

## NEW FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS TAKE EFFECT

On November 1, 1991, new federal guidelines for sentencing organizational defendants became law.<sup>1</sup> The federal sentencing guidelines provide standards for the imposition of remedial orders, fines, probation, and/or special assessments. As amended, the guidelines promise higher fines, less judicial discretion, more power for prosecutors, and a drastic change in the way corporations and other organizations respond to illegal conduct.

### I. BACKGROUND

Prior to 1984, federal judges had considerable discretion in sentencing defendants.<sup>2</sup> However, in 1984, Congress passed the Sentencing Reform

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1. United States Sentencing Commission, *Federal Sentencing Guidelines Manual* ch. 8, at 347 (1992) [hereinafter U.S.S.G.]. The sentencing guidelines define an organization as "a person other than an individual." *Id.* § 8A1.1, cmt. n.1. This definition of an organization is identical to that used in the Criminal Code. 18 U.S.C. § 18 (1988). See *infra* notes 17-18 and accompanying text.

2. Before 1984, Congress included a maximum fine and maximum term of imprisonment within each substantive provision that criminalized particular conduct. See, e.g., 18 U.S.C. § 1341 (1988) ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme . . . places in any post office . . . any matter or thing whatever to be sent or delivered . . . shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both."). See also S. REP. NO. 225, 98th Cong., 2d Sess. 39 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3222 ("[C]urrent Federal law contains no general sentencing provision. Instead, current law specifies the maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense.").

Absent general standards, judges lacked guidance in choosing an appropriate sentence within the statutory maximums. *Id.* at 3221 ("[Sentence] disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look.").

The sentencing judge's discretion generally was not subject to review by appellate courts. Only two special sentencing statutes provided for appellate review of sentences, unless the court imposed an illegal sentence. See S. REP. NO. 225, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3221 n.7. Defendants sentenced under 18 U.S.C. § 3575 (1982) (repealed 1986), which provided for a sentence of up to 25 years if the defendant was found to be a "dangerous special offender," were entitled to judicial review. Under 18 U.S.C. § 3576 (1982) (repealed 1986), either a defendant sentenced as a "dangerous special offender" under § 3575, or the United States could appeal the sentence to a court of appeals. *Id.* After reviewing the sentence, the sentencing procedure and the sentencing court's findings and rationale, the appellate court could then affirm the sentence, impose a different sentence, or remand for further sentencing proceedings. *Id.*

Constitutional review of sentences was also very limited. Although the Eighth Amendment of the Constitution prohibits cruel and unusual punishment, the Supreme Court has sharply divided on the

Act ("Sentencing Act")<sup>3</sup> as part of the Comprehensive Crime Control Act of 1984.<sup>4</sup> The Sentencing Reform Act established statutory standards for the imposition of sentences,<sup>5</sup> and provided general criteria to assist judges in choosing the best sentence.<sup>6</sup> In addition, Congress estab-

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extent to which an appellate court may review a sentence on constitutional grounds. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court held in a 5-4 decision that a life sentence without parole, imposed for a defendant's seventh non-violent felony conviction, violated the defendant's Eighth Amendment guarantee of proportionality. *Id.* at 303. The majority stated that the Eighth Amendment required a comparison between the gravity of the offense and the harshness of the penalty, as well as between the penalty imposed, penalties imposed on other criminals in the same jurisdiction, and penalties imposed for the same offense in different jurisdictions. *Id.* at 290-92. The dissent believed that the legislature should decide the severity of penalties, and that the Eighth Amendment only required review of the type of sentence rather than the length of sentence. *Id.* at 310, 313 (Burger, C.J., dissenting). However, even under the majority's analysis, appellate review was limited in scope. *See, e.g.*, FRANK MILLER ET AL., CRIMINAL JUSTICE ADMINISTRATION 1120 (1986) (sentencing review was seldom meaningful because appellate courts are so reluctant to override the trial court's discretion); *Mistretta v. United States*, 488 U.S. 361 (1989):

[The sentencing] court . . . usually did exercise, very broad discretion . . . This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal.

*Id.* at 363-64.

3. Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1987-2040 (1984) (codified as amended at 18 U.S.C. §§ 3551-3566, 3571-3586 (1988), and 28 U.S.C. §§ 991-998 (1988)).

4. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

5. For example, under the sentencing guidelines, for organizations found guilty of an offense a judge must impose either a fine, probation, or both. 18 U.S.C. § 3551(c) (1988). In addition, the judge may impose an order of criminal forfeiture, an order of notice of conviction to the victim, or an order of restitution. *See* 18 U.S.C. §§ 3554-3556 (1988). An order of restitution may require the defendant to return property, or its value, and pay for medical and related services. *See* 18 U.S.C. §§ 3663(b)(1), (b)(2) (1988). If the defendant is sentenced to probation, the restitution order is automatically a condition of the probation. *See* 18 U.S.C. § 3663(g) (1988).

6. Under the Sentencing Reform Act, a defendant shall be sentenced "so as to achieve the purposes set forth in . . . section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case." 18 U.S.C. § 3551(a) (1988). Section 3553(a) directs the court to consider seven factors when determining a sentence:

- 1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- 2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed education 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 . . . as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1) and that are in effect on the date the defendant is sentenced;
- 5) 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;
- 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.

lished the United States Sentencing Commission ("Commission"),<sup>7</sup> an independent agency of the judicial branch of the federal government charged with promulgating guidelines to assist judges in applying the statutory sentencing standards.<sup>8</sup> The Sentencing Reform Act mandates that a judge impose a sentence within the Commission's guidelines, or state why the sentence deviates from the range established by the guidelines.<sup>9</sup>

Initially, the Commission only promulgated guidelines for sentencing

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18 U.S.C. §§ 3553(a)(1)-(7) (1988).

Specific statutory criteria control the imposition of probation and of fines. There are three mandatory conditions of probation: (1) the defendant must not commit any federal, state, or local crimes during the term of probation; (2) the defendant must not possess any illegal controlled substance; and (3) if the offense is a felony, the defendant must pay either a fine, make restitution, or perform community service, unless such a condition would be plainly unreasonable. 18 U.S.C. § 3563(a) (1988). Discretionary conditions of probation include fines, restitution, notice to victims, orders to refrain from specific business, community service, reports to a probation officer, and any other such conditions as the court may impose. 18 U.S.C. § 3563(b) (1988).

