Organizational Sentencing Guidelines: Past, Present and Future

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Kathleen Cooper Grilli
General Counsel
U.S. Sentencing Commission
Eric Morehead
Principal Consultant
Morehead Compliance Consulting

www.ussc.gov (202) 502-4500 @theusscgov pubaffairs@ussc.gov

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Agenda

- The United States Sentencing Commission and the Evolution of the Organizational Sentencing Guidelines
- Guidelines Influence and Current Sentencing Data on Organizations
- What Might the Future Hold for the Organizational Sentencing Guidelines?

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The United States Sentencing Commission and the Evolution of the Organizational Sentencing Guidelines

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Compliance and Ethics circa 1984

- Corporate scandals
- Prevailing view that corporate crime was a cost of doing business
- No Compliance and Ethics Officers
- No professional organizations focused on Compliance and Ethics
- No business certifications
- No professional field of study
- One voluntary association of defense contractors seeking to promote business ethics

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Commission Was Created By Sentencing Reform Act of 1984

- The SRA also addressed underlying changes in the Federal criminal justice system:
  - Determinate Sentencing (sentencing announced very close to sentence served)
  - Supervised Release and Parole eliminated
  - Good time reduced (maximum reduction of 15% per year)
  - Sought to reduce disparities in sentencing
  - Increased due process

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U.S. Sentencing Commission's Role

- Independent Agency in Judicial Branch
- 7 voting, 2 non-voting commissioners (judges and non-judges)
- Develop sentencing guidelines for use by courts
- Study and research sentencing issues
- Educate

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Sentencing Reform Act of 1984

- The SRA mandated that organizations be considered in the new Sentencing Guidelines and the first version was created in 1991.
- "Current 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 characterizes offenses typically perpetrated by organizations." *See* S. Rep. No. 98–225, at 66-7 (1984).

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General Principles of Chapter 8: "Organizational Sentencing Guidelines"

- Chapter 8 reflects general principles
  - -- Organizations should remedy harm caused by offense
  - -- Organizations with criminal purpose should be divested
  - --"Carrot and Stick Approach" - Fine ranges determined by seriousness of offense and culpability
  - -- Probation to implement sanctions and reduce recidivism
- Goal: provide a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program.

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Opposition to Organizational Guidelines

- Commentators urged the Commission 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.
- Probation described as a "death sentence" for small to medium organizations.
- Pressure behind the scenes to delay implementation of the organizational guidelines
- Challenges to the Commission's statutory authority to promulgate guidelines for organizations

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Initial Development of the Organizational Guidelines

- Authorization: **The Sentencing Reform Act of 1984**
  - Principal purposes to reduce sentencing disparity and prevent crime
  - U.S. Sentencing Commission to develop sentencing guidelines for individuals and organizations
- Initial 1991 Organizational Guidelines pioneered concept of punishment mitigation for organizations with effective compliance program and for cooperation

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Effective Compliance Programs - §8B2.1(a)

AN EFFECTIVE COMPLIANCE PROGRAM MUST:

1. Exercise due diligence in fulfilling the seven minimum requirements at §8B2.1(b)(2) *(see next slide)*
2. Promote ethical conduct and organizational culture that encourages a commitment to compliance with the law

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Seven Minimum Requirements - §8B2.1(b)(2)

1. Standards and procedures to prevent and detect criminal conduct

2. Board must be knowledgeable about and oversee program; top management must ensure effectiveness of program; specific individual(s) within high-level personnel must have responsibility

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Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

3. Reasonable efforts not to include within substantial authority personnel individuals whom organization knew or should have known have engaged in illegal activities or conduct inconsistent with effective program

4. Communicate standards and procedures by **training** directors, employees and, as appropriate, agents, and by other means

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Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

5. Monitor and audit to detect criminal conduct; evaluate program periodically; have and publicize a system for reporting suspected violations and seeking guidance

6. Promote and consistently enforce through appropriate incentives to perform in accordance with the program and appropriate discipline

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Seven Minimum Requirements - §8B2.1(b)(2) (cont.)

