Chapter 15 THE SENTENCING OF ORGANIZATIONS

2-15 Federal Sentencing for Business Crimes § 15.syn

§ 15.syn Synopsis to Chapter 15 THE SENTENCING OF ORGANIZATIONS

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Scope

This chapter reviews the law of corporate criminal liability as an introduction to the organizational sentencing guidelines, and then analyzes Chapter Eight of the Sentencing Guidelines in order to provide the practitioner with an understanding of the mechanics of organizational sentencing, as well as areas that may be ripe for negotiation or legal challenge.

FOOTNOTES:

(n1) Footnote *. Mr. Spivack is a partner in Hogan & Hartson, LLP's Washington, D.C. office, practicing in the firm's Criminal Defense, Investigations, and Corporate Compliance Practice Group. A former federal prosecutor, he has defended numerous corporations and other entities in criminal investigations.

§ 15.01 Introduction.

The sentencing of corporations and other types of business enterprises under federal law changed dramatically with the introduction of Chapter Eight of the United States Sentencing Guidelines on November 1, 1991. Chapter Eight made the fines and other penalties imposed on corporations convicted of federal crimes more severe than under prior law. Chapter Eight also gave corporations the option to decrease those potential penalties by having in place a business ethics or compliance program designed to detect and deter criminal conduct by corporate employees.

The prospect of reducing potential fines is significant because a business enterprise is generally liable for the criminal acts of its employees, agents, and independent contractors, whenever those individuals act within the scope of their employment and with intent to benefit the corporation. The law imposes liability even where the individual's acts violate express corporate policy or supervisorial direction. Moreover, the "scope of employment" has a much broader definition under the criminal law and includes acts within the agent's apparent authority. Thus, responsible businesses can find themselves at risk of prosecution for crimes even when senior management had no idea that the conduct was occurring.

Such a prosecution can have serious financial consequences under the Guidelines. The Guidelines use a formula to determine the fine range to be imposed on a corporation. There are numerous factors that can cause the fine range to increase significantly, especially the nature and seriousness of the crime, the amount of money the business gained or the victim lost because of the crime, and the culpability of the business. Under the Guidelines, the "culpability" of the business is measured by the involvement of senior management in the offense and the size of the organization.

In addition, the Guidelines can result in a company being ordered to pay restitution to the victims of an offense, and to disgorge profits and forfeit assets to the government. Sentencing under the Guidelines also frequently results in the imposition of a corporate integrity agreement on the offending corporation that requires it to submit to extensive oversight by the government.

The Guidelines provide incentives, in the form of reduced fines, for a company to act proactively by adopting a corporate compliance program. Corporate compliance is the foundation of any company's efforts to minimize its exposure under federal criminal law. An effective compliance program ensures that a company educates its employees and agents about the requirements of the criminal laws. It also increases the company's chances to detect violations and take appropriate actions, including minimizing the loss to others and reporting the violation to the government. Finally, it can decrease the fine that the company has to pay in the event of a violation.

The Guidelines also provide an opportunity for creative litigation and interpretation. Because corporations generally avoid trials and protracted sentencing disputes by entering into negotiated settlements, Chapter Eight has not been the subject of extensive litigation.n1 There are numerous provisions that could provide avenues of relief if tested in the courts. Even if corporate counsel decides against litigation, a thorough knowledge of Chapter Eight's intricacies can provide an invaluable tool in negotiating a corporate resolution with the government.

FOOTNOTES:
(n1) Footnote 1. In 1999, for example, 255 organizations were sentenced under the Guidelines. Of those, 234 entered pleas of guilty or *nolo contendere* and 21 went to trial. United States Sentencing Commission, *Annual Report 1999*, Ch. 5, at 45.

§ 15.02 Corporate Criminal Liability.

Any discussion of the organizational sentencing guidelines must begin with a summary of the law of corporate criminal liability. Under the law of corporate criminal liability, discussed below, the organization is responsible for the actions of its employees, agents, and brokers, even if they are independent contractors. Moreover, because the sum of all knowledge held by employees, agents, and brokers is attributed to the organization under the law, the organization could be held liable for criminal actions even where no single actor has the required knowledge and intent.

[1]--Corporate Liability for Acts of Agents and Brokers.