A fine imposed on an organization as a sentence is limited to the greater of the amount specified in the law creating the offense, \$500,000 for felonies and misdemeanors resulting in death, \$200,000 for Class A misdemeanors, and \$10,000 for Class B and C misdemeanors not resulting in death, or \$10,000 for infractions. 18 U.S.C. § 3571(c) (1988). However, if the defendant derives pecuniary gain from the offense, or causes pecuniary loss, the maximum fine is twice the gain or loss, whichever is greater. 18 U.S.C. § 3571(d) (1988). When imposing the fine, the court must consider the factors listed in § 3553(a), plus the defendant's income and financial resources, the burden on the defendant, any pecuniary loss inflicted on others, the amount of any restitution, the need to deprive the defendant of illegally obtained gains, whether the defendant can pass on to consumers the expense of the fine, the size of the organization, and any measures taken to discipline the responsible persons and prevent a recurrence of such an offense. 18 U.S.C. § 3572(a) (1988).

7. 28 U.S.C. § 991(a) (1988). The Commission is composed of seven members, three of whom must be federal judges. *Id.* Under the authority of 28 U.S.C. § 994(o), the Commission periodically prepares draft amendments to the guidelines, then publishes the drafts in the Federal Register for public comment. Once the Commission has voted to adopt the final version of an amendment to the guidelines, it is published in the Federal Register, with a stated future effective date. 28 U.S.C. § 994(p) (1988). If Congress takes no contrary action before the effective date specified, the guideline becomes law. *Id.*

8. 28 U.S.C. § 994(a)(1) (1988). The Supreme Court, in *Mistretta v. United States*, 488 U.S. 361 (1989), upheld the constitutionality of the guidelines and of the Commission itself. *Id.* at 374, 412. In *Mistretta*, the Court sustained both the binding nature of the guidelines, and the authority of the Commission to promulgate the guidelines, against claims that the Sentencing Reform Act delegated excessive legislative power to the Commission. *Id.* at 412.

9. 18 U.S.C. §§ 3553(a), (b) (1988). A judge may deviate from the guidelines when the case presents circumstances which were not adequately taken into account by the Commission. *Id.* Regardless of whether the judge imposes a sentence within the guidelines, the judge must state in open court why a particular sentence was imposed. 18 U.S.C. § 3553(c) (1988). In addition, the judge must indicate the reasons for selecting a particular sentence within the guideline's range, or the reasons for imposing a sentence outside of the range. *Id.*

individuals,<sup>10</sup> leaving organizations subject to the judges' discretionary sentencing power.<sup>11</sup> However, the Sentencing Reform Act charged the Commission with standardizing sentencing for all types of defendants.<sup>12</sup> Consequently, the Commission drafted guidelines for sentencing organizations which were submitted to Congress on May 1, 1991.<sup>13</sup> The federal sentencing guidelines for organizations became law on November 1, 1991.<sup>14</sup>

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10. For a general discussion of the guidelines as initially promulgated by the Commission, see 26 AM. CRIM. L. REV. 1239 (1989) (overview of the Sentencing Act's policies and the mechanics of the guidelines). The initial sentencing guidelines covered only individual defendants because organizational defendants presented different and complex sentencing issues. However, in 1988 the Commission began drafting a separate chapter of the guidelines to provide standards for sentencing organizations. United States Sentencing Commission Annual Report 61 (1988).

11. Notice of Proposed Additions to Sentencing Guidelines, 55 Fed. Reg. 46,600 (1990). The Sentencing Reform Act itself did contain some general references to organizations. See, e.g., 18 U.S.C. § 3572(a) (stating factors for a judge to consider in selecting a fine, which would be relevant only if the defendant was an organization, including whether the defendant can pass on to consumers the expense of the fine, the size of the organization, and whether any measures were taken to discipline the responsible persons to prevent a recurrence of such an offense). See also U.S.S.G., *supra* note 1, § 2R1.1 (containing guidelines for antitrust offenses which specifically distinguish between factors to consider when fining an individual defendant and factors to consider when fining an organizational defendant).

12. The Commission is responsible for providing certainty and fairness in sentencing, avoiding unwarranted sentence disparity, and accomplishing the objectives set forth in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 991(b) (1988). See *supra* notes 6 and 7. This mandate does not distinguish between individual and organizational defendants, and by its terms requires that the Commission establish sentencing policies and practices for the entire federal criminal justice system. *Id.* In addition, the legislative history indicates that Congress intended the Commission to have broad powers to formulate guidelines for sentencing. See S. REP. NO. 225, 98th Cong., 2d. Sess. 39 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234 ("The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently."). Moreover, when organizations and individuals are prosecuted simultaneously for offenses arising from the same criminal conduct, the same goals and principles for sentencing should apply. See U.S.S.G., *supra* note 1, intro. cmt., at 347.

13. Notice of Submission of Amendments to Congress, 56 Fed. Reg. 22,762 (1991) [hereinafter Submission of Amendments]. In July, 1988, the Commission published a discussion draft of the sentencing guidelines for organizations and held two public hearings on the subject. See Stanley S. Arkin, *Corporate Sentencing Guidelines—Again*, N.Y. L.J., Oct. 11, 1990, at 3. In November, 1989, the Commission published a preliminary proposal. *Id.* However, the reaction of the business community to the 1989 proposal was generally negative. *Id.* In addition, the Justice Department, which initially supported the 1989 proposal, later withdrew its support. In March, 1990, the Commission withdrew the November 1989 draft and published a third proposal. *Id.* Action on these proposals was delayed because three of the seven Commission slots were vacant. *Id.* In October, 1990, the Commission proposed yet another draft. Stanley S. Arkin, *Corporate Sentencing Guidelines*, N.Y. L.J., June 13, 1991, at 3. After several major revisions, the Commission finally voted to accept the amended October 1990 guidelines on April 26, 1991. *Id.*

14. Under 28 U.S.C. § 994(p), the Commission is directed to review and revise the sentencing guidelines, and submit the amendments to Congress no later than the first day of May each year.

