

**THE FEDERAL SENTENCING GUIDELINES  
FOR ORGANIZATIONAL CRIMES:  
QUESTIONS AND ANSWERS**

## I. Background Statistical Information

**Q:** *How many organizations are sentenced in the federal courts yearly?*

**A:** Commission research shows the following number of organizational sentencing events:

1989.....273  
 1988.....328  
 1987.....257  
 1986.....290  
 1985.....286  
 1984.....307

**Q:** *Among all organizations sentenced, what is the breakdown between closely-held and publicly-traded organizations convicted of federal offenses?*

**A:** According to Commission research, the following table reflects the ownership structure of convicted organizations:

	1988		1989	
	Frequency:	Percent:	Frequency:	Percent:
Closely-held Organization	304	92.7%	241	88.2%
Publicly-Traded Organization	19	5.8%	30	11.0%
Non-profit Institution	2	0.6%	1	0.4%
Public/Municipal Organization	0	0.0%	1	0.4%
Unknown	3	0.9%	0	0.0%

**Q:** *What types of offenses do organizations most commonly commit?*

**A:** Fraud and antitrust offenses are the most common offenses committed by organizations, according to the Commission's studies of past sentencing practices for organizational defendants.

	1988		1989	
	Frequency:	Percent:	Frequency:	Percent:
Fraud Offenses	106	32.3%	82	30.0%
Antitrust Offenses	98	29.9%	58	21.2%
Taxation Offenses	14	4.3%	26	9.5%
Property Offenses	12	3.6%	12	4.4%
Environmental Offenses	28	8.5%	28	10.3%
Other	70	21.3%	67	24.5%

**Q:** *How pervasive is management involvement in offenses committed by organizations?*

**A:** Based on the Commission's research, owners or top level executives are frequently involved in organizational crime.

	1988		1989	
	Frequency:	Percent:	Frequency:	Percent:
No managerial involvement identified	13	4.0%	5	1.8%
Owner of Organization	169	51.5%	141	51.6%
Top Executive	30	9.1%	44	16.1%
Manager	14	4.3%	19	7.0%
Employee	5	1.5%	3	1.1%
Unknown	97	29.6%	61	22.3%

**Q:** *Judged by the individual guidelines' offense seriousness scale (running from level 0 to level 43), how serious are offenses committed by organizations?*

**A:** Based on the Commission's study of past sentencing practices, organizational offenses range from an offense level 4 (trespassing on government property offense) to an offense level 42 (unlawful manufacture of illicit drugs). However, the typical case is a fraud at offense levels 12-14 that involves a loss of approximately \$30,000.

**Q:** *What proportion of offenses will be covered by the fine provisions in this set of organizational guidelines?*

**A:** The fine calculation sections of these guidelines do not cover environmental or food and drug offenses; the restitution and probation provisions do. Based on past prosecution practices, the fine provisions in these guidelines will apply to approximately 81 percent of all organizations convicted of federal offenses.

**Q:** *What types of criminal fines have been imposed in the past for organizational defendants?*

**A:** Describing past practice fine amounts with one figure is difficult. Statistically, the average fine is greatly affected by *extreme* values -- several organizations received multi-million dollar fines and, conversely, many organizations received no fine. Keeping that in mind, Commission research has found the following:

	1988	1989
Average Fine Amount	\$147,310	\$175,971
Median Fine Amount	\$17,500	\$30,000
Modal Fine Amount	\$10,000	\$0
Range of Fine Amounts	\$0 → \$6,850,000	\$0 → \$5,500,000

## II. The Theory of the Organizational Guidelines

**Q:** *The Commission has indicated that the new organizational guidelines are designed to have a "crime control" effect. How so?*

**A:** The organizational guidelines call for stringent fines in serious cases -- with few exceptions, as high or higher than the highest fines historically imposed. On the other hand, the guidelines provide for incrementally lower fines when an organization reports an offense to authorities, fully cooperates in the investigation, identifies and disciplines all culpable agents and employees, and takes vigorous steps to reduce the likelihood that an offense will be committed. Thus, the guidelines create clear "carrot and stick" incentives that should discourage criminal conduct in the first instance, and, when it has already occurred, increase the likelihood that the individuals responsible will be identified and appropriately punished. For these reasons, the Commission expects the new organizational guidelines to have significant crime-controlling effects with respect to federal crimes.