7. After criminal conduct is detected, take reasonable steps to respond appropriately and prevent further similar criminal conduct, including necessary modifications to program

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Ten- year Influence of the Organizational Guidelines

- Prosecutorial policies of DOJ
- Policies of other regulatory agencies
- Creation of a new job description: Ethics and Compliance Officer

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Notable Historical Developments

"[T]he organizational sentencing guidelines have been successful in inducing many organizations, both directly and indirectly, to focus on compliance and to create programs to prevent and detect violations of law." U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 3 (Oct. 7, 2003).

Other commentators agreed, describing the Commission's "profound influence on corporate behavior," asserting that the guidelines had been "incredibly successful in galvanizing [and] inspiring companies to . . . put programs in place."

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New Considerations

Whether ethics was "an *implicit* component of effective compliance programs, or whether ethics should now *explicitly* be incorporated into the compliance program criteria in the organizational guidelines."

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Suggestions for Improvement

- Notwithstanding this success, "changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in *effective* programs to prevent and detect violations of law."
- The organizational guidelines should "better address the role of organizational leadership in ensuring that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose," and should be updated to reflect the "best practices" in the compliance field.

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Amendment 673

Effective Nov. 1, 2004

Created more visible, stand alone **Guideline, §8B2.1,** describing more detailed elements of an Effective Compliance and Ethics Program

- Expressly joined Ethics and Compliance functions, emphasizing importance of Organizational Culture
- Emphasized importance of Risk Assessments
- Established express Governing Authority Responsibilities
- Strengthened all program elements

Impetus for Change

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"Chapter Eight is an important deterrent to criminal activity, and. . . the Commission must remain abreast of current industry practice in order to ensure that this deterrent effect continues."

Hon. Beryl A. Howell

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Suggestions for Improvement

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"Public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary."

Notable Historical Developments

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- Mindful of the fact that "even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization," the Commission actively solicited input on the proposed amendment from groups known to have an interest in Chapter Eight.
- The Chapter Eight proposed amendment received more public comment than any other proposed amendment in 2010.

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Amendment 744

Effective Nov. 1, 2010

- Clarified expected responsive and remedial actions when violations occur:
  1. Restitution, remediation
  2. Voluntary disclosure
  3. Compliance program review, possible outside expertise

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Amendment 744 (cont.)

Effective Nov. 1, 2010

- Emphasized importance of CCO Direct Reporting and Independence
  1. Direct reporting to governing authority regarding criminal conduct occurrences, and at least yearly regarding compliance program operation
  2. Policy expressed in context of judging program as effective even if high level person involved in wrongdoing
- Existence of Whistleblower Report does not render program per se ineffective

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General Procedures for Guideline Amendment Cycle

- The Guideline Amendment Cycle begins on May 1 of each year.
- Priority Setting
  - Proposed Priorities (developed at Planning Session)
    - Published in May or June
    - Notice and comment period follows
  - Final Priorities (Published in August or September)
- Development of Policy Work
  - Research
  - Consultation with outside groups
  - Prison impact
  - Oral and written presentations to Commissioners

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General Procedures for Guideline Amendment Cycle (cont.)

- Publication of Proposed Amendments (December or January)
- Formal and Informal Public Participation (January to March)
  - 60 day public comment period
  - Public Hearing on Proposed Amendments
- Vote on Proposed Amendments (April)
- Submission to Congress (May 1)
- Other Post-Amendment Activities

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Public Involvement

- When promulgating guidelines, the Commission must comply with the notice and comment provisions of the Administrative Procedure Act. **(28 U.S.C. § 994(x))**
- The Commission shall periodically review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.
- The Commission considers input received from "authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." **(28 U.S.C. § 994(o))**

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Guidelines Influence and Current Sentencing Data on Organizations

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The Organizational Guidelines Echo Through Requirements, Standards and Incentives

- OECD Good Practice Guidance
- UK Bribery Act Guidance from UK Ministry of Justice
- FCPA Guidance from DOJ and SEC
- FAR Compliance Requirements
- Brazil Clean Companies Act
- ISO 19600 and 37001
- 2013 COSO Framework

The Organizational Guideline's Hallmarks are Still the "Gold Standard"

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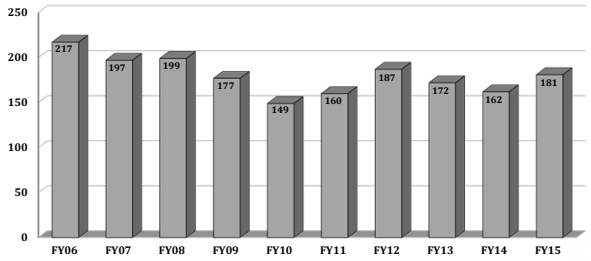
Number of Organizational Cases Fiscal Years 2006-2015