## II. THE SENTENCING GUIDELINES FOR ORGANIZATIONS

The Commission intended for the new guidelines to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."<sup>15</sup> The guidelines seek to achieve these goals through four methods: restitution and remedial orders, fines, organizational probation and special assessments, forfeitures and costs.<sup>16</sup>

The guidelines apply to any organization as "a person other than an individual."<sup>17</sup> Under this definition, "organization" includes: corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, unincorporated and nonprofit organizations, and governments and their political subdivisions.<sup>18</sup>

### A. Restitution and Remedial Orders

The sentencing court's first goal under the guidelines is to ensure that the convicted organization compensates the victims of its conduct and remedies the harm it caused.<sup>19</sup> In general, the sentencing court must order the organization to make restitution.<sup>20</sup> The court may also order the organization to take remedial action, such as creating a trust fund to remedy expected future harm, recalling a product for a food and drug violation, or cleaning up an environmental violation.<sup>21</sup> In addition, the

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Absent Congressional action to the contrary, the amendments become law on the date specified by the Commission. 28 U.S.C. § 994(p) (1988). The Commission specified November 1, 1991 as the effective date of the sentencing guidelines for organizations. Submission of Amendments, *supra* note 13, at 22,762.

15. U.S.S.G. *supra* note 1, intro. cmt., at 347.

16. *Id.* § 8A1.2. These methods are cumulative. The sentencing court's first duty is to ensure that the harm is remedied. *Id.* The court then must impose a fine based on the seriousness of the offense and the culpability of the organization. *Id.* Finally, the court may decide to order probation to ensure that the other sanctions are fully implemented or to "reduce the likelihood of future criminal conduct." *Id.*

17. U.S.S.G., *supra* note 1, § 8A1.1, cmt. n.1.

18. *Id.*

19. The general application instructions direct the court first to consider the sentencing requirements pertaining to restitution, and remedial relief under Part B of the guidelines, before determining a fine. U.S.S.G., *supra* note 1, § 8A1.2(a). See also *infra* note 28.

20. U.S.S.G., *supra* note 1, at XVII (highlights of the 1991 amendments). The court may elect not to order restitution only if "the complication and prolonging of the sentencing process that would result from fashioning an order of restitution outweigh the need to provide restitution 'through the criminal process.'" *Id.* (analyzing § 8B1.1 of the guidelines).

21. These examples of remedial orders are listed in the commentary to § 8B1.2. Significantly, the Commission chose to include, as examples, environmental and food and drug offenses, because these crimes are not subject to the guideline's mandatory fines. See *infra* note 35 and accompanying

court may order notice to the victim,<sup>22</sup> or order community service that is "reasonably designed to repair the harm caused by the offense."<sup>23</sup>

### B. *Criminal Purpose Organizations*

The sentencing guidelines contain a "death penalty"<sup>24</sup> for organizations that operate primarily for a criminal purpose, or primarily by criminal means.<sup>25</sup> If the court determines that an organization is a criminal purpose organization, the court must impose a fine that is large enough to divest the organization of its net assets.<sup>26</sup> The guidelines define net assets as including all assets that remain after the organization pays all legitimate claims by known, innocent bona fide creditors.<sup>27</sup> Restitution must also take precedence over the death penalty fine.<sup>28</sup>

The only standards furnished in the guidelines for determining whether an organization is operated primarily for a criminal purpose instruct a court to examine the nature and circumstances of the offense, and the history and characteristics of the organization.<sup>29</sup> Because these are not very detailed standards, applying them may cause problems in practice.<sup>30</sup>

### C. *Fines*

The most significant aspect of the new guidelines is the provision for calculating fines.<sup>31</sup> However, the provisions for determining a fine contained in the new guidelines are not generally applicable. Unlike remedial orders, death penalty fines, and probation, none of which depend on the particular offense, fines are only imposed under the new guidelines if

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text. However, the latter offenses are still subject to the provisions on restitution, remedial orders, and probation. See U.S.S.G., *supra* note 1, § 8A1.1.

22. U.S.S.G., *supra* note 1, § 8B1.4. Under an order mandating notice to victims, a defendant found guilty of fraud or other intentionally deceptive practices must "give reasonable notice and explanation of the conviction" to the victims of the offense. 18 U.S.C. § 3555 (1988).

23. U.S.S.G., *supra* note 1, § 8B1.3.

24. See Elkan Abramowitz, *Reaching Deeper Into the Deep Pockets*, N.Y. L.J., Jan. 2, 1990, at 3 n.12.

25. U.S.S.G., *supra* note 1, § 8C1.1.

26. *Id.*

27. U.S.S.G., *supra* note 1, § 8C1.1, cmt. n.1.

28. See 18 U.S.C. § 3572(b) (1988) ("[T]he court shall impose a fine only to the extent it will not impair the defendant's ability to make restitution.").

29. U.S.S.G., *supra* note 1, § 8C1.1 cmt.

30. Abramowitz, *supra* note 24.

31. Stanley S. Arkin, *Business Crime*, N.Y. L.J., June 13, 1991, at 3.

the organization is convicted of one of the offenses listed in section 8C2.1 of the guidelines.<sup>32</sup> If the offense for which the organization is convicted is not listed in this section, the guidelines instruct the court to determine a fine by applying the criteria in sections 3553 and 3572 of the Sentencing Act.<sup>33</sup>

The roster of listed offenses includes many of the offenses for which corporations are most commonly convicted in federal courts, such as antitrust, fraud, and tax crimes.<sup>34</sup> The Commission expects that the sen-

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32. U.S.S.G., *supra* note 1, at XVII (explaining that the application of the new sentencing guidelines depends on whether the offense for which the organization is convicted is listed in § 8C2.1 of the new guidelines).

33. U.S.S.G., *supra* note 1, at XVII. Some of the offenses not contained in § 8C2.1 include obstruction of justice, offenses involving food, drugs and agriculture, and environmental offenses. *Id.* See 18 U.S.C. §§ 3553, 3572 (1988) for the standards for imposing a fine when the offense is not contained in § 8C2.1.