### **III. The Development of Organizational Guidelines**

**Q:** *Does the Commission have an adequate empirical foundation for issuing organizational guidelines?*

**A:** Yes. Over the last several years, the Commission has conducted a study of federal organizational sentencing that is unprecedented in the history of the American criminal justice system. Virtually every case sentenced from 1984 through late 1990 has been studied. Particular focus has been given to organizations sentenced in the last three years to assure that recent trends or changes in the law are considered. Nearly one hundred factual variables that can occur in federal organizational crimes (e.g., the level of employee involvement, the loss from the offense, the gain, whether the organization had a compliance program, whether the organization had a prior criminal record, whether the organization obstructed justice) have been coded for computer analysis and Commission review.

Using this information, the Commission has been able to understand how such factors affect sentencing. The compilation of this highly detailed data base has also permitted the Commission to simulate how its various guideline drafts would work in real cases. In short, the Commission's empirical research has been extensive and illuminating.

**Q:** *Are all of the Commission's decisions regarding the organizational guidelines data driven?*

**A:** No. The Commission has made a number of important decisions for purely policy-related reasons. For example, the Commission has learned that while courts have in the past viewed strong compliance programs as a mitigating factor, compliance programs on the whole have not played a prominent role in federal sentencing. Nevertheless, the Commission has determined that guideline incentives for compliance programs can encourage organizations to adopt such programs, and experts in enforcement have confirmed that this can reduce crime. Accordingly, the guidelines provide for a lower fine if an organization had a sound compliance program.

The Commission has also tailored the guidelines to meet a number of important statutory directives. One example is the offense level table (used to calculate the base fine when loss and gain do not apply). The starting point and foundation of the offense level table is a distillation and rationalization of the numerous statutory penalties Congress has enacted for federal crimes committed by organizations.

**Q:** *What other information sources has the Commission drawn on to shape the guidelines?*

**A:** In addition to drawing on its in-house expertise, the Commission has engaged in a program of public outreach and input dating back to 1986. The Commission has held five formal public hearings (and numerous other public meetings) on organizational guidelines, published four guideline drafts for public comment, and met regularly with interested members of government, the business community, academia and public interest groups. In addition, the Commission has received and reviewed hundreds of position papers, letters and memoranda on the issue.

#### **IV. How the Organizational Guidelines Work**

**Q:** *How does restitution factor into the guidelines? Does it affect the fine imposed?*

**A:** Mandatory restitution is a cornerstone of the total sanction under the organizational guidelines and must be ordered whenever it is reasonably possible to do so. Restitution and other remedial orders are treated by the guidelines not as punishment, but as a necessary additional sanction to make victims whole.

Under the guidelines, restitution has no bearing on the fine level called for in a given case, except for the very limited circumstance when an organization's ability to pay restitution would be impaired by a fine. In this limited instance, the fine may be lowered, but not beyond what is necessary to ensure that restitution will be paid.

**Q:** *How are fines determined under the organizational guidelines?*

**A:** In the unusual case when an organization has no lawful purpose (e.g., a front for a scheme to commit fraud or sell drugs), the guidelines require that the fine be set sufficiently high to divest the organization of its assets.

In all other cases, fines are based on two distinct analyses. The first analysis yields a "base fine" that is a measure of the seriousness of the offense involved. The second analysis yields a "culpability score" that is a measure of how culpable the organization was in committing and responding to the occurrence of the offense. Together, these two determinations yield a "guideline fine range" from which the court has discretion to select the precise fine amount to be imposed.

**Q:** *How does the base fine reflect the seriousness of the offense?*

**A:** Under the guidelines, the base fine for an offense will generally be the highest of three measures of offense seriousness: the loss caused by the offense, the gain to the organization from the offense, or an amount from a table corresponding to the applicable "offense level" (a generic offense seriousness measure already used in the individual guidelines). By analyzing past sentencing decisions, the Commission has determined that any of these three measures may, in a given case, best reflect the seriousness of the offense.

