An Overview of the

UNITED STATES SENTENCING COMMISSION AND THE FEDERAL SENTENCING GUIDELINES

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.

The U.S. Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. Unlike many special purpose "study" commissions within the executive branch, Congress established the U.S. Sentencing Commission as an ongoing, independent agency within the judicial branch. The seven voting members on the Commission are appointed by the President, confirmed by the Senate, and serve six-year terms. No more than three of the commissioners may be federal judges, and no more than four may belong to the same political party. The Attorney General is an *ex officio* member of the Commission, as is the Chairman of the U.S. Parole Commission.

The Commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.

A Brief History of Federal Sentencing Guidelines

Disparity in sentencing, certainty of punishment, and crime control have long been issues of interest for Congress, the criminal justice community, and the public. Before guidelines were developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense. After more than a decade of research and debate, Congress decided that: (1) the previously unfettered sentencing discretion accorded federal trial judges needed to be structured; (2) the administration of punishment needed to be more certain; and (3) specific offenders (*e.g.*, white collar and violent, repeat offenders) needed to be targeted for more serious penalties. Consequently, Congress created a permanent commission charged with formulating national sentencing guidelines to define the parameters for federal trial judges to follow in their sentencing decisions.

The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary.

Innovations under the Guidelines System

- Structured judicial discretion
- Appellate review of sentences
- Reasons for sentence stated on the record
- Determinate or "real time" sentencing
- Abolition of parole

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AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES

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Organizations, like individuals, can be found guilty of criminal conduct, and the measure of their punishment for felonies and Class A misdemeanors is governed by Chapter Eight of the sentencing guidelines. While organizations cannot be imprisoned, they can be fined, sentenced to probation for up to five years, ordered to make restitution and issue public notices of conviction and apology to their victim, and exposed to applicable forfeiture statutes. Data collected by the Sentencing Commission reflect that organizations are sentenced for a wide range of crimes. The most commonly occurring offenses (in order of decreasing frequency) are fraud, environmental pollution, money laundering, antitrust, and food and drug violations.

The organizational sentencing guidelines, which apply to all organizations whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pension funds, trusts, non-profit entities, and governmental units, became effective November 1, 1991, after several years of public hearings and analysis. These guidelines were designed to further two key purposes of sentencing: "just punishment" and "deterrence." Under the "just punishment" model, the punishment corresponds to the degree of blameworthiness of the offender, while under the "deterrence" model, incentives are offered for organizations to detect and prevent criminal conduct within their ranks.

Organizational Culpability

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions. Consequently, when the Commission promulgated the organizational guidelines, it attempted to alleviate the harshest aspects of institutional vulnerability to which organizations are subjected under these principles of vicarious liability by incorporating into the sentencing structure an opportunity for the mitigation of punishment.

The culpability of an organization is generally determined by six factors that the sentencing court must consider: The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization in terms of prior violations, including civil and administrative dispositions; (iii) the violation of an earlier court order during the occurrence of the offense which is being prosecuted; and (iv) the obstruction of justice. The two factors that mitigate the punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) the combination of the organization's efforts in self-reporting, cooperating with the authorities, or accepting responsibility.

The potential fine range for a criminal conviction can be significantly reduced—in some cases up to 95 percent—if an organization can demonstrate that it had put in place an effective compliance and ethics program and that the criminal violation represented an aberration within an otherwise law-abiding community. This mitigating credit under the guidelines is contingent upon prompt reporting to the authorities and the non-involvement of high level personnel in the actual offense conduct. Conversely, the absence of an effective compliance and ethics program may be a reason for a court to place an organization on probation, and the implementation of such a program under court supervision may be a condition of a probationary term of up to five years under the organizational sentencing guidelines.

"Effective Compliance and Ethics Program"

The organizational sentencing guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may police its own conduct through an effective ethics and compliance program. The prevention and detection of criminal conduct should assist organizations in encouraging ethical conduct and full compliance with all applicable laws.

The Commission revised and strengthened the criteria for an effective compliance and ethics program in 2004 in order to synchronize the guidelines with "best practices" as reflected by over a decade of guideline application within organizations, the Sarbanes-Oxley Act of 2002, and other relevant regulatory and administrative initiatives.

In 2004, the Commission elevated the criteria for an effective compliance and ethics program into a separate new guideline at §8B2.1 in order to emphasize the importance of such programs. It also elaborated upon these criteria, introducing additional rigor generally and imposing significantly greater responsibilities upon an organization's governing authority (*e.g.*, Board of Directors) and executive leadership.

In order to have an effective program as defined by the guidelines, an organization must demonstrate that it exercised due diligence in fulfilling the requirements and also promoted in other ways "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."

The requirements for a effective program as defined by the guidelines are functional ones: it does not matter whether a program is called a compliance or ethics program or some other designation appropriate to the organization, as long as the organization can demonstrate that it incorporated and fulfilled the following requirements within its operational structure.

- Standards and procedures to prevent and detect criminal conduct
- Responsibility at all levels and adequate resources, and authority for the program
- Personnel screening related to program goals
- Training at all levels
- Auditing, monitoring, and evaluating program effectiveness
- Non-retaliatory internal reporting systems
- Incentives and discipline to promote compliance
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation

The Commission also made explicit in its 2004 amendments that the implementation and successful maintenance of an effective compliance and ethics program requires that organizations periodically assess the risk of criminal conduct. In addition, it provided guidance on the implementation of these requirements as well as suggested ways in which they may be adapted to the constraints of small organizations.

The organizational guidelines' criteria embody broad principles that, taken together, describe a corporate "good citizenship" model, and, as amended in 2004, offer considerably more guidance for their implementation. Flexibility and independence by organizations in designing programs that are best suited to their particular circumstances is encouraged.**O**