34. The offenses covered by the fine guidelines under § 8C2.1 are not listed by name or by citation; instead the guidelines refer to the sections in Chapter Two, governing individual defendants. Thus, to determine whether a given crime is listed, one must first find which section of the guidelines covers that crime, then determine if that section is listed in § 8C2.1. The listed crimes include:

**Property Offenses:** larceny, embezzlement, and other forms of theft; receiving, transporting, or possessing stolen property; property damage or destruction; trespass; commercial bribery; criminal copyright or trademark infringement; and altering vehicle identification numbers or trafficking in motor vehicles with altered numbers.

**Public Officials Crimes:** bribery; extortion; offering or receiving gifts; payment or receipt of unauthorized compensation; loans or gifts to bank examiners, to get a loan, to get a discount on commercial paper or to get an adjustment of farm indebtedness; and fraud involving deprivation of right to honest public officials, conspiracy to defraud by interference with government functions.

**Drug Offenses:** sale or transport of paraphernalia; illegal use of a registration number to manufacture, distribute or transport a controlled substance; manufacture of a controlled substance in excess of registration quota; and illegal transfer of controlled substances.

**Criminal Enterprises and Racketeering:** gambling; transmission of wagering information; dealing in contraband cigarettes; bribery, theft, or embezzlement of employee pensions; false statements or concealment of fact in relation to ERISA documents; theft or embezzlement from a labor union; falsifying Labor Management Reporting records; and unlawful bribes or gifts to labor organizations.

**Fraud:** fraud, deceit, and insider trading.

**Other:** transporting, importing or mailing obscene matter; failure to report theft of explosive materials; improper storage of explosive materials; unlawful receipt, possession or transportation of firearms; harboring unlawful aliens; odometer violation; bid rigging, price-fixing or market allocation agreements; money laundering; using money derived from unlawful activity; other monetary transaction violations; various tax crimes; and various antitrust violations. U.S.S.G., *supra* note 1, § 8C2.1.

See also Barbara Franklin, *Meting Out a Sentence*, N.Y. L.J. Apr. 25, 1991, at 5 (noting that according to the Sentencing Commission, in 1989 and 1990, 444 corporations were sentenced in federal courts: 30% for fraud, 18.2% for antitrust violations, 9.6% for environmental, 5.2% for obscenity, and 5.2% for income tax); Molly Rath, *Commission Sets Uniform Penalties on Corporate Crime*, WASH. BUS. J., Dec. 10, 1990, § 1, at 20 (explaining that the most common crimes by organizations are defense procurement fraud, tax fraud, and environmental offenses).

tencing guidelines will cover eighty-one percent of all of the federal prosecutions of corporations.<sup>35</sup>

If the offense is covered by the fine-setting provisions of the new guidelines, the court must follow a complex series of steps in order to determine the range from which to choose a fine.<sup>36</sup> First, the court must assess the organization's ability to pay restitution. If it is evident that the organization will not be able to pay the ordered restitution, the court need not determine the appropriate guideline fine range because, under the new guidelines, no fine will be imposed.<sup>37</sup>

Second, the court must determine the base fine.<sup>38</sup> The base fine consists of the greater of three figures: (1) the amount assigned by the guidelines for the particular offense for which the organization was convicted;<sup>39</sup> (2) the gain to the organization from the offense;<sup>40</sup> or (3) the loss from the offense caused by the organization, to the extent such loss

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35. Sharon LaFraniere, *Corporate Lawbreakers May Face Tougher Penalties*, WASH. POST, Apr. 27, 1991, at A6. However, controversial matters such as the sentencing of corporations convicted for violating environmental, export control, and product safety statutes or regulations are not covered by the guidelines. Franklin, *supra* note 34, at 5. Because environmental crimes are not included in the organizational guidelines, in real terms, the new sentencing guidelines will cover a decreasing proportion of prosecutions as the number of environmental prosecutions increases.

36. For each count covered by § 8C2.1, the court must proceed through the complex fine procedures set forth in the new sentencing guidelines. For counts not covered under § 8C2.1, the court should determine a fine under the provisions of 18 U.S.C. §§ 3553, 3572 (1988). When an organization is convicted of more than one count and one count falls within the guidelines and one does not, the court should apply the applicable standards as outlined above and add the two fines together to determine the fine to be imposed. U.S.S.G., *supra* note 1, § 8C2.10 & cmt.

37. See U.S.S.G., *supra* note 1, § 8C2.2(a). Under § 8C2.2(a), no fine guideline range determination need be made because under § 8C3.3 no fine would be imposed. See also *supra* note 28. Note that although the specific language in § 8C2.2(a) states that no fine would be imposed when the organization is unable to pay restitution, § 8C3.3(a) merely states that a fine will be reduced to the extent "that imposition of such fine would impair its ability to make restitution to victims." *Id.* § 8C3.3(a).

38. See U.S.S.G., *supra* note 1, at XVIII (the base fine level is "intended to measure the seriousness of the offense").

39. *Id.* § 8C2.4(a)(1). The applicable base fine is determined by using the standards in Chapter Two of the sentencing guidelines to determine the offense level, and then using the "Offense Level Fine Table" contained in § 8C2.4(d) to find the specified fine for each offense level. For example, an offense level of 10 carries a fine of \$20,000. *Id.* § 8C2.4(d).

All listed offenses are described and assigned a level in Chapter Two of the guidelines promulgated for individual defendants. The offense levels roughly correspond to the seriousness of the crime. Thus, the higher the level, the more serious the crime and the greater the assigned base fine. The guidelines provide the following table which specifies the base fine for each offense level:



was caused intentionally, knowingly, or recklessly.<sup>41</sup>

Third, the court must adjust the base fine based on the organization's culpability score.<sup>42</sup> Every organization begins with a culpability score of five;<sup>43</sup> the judge then adds or subtracts points depending on the organization's conduct before and after the offense.<sup>44</sup> Four general categories of conduct may increase an organization's culpability score. First, depending on the number of employees in the organization, the score is increased by one to five points if high level personnel were involved in the offense, were willfully ignorant of the offense or tolerance of the offense

<u>Offense Level</u>	<u>Amount</u>	<u>Offense Level</u>	<u>Amount</u>
6 or less	\$5,000	22	\$1,200,000
7	\$7,500	23	\$1,600,000
8	\$10,000	24	\$2,100,000
9	\$15,000	25	\$2,800,000
10	\$20,000	26	\$3,700,000
11	\$30,000	27	\$4,800,000
12	\$40,000	28	\$6,300,000
13	\$60,000	29	\$8,100,000
14	\$85,000	30	\$10,500,000
15	\$125,000	31	\$13,500,000
16	\$175,000	32	\$17,500,000
17	\$250,000	33	\$22,000,000
18	\$350,000	34	\$28,500,000
19	\$500,000	35	\$36,000,000
20	\$650,000	36	\$45,500,000
21	\$910,000	37	\$57,500,000
		38 or more	\$72,500,000

*Id.* § 8C2.4(d).