SOURCE: United States Sentencing Commission, 2006-2015 *Sourcebooks of Federal Sentencing Statistics.*

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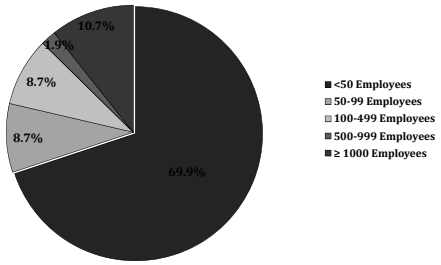
Size of Organizations Sentenced By Number of Employees Fiscal Year 2015



SOURCE: United States Sentencing Commission, 2015 Datafile, CORP15

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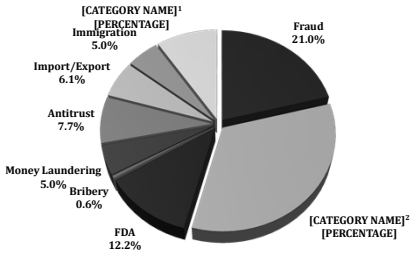
Primary Offense of Organizational Cases Fiscal Year 2015



[1] The Other category includes the following offense types: Administration of Justice, Contraband, Copyright/Trademark Infringement, Drugs (not FDA), Gambling, Tax, and Other.
[2] The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.
SOURCE: United States Sentencing Commission, 2015 Datafile, CORP15.

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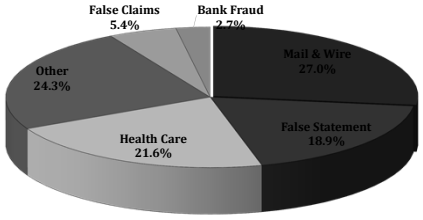
Fraud Offenses in Organizational Cases Fiscal Year 2015



SOURCE: United States Sentencing Commission, 2015 Datafile, CORP15.

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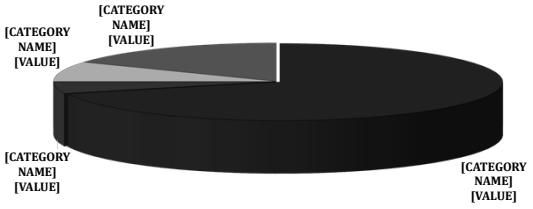
Number of Environmental Organizational Cases Fiscal Years 2015



SOURCE: United States Sentencing Commission, 2015 *Sourcebook of Federal Sentencing Statistics.*

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Relationship of Individual Offender To Organizational Cases Fiscal Years 2014-2015

SOURCE: United States Sentencing Commission, 2014-2015 Datafiles, CORPFY14 and CORP15.

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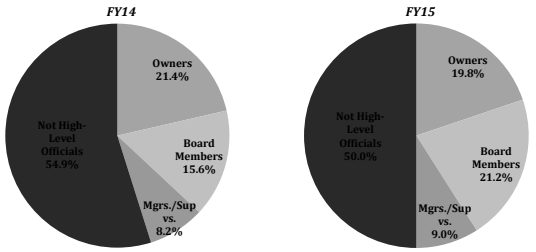
Percentage of Individual Offenders Who Were "High-Level" Officials of Co-Defendant Organizations Fiscal Years 2014-2015



SOURCE: United States Sentencing Commission, 2014-2015 Datafiles, CORPFY14 and CORP15.

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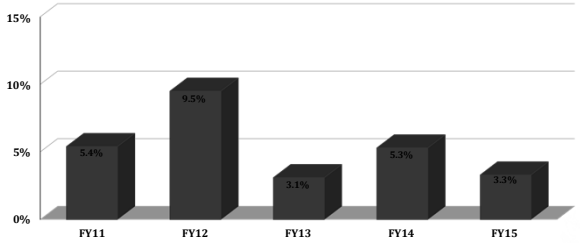
Percentage of Organizations Sentenced that Obstructed Justice (§8C2.5(e)) Fiscal Years 2011-2015