A corporation, or other organization, may be convicted for the criminal acts of its agent where the agent acts within the scope of his employment. "That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated, at least in part, by an intent to benefit the corporation."n1 The scope of authority for which liability can accrue is broader than the civil standard; it includes apparent authority associated with the

agent's general line of work, and is not limited to authority that is within a specific or express delegation.n2 Apparent authority "is the authority which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct."n3

A common defense is that an employee or agent has acted outside the scope of his or her authority and against express corporate policy in committing the illegal conduct. Many courts, however, have found that corporate policy alone does not establish a defense that the acts were ultra vires. The general rule is that a corporation can be held criminally liable even though the conduct was in direct violation of specific corporate instructions.n4 The government can introduce evidence of lax corporate enforcement or inaction in the face of knowledge that employees were violating company policies.n5 The corporation must establish both the existence and communication of the policy to employees and diligence in assuring adherence to that policy.n6

[2]--Knowledge of Criminal Activities.

Under traditional standards of criminal law, the corporate employee would have to knowingly and intentionally engage in a criminal offense for the entity to be held liable. Recently, however, courts have begun to impose liability on corporations even where no single employee could be convicted of a crime. The courts have used two different, but related, doctrines to do so: deliberate indifference and collective knowledge.

[a]--Deliberate Indifference.

One way that courts have permitted the government to prove corporate knowledge for specific intent crimes is under the "deliberate indifference" or "willful blindness" doctrine. Under this doctrine, the government may prove corporate mens rea by demonstrating organizational indifference to wrongdoing by corporate employees.n7 Typically, a deliberate indifference instruction is proper where the evidence shows: "(1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct."n8 On the other hand, such an instruction is inappropriate "where the only evidence alerting the defendant to the high probability of criminal activity is direct evidence of the illegality itself."n9

The leading case on the deliberate indifference theory, as applied to organizations, is *United States v. Bank of New England* .n10 In that case, a customer visited a branch of the bank 31 times in approximately one year, and on each visit, he cashed several checks that totaled over $ 10,000 drawn on a single account. The bank did not file Currency Transaction Reports ("CTRs") on these transactions, required on customer currency transactions over $ 10,000, until after it received a grand jury subpoena. The bank was subsequently indicted and convicted of 31 counts of violating the Currency Transaction Reporting Act, 31 U.S.C. § § 5311-5322 , which imposes felony liability when a financial institution willfully fails to file CTRs "as part of a pattern of illegal activity involving transactions of more than $ 100,000 in a twelve-month period."n11

On appeal, the bank contended that there was insufficient evidence to find that it had the intent to violate the reporting obligation. The First Circuit turned aside this argument, noting that a rational jury could have concluded that the bank was deliberately indifferent based on evidence that its employees knew about the currency reporting requirements and regarded the customer's transactions as unusual, speculated that he was a bookie, and suspected that he was structuring his transactions to avoid the reporting requirements. Moreover, the court of appeals pointed to an internal bank memorandum, written after an investigation of the customer's transactions, concluding that a "person managing the branch would have had to have known that something strange was going on" as additional evidence of deliberate indifference.n12

In *United States v. Giraldi* ,n13 the Fifth Circuit Court of Appeals affirmed the conviction of an employee of American Express Bank International. While there was no direct evidence that the employee knew that any funds were tainted, the court held that evidence of the employee's failure to follow the bank's policy of determining the identity of the customer and source of the funds (called "know your customer" policies), and falsifying of records so as to appear to comply with the policy, was evidence of willful blindness. The court also observed that the types of activity in the accounts should have raised suspicions: the customer formed companies to open bank accounts in bank secrecy havens such as Switzerland and the Cayman Islands, and transmitted and received large sums of money by wire transfer.

In *United States v. Erickson* ,n14 the defendants, a physician and a medical center, were charged with making false claims to the Medicare system under 18 U.S.C. § 287 based on their billing practices. The defendants claimed that the Medicare billing regulations were impossible to understand. Over their objection, the district court instructed the jury that the government could prove the defendants' knowledge under section 287 by showing that they were deliberately ignorant of the billing requirements. The Ninth Circuit affirmed the instruction, holding that there was evidence to show that the

defendants deliberately avoided learning about the billing requirements, including the fact that they had been specifically warned by an HCFA agent that their billing practices might be illegal.n15

In *Stein Distributing Co. v. Department of the Treasury* ,n16 the appellant, a liquor wholesaler, appealed its suspension under the Federal Alcohol Administration Act for restocking a customer's shelves and moving its competitors' products. The regulation in question permitted suspension only for willful violations of the Act. The Ninth Circuit affirmed the suspension, finding that the appellant had disregarded two notifications by the Bureau of Alcohol, Tobacco, and Firearms that its conduct violated the law. As a result, the court of appeals found that there was sufficient evidence to support the finding that the company "acted with an intentional disregard of the statute or plain indifference to its requirements."n17