40. *Id.* § 8C2.4(a)(2).

41. *Id.* § 8C2.4(a)(3). Under either § 8C2.4(a)(2) or (a)(3), the court may approximate the gain or loss; however, if calculating the gain or loss would "unduly complicate or prolong the sentencing process," the court may use the offense level to determine the base fine. *Id.* § 8C2.4(c). *See also* 18 U.S.C. § 3571(d) (1988). When multiple defendants are convicted, and the base fine is calculated pursuant to § 8C2.4(a)(2) or § 8C2.4(a)(3), the court may apportion the gain or loss among the defendants according to their relative culpability "and other pertinent factors." U.S.S.G., *supra* note 1, § 8C2.4, cmt. n.4.

42. U.S.S.G., *supra* note 1, § 8C2.5. Persons within substantial authority personnel are defined as individuals "who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization." *Id.* § 8A1.2, cmt. n.3(c).

Where an organization meets the above standard, the amount of points added depends upon the greater of the number of employees within the particular unit or the organization as a whole. *Id.* § 8C2.5(b). The judge will add five points to an organization or unit with 5,000 or more employees, four points if the organization or unit has 1,000 or more employees; three points if it has 200 or more employees; two points if it has 50 or more employees, and one point if it only has 10 or more employees. *Id.*

43. *Id.* § 8C2.5(a).

44. *Id.* §§ 8C2.5(b)-(g).

was pervasive throughout the unit.<sup>45</sup> Second, a court will add one or two points if the organization has a prior criminal history.<sup>46</sup> Third, a court will add one or two points if the offense violated a judicial order, an injunctive order, or a condition of probation.<sup>47</sup> Finally, a court must add three points if the organization willfully obstructed justice during the investigation, prosecution, or sentencing of the current offense.<sup>48</sup>

A court may also lower an organization's culpability score. Three points are subtracted if the organization has "an effective program to prevent and detect violations of law."<sup>49</sup> In addition, five points are subtracted if the organization reports the offense itself;<sup>50</sup> two points are sub-

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45. *Id.* § 8C2.5(b). The general standard for the addition of culpability points under § 8C2.5(b)(1)(A) is whether "(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization." *Id.*

High-level personnel are defined as "individuals who have substantial control over the organization or who have a substantial role in the making of policy. *Id.* § 8A1.2, cmt. n.3(b). Directors, executive officers, individuals in charge of a major business unit, and individuals with substantial ownership interests all qualify as high-level personnel. *Id.* Section 8C2.5(a) directs a court to begin with five points and then apply subsections (b) through (g) to determine how many points to add or subtract. *Id.*

46. *Id.* § 8C2.5(c). One point is added if any part of the current offense occurred within 10 years after a criminal proceeding based on similar misconduct, or civil or administrative proceedings based on at least two separate instances of like misconduct. Two points are added if any part of the current offense occurred within five years. *Id.* When considering the prior history of an organization, the court is directed to examine the "underlying economic entity," without taking into account its legal structure or ownership. *Id.* § 8C2.5(c), cmt. n.6. Thus, a company that has merged with, or has been acquired, by a larger company retains its prior history.

47. U.S.S.G., *supra* note 1, § 8C2.5(d). Two points are added if the organization violated a judicial or injunctive order when it committed the current offense. Two points will also be added if the organization violates a condition of probation by engaging in similar misconduct. One point is added for otherwise violating a condition of probation. *Id.*

48. *Id.* § 8C2.5(e).

49. U.S.S.G., *supra* note 1, § 8C2.5(f). An effective program is defined in the commentary to § 8A1.2. *See infra* notes 79-81 and accompanying text. The court may not subtract culpability points if a high-level individual within the organization, a high-level individual within a unit that has 200 or more employees, or an individual responsible for the organization's prevention program participated in, condoned, or was willfully ignorant of the offense. *Id.* If a person with substantial authority participated in the offense, a rebuttable presumption is raised that the organization did not have an effective prevention program; therefore, the organization is not entitled to subtraction of culpability points. *Id.* Finally, if the organization unreasonably delays reporting the offense, a court may not subtract points under this subsection. *Id.*

50. *Id.* § 8C2.5(g)(1). Note, however, that the organization must report the offense prior to a threat of imminent disclosure or commencement of a government investigation and within a reasonable time after learning of the offense. *Id.* In addition, the organization must fully cooperate in the event of an investigation and demonstrate affirmative responsibility for the criminal conduct. *Id.*

tracted if it cooperates in the investigation;<sup>51</sup> and one point will be subtracted if it affirmatively accepts responsibility for its conduct.<sup>52</sup>

Finally, the court determines the appropriate fine range by multiplying the base fine by minimum and maximum multipliers, which are derived from a table that assigns the multipliers on the basis of the organization's culpability score.<sup>53</sup> The bottom of the fine range is the base fine times the minimum multiplier, and the top of the fine range is the base fine times the maximum multiplier. If an organization's beginning culpability score of five is not adjusted upward or downward, the minimum fine will be the base fine itself and the maximum fine will be twice the base fine.<sup>54</sup> If the organization reduces its culpability score to zero, the minimum fine will be five percent of the base fine and the maximum, twenty percent of the base fine.<sup>55</sup> An organization whose culpability score falls within the highest category of ten points or more will face a minimum fine of double the base fine, and a maximum fine of four times the base fine.<sup>56</sup> Finally, if

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51. *Id.* § 8C2.5(g)(2). The organization must also demonstrate acceptance of affirmative responsibility for the criminal conduct. *Id.*

52. *Id.* § 8C2.5(g)(3). Entering a guilty plea and admitting the conduct will ordinarily be sufficient. However, an organization may qualify for this mitigation even after a trial and conviction. *Id.* § 8C2.5(g)(3), cmt. n.13.