SOURCE: United States Sentencing Commission, 2011-2015 *Sourcebooks of Federal Sentencing Statistics.*

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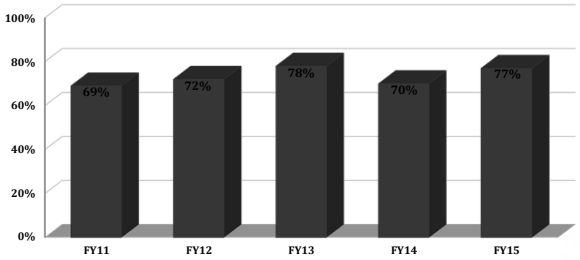
Percentage of Organizational Cases Receiving Probation Fiscal Years 2011-2015



SOURCE: United States Sentencing Commission, 2011-2015 *Sourcebooks of Federal Sentencing Statistics.*

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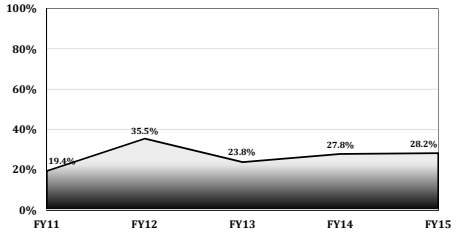
Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Years 2011-2015



SOURCE: United States Sentencing Commission, 2011-2015 *Sourcebooks of Federal Sentencing Statistics.*

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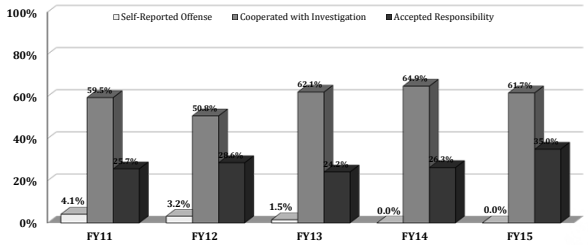
Percentage of Organizational Cases Receiving Reduction in Culpability Score under §8C2.5(g) Fiscal Years 2011-2015



SOURCE: United States Sentencing Commission, 2011-2015 *Sourcebooks of Federal Sentencing Statistics.*

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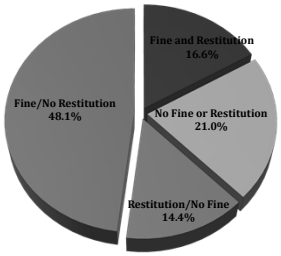
Types of Monetary Sentences
Fiscal Year 2015



SOURCE: United States Sentencing Commission, 2015 *Sourcebook of Federal Sentencing Statistics.*

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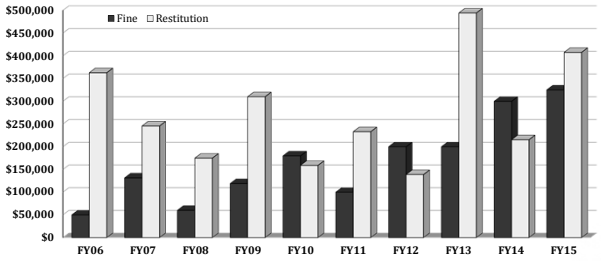
Number of Organizational Cases
Fiscal Years 2006-2015



SOURCE: United States Sentencing Commission, 2006-2015 *Sourcebooks of Federal Sentencing Statistics.*

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Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) Fiscal Year 2015

Fines	
Environmental	$1,333.5
Food & Drug	$ 155.1
Food & Drug	$ 140.0
Environmental	$ 96.0
Fraud	$ 96.0
Environmental	$ 80.0
Environmental	$ 67.7
Tax	$ 67.6
Antitrust	$ 59.4
Antitrust	$ 57.8

Restitution	
Fraud	$ 666.5
Tax	$ 275.0
Fraud	$ 40.0
Fraud	$ 16.0
Money Laundering	$ 15.0
Money Laundering	$ 12.8
Money Laundering	$ 6.7
Fraud	$ 6.6
Fraud	$ 6.2
Fraud	$ 6.2

SOURCE: United States Sentencing Commission, 2015 Datafile, CORP15.

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What Might the Future Hold for the Organizational Sentencing Guidelines?

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Thank you!

Eric Morehead
Morehead Compliance Consulting
eric@moreheadconsulting.com
www.moreheadconsulting.com
512-961-3890