

APPENDIX H EXTRACTS FROM THE U.S. FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS

These sentencing guidelines for organizational defendants were published as Chapter 8, “Sentencing of Organizations,” in United States Sentencing Commission, Guidelines Manual (Washington, D.C.: U.S. Sentencing Commission, November 2002). The full text of the manual can be found at www.ussc.gov/2002guid/TABCON02.htm.

Chapter 8: Sentencing of Organizations

INTRODUCTORY COMMENTARY

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal

conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

SECTION 8A1.2 APPLICATION INSTRUCTIONS—ORGANIZATIONS

COMMENTARY

Application Notes:

3. The following are definitions of terms used frequently in this chapter:

...

(b) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.

(c) "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

(d) "Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

(e) An individual "condoned" an offense if the individual knew of the offense and did not take reasonable steps to prevent or terminate the offense.

(f) "Similar misconduct" means prior conduct that is similar in nature to the conduct underlying the instant offense, without regard to whether or not such conduct violated the same statutory provision. For example, prior Medicare fraud would be misconduct similar to an instant offense involving another type of fraud.

...

(k) An “effective program to prevent and detect violations of law” means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
- (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
- (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
- (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
- (5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
- (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its program to prevent and detect violations of law.

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

(i) **Size of the organization**—The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.

(ii) **Likelihood that certain offenses may occur because of the nature of its business**—If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.

(iii) **Prior history of the organization**—An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.

SECTION 8C2.5 CULPABILITY SCORE

(a) Start with 5 points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If —

(A) the organization had 5,000 or more employees and

(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; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

- (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit, add 5 points; or

...

(f) Effective Program to Prevent and Detect Violations of Law

If the offense occurred despite an effective program to prevent and detect violations of law, subtract 3 points.

Provided, that this subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

Provided, further, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.