53. U.S.S.G., *supra* note 1, § 8C2.7. To determine the appropriate multiplier, a court must use the culpability score computed under § 8C2.5 and consult the table contained in § 8C2.6. The table provides as follows:

<u>Culpability Score</u>	<u>Minimum Multiplier</u>	<u>Maximum Multiplier</u>
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

*Id.* § 8C2.6.

54. *Id.*

55. *Id.*

56. *Id.* An example may clarify this procedure. Assume that a corporation is convicted of defrauding the government of \$100,000. Fraud is a listed offense, (*see* § 2F1.1, listing fraud), with an offense level of twelve. The base fine for offense level twelve is \$40,000. *Id.* § 8C2.4. Under § 8C2.4, the court must then decide which of the following potential base fines is greater: the computed figure of \$40,000, the gain to the firm, or the loss to the government. *Id.* Assuming the court chooses \$40,000 as the base fine, the court must tally the firm's culpability score under § 8C2.5. If the beginning score of five does not need to be adjusted upward or downward under the guidelines detailed in § 8C2.5, the appropriate fine range is \$40,000 to \$80,000 (the minimum equals one times

the minimum fine as determined by the guidelines is greater than the maximum fine authorized by law,<sup>57</sup> the court should impose the maximum fine authorized by law.<sup>58</sup> Similarly, if the maximum fine under the guidelines is less than the minimum fine required by statute, the minimum statutory fine is deemed to be the guideline fine.<sup>59</sup>

Once the court determines the fine range, the guidelines instruct the court to consider ten general factors in deciding what exact fine within the range will be imposed.<sup>60</sup> The court must add to the actual fine any gain that the organization realized which will not be repaid through restitution.<sup>61</sup> The court may reduce the fine if it finds the organization's ability to make restitution to victims will be impaired or if the organization will not be able to pay even the minimum range amount.<sup>62</sup> The guidelines also include several other factors which may justify upward or downward departures from the established fine range.<sup>63</sup>

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the base fine and the maximum, two times the base fine). *Id.* § 8C2.6. However, if the firm has 1000 employees and the president of the organization was aware of the fraud, under § 8C2.5, four points must be added to the culpability score. Absent any downward adjustments under § 8C2.5, the organization's culpability score now equals nine, and the fine range increases from \$72,000 to \$144,000 (the minimum equals the base fine times 1.80 and the maximum equals the base fine times 3.60). *Id.* However, if the organization fully cooperates in the investigation and accepts responsibility for its criminal conduct, two points may be subtracted from the score of nine under § 8C2.5(g)(2), leaving a culpability score of seven, with a resulting fine range from \$56,000 to \$128,000 (the minimum equals the base fine times 1.40 and the maximum equals the base fine times 3.20). *Id.*

57. Two different laws may limit the maximum fine. First, 18 U.S.C. § 3571(c) limits the maximum fine for felonies and misdemeanors resulting in death to \$500,000, the fine for Class A misdemeanors to \$200,000, and the fine for Class B and C misdemeanors to \$10,000. *See* 18 U.S.C. § 3571(c) (1988). Second, the statutory provision that establishes the substantive crime may include a maximum fine. *See also supra* note 6.

58. U.S.S.G., *supra* note 1, § 8C3.1(b).

59. *Id.* § 8C3.1(c).

60. *Id.* § 8C2.8(a)(1)-(10). The first factor restates the primary goals of the sentencing guidelines for organizations: that the sentence reflect the severity of the crime, promote respect for the law, justly punish, adequately deter and protect the public. *Id.* *See also* U.S.S.G., *supra* note 1, § 8C2.8(a)(1), intro. cmt. In addition, § 8C2.8 instructs a court to consider: the role of the organization in the offense, any collateral consequences of the conviction, any nonpecuniary losses, whether the victim was vulnerable, whether any high-level organizational personnel with a prior record participated or condoned the criminal conduct, other civil or criminal misconduct by the organization, culpability scores in excess of ten or lower than zero, partial mitigation or aggravation of the offense under § 8C2.5, or any of the factors listed in 18 U.S.C. § 3572(a) (1988).

61. U.S.S.G., *supra* note 1, § 8C2.9.

62. *Id.* § 8C3.3.

63. Under § 8C3.4, a court may offset a fine imposed on a closely held corporation by the fines already assessed against individuals for the same offense. *Id.* § 8C3.4. In addition, a court may impose a fine below the range under § 8C4.1, when an organization substantially assisted the authorities; under § 8C4.7, when the convicted organization is a public entity; under § 8C4.8, when mem-

#### D. Probation

The new guidelines set forth the circumstances under which a court is required to sentence an organization to a term of probation.<sup>64</sup> In addition, the guidelines mandate certain conditions of probation,<sup>65</sup> and recommend other conditions, including publication of the offense,<sup>66</sup> periodic submissions of the organization's books to the court,<sup>67</sup> or the development of a program to detect and prevent violations of law.<sup>68</sup> The court may also assess costs, impose additional penalties as authorized by law, and order forfeiture.<sup>69</sup>

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bers of the organization, other than the shareholders, are direct victims of the crime; and, under § 8C4.9, when the organization has agreed to pay remedial costs which greatly exceed the organization's gain from the offense. *Id.* §§ 8C4.1, 8C4.7-8C4.9.

A fine above the range may be imposed under § 8C4.2, when the crime involved a risk of death or bodily injury; under § 8C4.3, when the offense involved a threat to national security; under § 8C4.4, when the offense threatened the environment; under § 8C4.5, when the offense threatened the integrity or continued existence of a market; and, under § 8C4.6, when the offense was connected with corruption of a public official. U.S.S.G., *supra* note 1, §§ 8C4.2-8C4.6. In addition, an upward departure may also be appropriate to offset a reduction in the organization's culpability score under § 8C2.5(f), or when the organization's culpability score exceeded ten. *Id.* §§ 8C4.10, 8C4.11.

