance program.<sup>[117]</sup> One witness thought that by striking the proper balance in the guidelines to account for such programs, the USSC could incentivize corporations to develop meaningful compliance programs.<sup>[118]</sup> He reasoned that “corporations themselves are probably better equipped to deal with wrongdoing if in fact they have the proper incentives to do so.”<sup>[119]</sup> The testimony also touched on various elements that should be included in a successful compliance program, such as the audit function, an ombudsman or other program to protect employees who report corporation wrongdoing, support of upper management,<sup>[120]</sup> and managers to monitor and execute the program.<sup>[121]</sup>

Immediately following the February 14, 1990, public hearing, the USSC conducted a business meeting and discussed the organizational guidelines.<sup>[122]</sup> Members of the attorney working group were present and expressed their views and concerns about organizational sanctions. “The Commission questioned the working group on how to structure the guidelines to provide incentives for corporations to cooperate.”<sup>[123]</sup> After hearing the group’s views, the chair of the USSC announced that the “first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality,” and suggested that “the Commission investigate the possibility of beginning with a presumptively high fine range and work downward to zero for a ‘good citizen’ corporation.”<sup>[124]</sup> The USSC then came to the consensus that “staff should develop draft guidelines to reflect self-policing through economic incentives as a possible alternative to the current options.”<sup>[125]</sup>

## **Unforeseen Delay in Implementation of Organizational Guidelines**

Throughout the 1989–1990 amendment cycle, the USSC had publicly indicated that it would likely deliver the organizational guidelines, policy statements, and accompanying commentary to Congress by May 1, 1990,<sup>[126]</sup> and it diligently worked toward that deadline.<sup>[127]</sup> Ultimately, however, a series of unrelated events transpired to derail the planned delivery of the organizational guidelines.

First, two of the seven original commissioners resigned before the end of their terms.<sup>[128]</sup> Additionally, the four-year term of a third expired in October of 1989.<sup>[129]</sup> Consequently, as of November 1989, the USSC had only four voting members remaining and, by statute, all four had to vote in favor of any guidelines submitted to Congress.<sup>[130]</sup> Nevertheless, the USSC continued to work on the organizational guidelines, as evidenced by release of the draft guidelines in November 1989 and the public hearing held in February 1990.

Shortly after the February public hearing, representatives of the Business Roundtable publicly urged the USSC to “take more time to consider the draft guidelines because of the potential impact on the corporate sector” and to adopt policy statements instead of binding guidelines.<sup>[131]</sup> In addition to these public statements to the USSC, members of the Business Roundtable were allegedly exerting pressure behind the scenes to delay implementation of the organizational guidelines.<sup>[132]</sup>

The Commission met on April 10, 1990, to vote on new amendments to the Guidelines Manual, including the potential inclusion of organizational guidelines. No new commissioners had been confirmed by the Senate at that point, leaving only four commissioners to promulgate the organizational guidelines if the May 1, 1990, delivery to Congress was to be met. At the April 10 meeting, one of the four voting commissioners, Judge George E. MacKinnon, announced that he would “not vote to adopt organizational sanction guidelines during this amendment cycle.”<sup>[133]</sup> Judge MacKinnon explained this decision as follows:

The issuance of Organizational Sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for

every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies on our seven member Commission. I expressed this concern some weeks ago to representatives of the [DOJ] and had hoped that the vacancies would be filled by now. However, this has not occurred.

Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during this current amendment cycle.<sup>[134]</sup>

After the May 1 deadline passed, the Subcommittee on Criminal Justice of the Judiciary Committee of the House of Representatives conducted an oversight hearing regarding guidelines for organizations. At the hearing, several congressmen made statements evidencing their support for promulgation of organizational guidelines. For example, the chairman of the subcommittee conducting the hearing stated that “[t]he evidence of corporate fraud and abuse that continues to [mount] in the S&L industry most notably in the last several months, makes the establishment of new sentencing guidelines imperative.”<sup>[135]</sup> Another congressman echoed these concerns, noting that when the “Sentencing Reform Act was passed a number of years ago, the intent of Congress was to send a message that corporate criminality would be attacked more vigorously than it ever [w]as before”; however, events that had transpired in the preceding months, including the USSC’s decision not to promulgate organizational guidelines, “[raise] the appearance of the [DOJ] caving in to the big business demands at the expense of Congress’ clear mandate to issue guidelines that bring corporate criminals to justice.”<sup>[136]</sup>

Judge William W. Wilkins, Jr., a judge on Fourth Circuit Court of Appeals and then chairman of the USSC, testified on behalf of the Commission at the hearing. He reported that the President had nominated three individuals to fill the vacancies on the USSC.<sup>[137]</sup> He briefed the subcommittee on the work that the USSC had already undertaken to develop the organizational guidelines.<sup>[138]</sup> He also reported that there was “general agreement among the four Commissioners who have been debating and working on this area on many of the issues that have to be resolved.”<sup>[139]</sup> According to his testimony, the issues upon which there was agreement included that the individual actors responsible for the criminal act should be prosecuted and sentenced along with the organization, that criminal purpose organizations should forfeit all of their assets, that the guidelines should require full restitution to any victim of organizational crime, and that any sanction on organizations should include complete disgorgement of any illegal gain.<sup>[140]</sup> Judge Wilkins noted, however, that “there are other important issues yet to be resolved.”<sup>[141]</sup> One example of such an issue was whether “a distinction [should] be made between a corporation that had a strong and meaningful compliance program prior to an employee committing a crime in the name of the corporation...and a corporation that has no such compliance program.”<sup>[142]</sup> Judge Wilkins concluded his remarks by assuring the subcommittee members that he was confident that the Commission would promulgate organizational guidelines and that those guidelines “[would] fairly and adequately and appropriately punish organizations which violate our Federal law.”<sup>[143]</sup>

During the question and answer period following Judge Wilkins’ testimony, two commissioners (Judge Wilkins and Judge MacKinnon) discussed concerns about public acceptance of the organizational guidelines.<sup>[144]</sup> Judge MacKinnon explained that the USSC’s consideration of corporate guidelines has been “vigorously, if not viscously (sic), opposed by the corporations at practically every meeting we had.”<sup>[145]</sup> In light of that opposition, it was his view that guidelines passed “by a minimal Commission that was 57 percent at strength” would be subject to attack.<sup>[146]</sup> Judge MacKinnon assured the congressmen that it was this concern, and not any external pressure brought to bear, that motivated his decision to abstain from a vote on the organizational guidelines

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until the new commissioners assumed office.<sup>[147]</sup>

Judge Wilkins also advised the subcommittee that the USSC had been moving in the direction of a vote on the organizational guidelines and had been engaged in ongoing discussions of the topic. He described the process involved in developing those guidelines:

[V]arious drafts were being prepared by staff. The Commission had met, for example, and talked about some issues we had learned from the recent public hearing and a draft had been put together, combining generally the thoughts of the four Commissioners that had been discussed at that session.

Other staff members with ideas were working with the staff director to develop various approaches. This thing is a fluid process. You write and draft. You study and you move and reject and move to a different [draft]. [S]o I don't know what the draft would have looked like, but we were moving forward with the documents that had been disseminated, as well as those that were being generated internally by the staff.<sup>[148]</sup>

Judge Wilkins assured the subcommittee members that the Commission would “not [defer] readying itself so that once the new Commissioners are on board it may efficiently renew deliberations...when we have our vacancies filled we will be in a position to move expeditiously.”<sup>[149]</sup>

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