For a few offense types, the guidelines employ a "special rule" to measure offense seriousness (and therefore determine the base fine). For example, in money laundering cases, the base fine is tied to the amount of money laundered; in antitrust cases, it is a set percentage of the volume of commerce affected.

**Q:** *How is the culpability score determined?*

**A:** Generally speaking, the court determines the culpability score by making findings with respect to the following factual issues:

- the level and extent of involvement in the offense by managers or other employees with substantial authority;
- whether the organization had a prior history of similar misconduct;
- whether the organization violated a condition of probation or other judicial order in committing the offense;
- whether the organization had a meaningful program to prevent and detect crime; whether the organization self-reported the offense to authorities;
- whether the organization fully cooperated in the investigation of the offense; and
- whether the organization demonstrated clear acceptance of responsibility for the offense.

**Q:** *Will organizations be able to mitigate their fine merely by showing that they had a compliance program "on paper?"*

**A:** No. The Commission has specified in the guidelines criteria for what experts agree is a demanding and generally effective compliance program. Unless these criteria are met, an organization cannot qualify for the mitigation credit assigned to this factor. For example, an organization that did not vigorously seek to enforce its program through auditing and monitoring procedures, or that did not carefully design the program to anticipate the kinds of crimes likely to occur, would fail to meet the guidelines' test. In addition, the Commission has made a policy judgment that if high-level personnel are involved in an offense or if the organization learned of the offense and failed to report it to authorities, the organization cannot receive credit for this mitigating factor.

**Q:** *Do the guidelines ever permit monetary sanctions that would be less than the organization's profit from the offense?*

**A:** No. Even when the culpability score dictates that a fine be relatively low due to an organization's internal efforts to prevent an offense and bring it to the attention of authorities, the guidelines mandate that the total sanction will always be greater than the gain from the offense. This is to ensure that under no circumstances will an organization profit from crime.

**Q:** *Aside from the factual determinations required for the culpability score, are there any other factors that may affect the fine imposed?*

**A:** Yes. The Commission has identified in policy statements (non-binding recommendations to courts) other factors that the sentencing court should consider in choosing the precise fine within the fine range. In addition, with respect to some factors that occur infrequently in organizational crimes -- including some unusual factors that may have great importance (e.g., a threat to national security, bodily harm or risk of harm to individuals) -- the Commission has directed the courts through departure provisions to consider imposing a fine outside the fine range otherwise called for.

**Q:** *If the departure factors are important, why didn't the Commission include them within the guidelines themselves?*

**A:** The Commission opted to address some factors through departure provisions because research showed that the amount that a fine should be increased for these factors may bear no predictable relationship to either the base fine or the culpability score in a given case. For example, a fraud involving relatively low loss or gain could nevertheless have national security implications if it involved the failure to test a key

component of a radar system needed for defense. Because the Commission wanted to ensure that important factors such as these are not under-valued in a fine, the Commission has for the present left such factors to the flexible departure authority of courts. In future amendment cycles, as more is learned about how courts employ these factors, the Commission may reassess the desirability of addressing them in the guidelines directly. The Commission has found that this evolutionary approach has worked well in the development of the individual guidelines.

**Q:** *Under what circumstances would the guidelines call for an organization to be placed on probation?*

**A:** There are two general mandatory bases for organizational probation under the guidelines: 1) when it is needed to ensure that another sanction will be fully implemented, and 2) to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct. Examples of when probation would be ordered for the first ground include when probation would be necessary to assure that a fine that an organization was unable to pay at sentencing would ultimately be paid on an installment basis; or to assure payment of restitution in cases in which the statute permits restitution only as a condition of probation.

Specific findings that would require probation under the second ground are that the organization (other than a small organization) lacked a compliance program, or that the organization (or one of its high-level agents) had a record of prior similar misconduct within the previous five years.