64. The court must order probation if necessary to secure enforcement of a remedial or restitution order, if necessary to ensure an organization's ability to make payments toward a monetary penalty, when there is no program to prevent and detect violations and the organization has fifty or more employees, when an organization has engaged in similar misconduct within the past five years, when high-level personnel participated in the misconduct and have engaged in similar misconduct within the past five years, when necessary to prevent future misconduct, when no fine was imposed, or when necessary to accomplish the purposes for sentencing set forth in the Sentencing Act. U.S.S.G., *supra* note 1, § 8D1.1.

65. *Id.* § 8D1.3. Pursuant to 18 U.S.C. § 3563(a), a court must include the condition that the organization not commit any federal, state or local crime during the term of probation. *Id.* If the probation is ordered because of the commission of a felony, the court must impose one of the following conditions: a fine, restitution, or community service, unless the condition would be unreasonable. *Id.* If the condition is unreasonable, the court must impose a condition from 18 U.S.C. § 3563(b). *Id.* See also 18 U.S.C. § 3563(b).

66. U.S.S.G., *supra* note 1, § 8D1.4(a). The publicity must include the nature of the offense, the fact of conviction, the punishment, and remedial steps taken to prevent recurrence of offenses. *Id.*

67. *Id.* § 8D1.4(b). When probation is ordered to ensure an organization's payment of a monetary penalty, other conditions may be appropriate. Such conditions include: examination of financial reports, interrogation of knowledgeable individuals with regard to the organization's books, notification of adverse changes in business, or specified periodic payments. *Id.*

68. *Id.* § 8D1.4(c). When probation is ordered under § 8D1.1(a)(3),(4),(5) or (6), further conditions may be appropriate. These include: developing a prevention program, notifying employees and shareholders of its criminal behavior and prevention program, or requiring periodic reports to the court regarding the implementation of such a program. *Id.*

69. *Id.* §§ 8E1.1-8E1.3.

### III. IMPACT OF THE GUIDELINES

The new guidelines for sentencing organizational defendants will impact sentencing decisions immediately. The resulting impact is primarily attributable to the requirement that courts apply whatever sentencing guidelines are in existence at the time of sentencing, not whatever guidelines were in effect when the offense was committed.<sup>70</sup> The new guidelines will affect each of the different actors in the sentencing process: the defendant organization, the prosecutor, and the judge who must apply the guidelines.

#### A. *The Effect on Organizations*

##### 1. *Compliance Programs*

For organizations, the most significant aspect of the new guidelines is the potential to increase or decrease the fine range. Under the new guidelines, an organization has two significant avenues for decreasing its culpability, and in effect, its potential fine: instituting programs to prevent and detect violations, and self-reporting.<sup>71</sup> The guidelines contemplate stringent programs for internal prevention and detection of violations and establish specific requirements for formulating and administering an effective program.<sup>72</sup>

The primary feature of an effective program is the organization's exercise of due diligence in seeking to detect and prevent violations.<sup>73</sup> At a minimum, to satisfy the due diligence requirement, the organization must follow the seven steps specified by the guidelines.<sup>74</sup> In addition to

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70. Under 18 U.S.C. § 3553(a)(4), a court must apply the sentencing guidelines that are in effect on the date of sentencing. *See supra* note 6. *See also* United States v. Lara, 905 F.2d 599 (2d Cir. 1990) (holding that a court must apply the sentencing guidelines and policy statements in effect at the time of sentencing, not those existing at the time of the commission of the crime).

71. *See supra* notes 49-52 and accompanying text.

72. U.S.S.G., *supra* note 1, § 8A1.2, cmt. n.3(k).

73. The commentary defines an effective program as one that is "reasonably designed, implemented, and enforced so that it will be generally effective in preventing and detecting criminal conduct." *Id.* However, failure to detect the specific crime charged does not render a program "not effective" when the organization has exercised due diligence in attempting to prevent and detect criminal conduct. *Id.*

74. *Id.* The commentary provides the following seven steps for due diligence: (1) the organization must establish compliance standards and procedures reasonably capable of reducing criminal conduct; (2) the organization must assign the responsibility for overseeing compliance to a specific high-level individual in the organization; (3) the organization should use reasonable care not to grant substantial discretionary authority to anyone the organization knew or should have known had a propensity to engage in illegal activity; (4) the organization must effectively communicate its stan-

due diligence, the sufficiency of a program will vary according to the size of the organization, the nature of its business, and the organization's prior history.<sup>75</sup> Similarly, the types of offenses that the program must address and attempt to detect and prevent will depend upon the scope of the organization's operation, its background, and any applicable industry practices or standards.<sup>76</sup>

The new guidelines provide strong incentives for an organization to adopt prevention and detection programs.<sup>77</sup> Although many firms traditionally have been skeptical about corporate codes of conduct,<sup>78</sup> a persuasive incentive to adopt them has now emerged.<sup>79</sup> However, the organization must balance the possibility of mitigating a sentence against the economic costs of implementing a satisfactory program. In fact, some have suggested that the guidelines discriminate in favor of big businesses, which can afford both elaborate compliance programs and the extra expense of monitoring and training employees.<sup>80</sup>

Moreover, relying on compliance programs to prevent criminal conduct creates the potential for organizations to implement cosmetic programs, which are only designed to minimize any damage that occurs, not to actually prevent violations.<sup>81</sup> In fact, one commentator has noted that

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dards and procedures to all employees, through training programs or written materials; (5) the organization must take reasonable steps to comply with its own standards by using monitoring and auditing programs, and creating and publicizing a system where employees may report violations without fear of retribution; (6) the organization's standards must be consistently enforced through appropriate discipline; and (7) the organization must take all reasonable measures to respond appropriately after an offense is detected and to prevent future similar offenses. *Id.*

75. *Id.* § 8A1.2, cmt. at 353. The degree of formality required in a program will vary depending on the organization's size. Larger organizations will require a greater degree of formality. *Id.*

76. *Id.*

77. For example, if a convicted organization has a program that meets the standards set forth in the commentary to § 8A1.2, the organization may deduct three points from its culpability score under § 8C2.5(f). If the organization's base fine is \$10,000 and the culpability score is only adjusted downward by the three points, the fine range will be \$6,000-\$12,000. Absent the prevention program, the fine range would be \$10,000-\$20,000. *See supra* notes 58-60.

78. *See, e.g.*, 22 Sec. Reg. & L. Rep. (BNA) 1206 (Aug. 17, 1990) (recognizing that business people are often skeptical about codes, because codes do not prevent investigations or shield firms from liability, while they may provide a plaintiff with ammunition by showing that the firm failed to satisfy even its own standards); Michele Galen, *Keeping the Long Arm of the Law at Arm's Length*, *BUS. WK.*, Apr. 22, 1991, at 104 (explaining that codes which restate the law may remove the firm's defense of ignorance or preclude an argument that the organization's conduct is permissible).

79. *See supra* note 56 (illustrating the guidelines' potential effect on a firm's fine).

80. John Coffee, *Sentencing Commission: Big Business's Best Friend*, *N.Y. L.J.*, May 23, 1991, at 11.

81. In addition, courts may be unable to discern a cosmetic compliance program from a legitimate one. *Id.*

the guidelines give organizations an odd incentive because they may reward a program that evidently did not work.<sup>82</sup> According to one study, eighty-five percent of the 711 firms surveyed already had an ethics policy or code of conduct; however only ten percent "actively engaged in ethics oversight."<sup>83</sup>

## 2. *Self-Reporting*

The mitigation provided by the new guidelines for self-reporting may be illusory. The maximum amount of mitigation, a deduction of five points, is only available to firms that report an offense before any investigation begins.<sup>84</sup> However, executives are unlikely to risk premature disclosure of an offense, and potential waiver of attorney-client and work product privileges, unless they strongly suspect that the government is likely to begin an investigation.<sup>85</sup> As a result, many businesses will now face a dilemma: if they fight the charges, they may lose some mitigating factors; on the other hand, few managements are willing to open their doors to government investigators.<sup>86</sup>

The potential benefits available from self-reporting and cooperation will also alter many defense strategies. Traditionally, firms focused on whether or not to disclose the offense, and on persuading the government not to press charges.<sup>87</sup> Firms often pled guilty to save the expense and publicity of a trial; and then, the executives focused their energy on influencing the judge to exercise his discretion for a lenient sentence.<sup>88</sup> The new guidelines place a premium on cooperating with the authorities, and curtail the amount of discretion in sentencing.<sup>89</sup> Because the incentives to disclose early are much stronger, management's focus will shift to the charging stage.<sup>90</sup> Firms will seek to influence which base offense is

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82. *Id.* See also John Coffee, *Corporate Crime and Punishment*, N.Y. L.J., Nov. 29, 1990, at 5. Interestingly, a program can be "effective" and still fail to prevent or detect the crime with which the organization is charged. See *supra* note 73.

83. Galen, *supra* note 78, at 104 (citing a 1990 study by the Ethics Resource Center in Washington D.C.).

84. U.S.S.G., *supra* note 1, § 8C2.5(g).

85. Arkin, *supra* note 13, at 3. See also 23 Sec. Reg. & L. Rep. (BNA) 676, 677 (May 3, 1991).

86. 22 Sec. Reg. & L. Rep. (BNA) 1206, 1207 (Aug. 17, 1990).

87. Thomas Holliday et al., *Tilting the Balance: The Effect of the Sentencing Guidelines on Organizational Defendants*, 5 L. & Bus. Insights No. 8 (P-H), at 2 (Aug. 1991).

88. *Id.*

89. *Id.*

90. *Id.*



charged, resulting in great influence over the fine range.<sup>91</sup>

### B. *The Effect on Prosecutors and Judges*

Prosecutors, who already enjoy considerable discretion in deciding what charges to levy, will now possess greatly increased power.<sup>92</sup> One United States Attorney recently stated that a strong factor in the decision whether or not to indict is whether the organization is making a reasonable effort to avoid criminal activity.<sup>93</sup> Because the guidelines eliminate much of the uncertainty about what sentence a judge will order, both the organization and the prosecutor can evaluate options with much greater specificity.

Finally, the guidelines will strictly constrain judges' discretion in determining sentences. Perhaps this will improve the uniformity of sentences for organizations. However, many judges have expressed discontentment with the sentencing guidelines for individuals, arguing that the sentencing guidelines transform the judge into a machine, plugging in numbers and spitting out an established response.<sup>94</sup> The new guidelines for organizations will likely increase their dissatisfaction and further erode their discretion.

## IV. CONCLUSION

The new organizational sentencing guidelines should have a distinct effect on the conduct of corporations and other organizations. The structure of the guidelines creates incentives for organizations to monitor their internal operations and their agents' activities, and to report violations themselves. In addition, the guidelines encourage organizations to implement more effective programs to prevent and detect criminal conduct

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91. *Id.*

92. See, e.g., Marcia Chambers, *The Old Days: When a Plea was a Plea . . .*, NAT'L L.J., Nov. 6, 1989, at 13 ("[Prosecutors'] already formidable discretion has expanded exponentially; they have emerged as the nation's sentencers, say many of the judges."). See also Albert W. Alschuler & Stephen J. Schuyhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENT. R. 94 (1989) ("What had been a regime of shared discretion could become a regime in which sentencing power is concentrated in the United States Attorney's office.").

93. Galen, *supra* note 78, at 104.

94. In the report accompanying the Sentencing Act, Congress expressed that it did not intend the sentencing guidelines to eliminate a judge's discretion. See S. REP. NO. 225, 98th Cong., 2d Sess. 51 (1984) reprinted in 1984 U.S.C.C.A.N. 3182, 3234 ("The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead it will guide the judge in making his decision on the appropriate sentence."). See *id.* at 3235 ("The Committee does not intend that the guidelines be imposed in a mechanistic fashion.").

as an attempt to secure lower fines. Although these prevention programs have been advocated in the past, the programs contemplated by the guidelines provide much more detailed requirements than the general codes of ethical conduct already enacted by many corporations. As private attorneys urge their organizational clients to implement programs and take other steps to mitigate potential criminal charges, the roles of the public prosecutors and judges will subtly change. Prosecutors will gain greater discretion to shape the sentence a criminal defendant receives, while judges' participation in the sentencing process will decrease substantially.

Although the new organizational guidelines will create more uniform sentences and will increase the defendant's ability to predict and influence its sentence, the guidelines will also change the way organizations, prosecutors, and judges function.

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