In *United States v. Camuti* ,n18 the defendant hired salesmen to market investments in mortgage pools purportedly consisting of mortgages on high-priced Boston residential properties. In fact, no residential mortgages secured the investments. After about nine months, the investment program attracted the attention of the state securities regulators, who made a written inquiry as to whether the defendant was illegally selling unregistered securities. The defendant instructed his attorney to respond (inaccurately) that no funds had been collected and no mortgage pool participations had been issued. Subsequently, a newspaper article appeared in a Boston newspaper that reported that no residential mortgages backed the investments. The defendant admitted to some of the larger investors that the report was true.n19

At his trial on mail fraud charges, the defendant contended that the salesmen were making misrepresentations without his knowledge. At the government's request, and without objection from the defendant, the district court gave the jury a willful blindness instruction.n20 The court of appeals held that the instruction did not constitute plain error because "[a] jury could reasonably find that even if [the defendant] had not actually directed the fraud, the warning signs were ample to have alerted [him] to the fraud unless he deliberately chose to avoid them; two good examples are the newspaper reports of the fraud (articles [the defendant] discussed with his investors) and the contacts by the state investigators (which [the defendant] sought to thwart with false information)."n21

[b]--The Collective Knowledge Doctrine.

Another theory under which the government can proceed against an organization is the collective knowledge doctrine. Under this doctrine, a corporation's knowledge consists of "the totality of what all of the employees know within the scope of their employment."n22 Thus, a corporation may be held criminally liable for conduct even when no single agent intended to commit the offense or even knew the operative facts that constituted the violation. The intent and knowledge of various agents may be collectively attributed to the corporation, thereby giving rise to corporate criminal liability when no individual criminal liability would exist.n23 As the First Circuit explained in *United States v. Bank of New England* :

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation: "[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly."n24

The Ninth Circuit, for example, addressed the doctrine of collective knowledge in *United States v. Shortt Accountancy Corp.* ,n25 In that case, the defendants, charged with willfully making and subscribing a false tax return, argued that the person who actually subscribed the tax return did not possess the requisite intent. The false information was supplied to the person who signed the tax return by a corporate agent who did possess the intent. The court held that liability existed because the agent deliberately caused the corporation to make and subscribe a false return, despite the fact that the person who actually filed the return did not have knowledge of its falsity.n26 The court stated that holding otherwise would mean "any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return."n27

FOOTNOTES:

(n1) Footnote 1. **Liable for agent's acts.**

1st Circuit United States v. Cincotta, 689 F.2d 238, 241-242 (1st Cir. 1982) .

6th Circuit United States v. Carter, 311 F.2d 934, 941-942 (6th Cir. 1963) ("[A] corporation, through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and wilfulness... . It is essential, however, to corporate guilt, that its officer's or agent's illegal conduct be related to and done within the course of his employment and have some connection with the furtherance of the business of such corporation."); Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960) ("[S]o long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have 'authorized' the criminal act.").

(n2) Footnote 2. **Scope of authority.**

4th Circuit United States v. Basic Constr. Corp., 711 F.2d 570, 573 (4th Cir. 1983) .

5th Circuit United States v. Investment Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993) .

9th Circuit United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) .

(n3) Footnote 3. **''Apparent authority.''** United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984) .

(n4) Footnote 4. **General rule.** United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) . *See also*--

3d Circuit United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-205 (3d Cir. 1970) .

4th Circuit United States v. Automated Med. Lab., 770 F.2d 399, 407 (4th Cir. 1985) .

10th Circuit United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972) .

(n5) Footnote 5. *See* Fed. R. Evid. 404(b) .

(n6) Footnote 6. **Corporate policy.** *Hilton Hotels Corp.*, 467 F.2d at 1007.

(n7) Footnote 7. **Indifference to wrongdoing.**

1st Circuit United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir. 1987) .

9th Circuit United States v. Erickson, 75 F.3d 470, 481 (9th Cir. 1996) .

(n8) Footnote 8. **Deliberate indifference instruction proper.** United States v. Threadgill, 172 F.3d 357, 368 (5th Cir.), *cert. denied*, 528 U.S. 871 (1999) . *See also*--

1st Circuit United States v. Gabriele, 63 F.3d 61, 66 (1st Cir. 1995) (a willful blindness instruction is warranted where "(1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge was mandatory.").

9th Circuit United States v. Erickson, 75 F.3d at 481 (an instruction on this theory is appropriate "only where there is evidence that the defendant may have purposely avoided learning the facts or shut his eyes to avoid learning the existence of a fact that he all but knew").

(n9) Footnote 9. **Instruction improper.** United States v. Erickson, 75 F.3d 470, 481 (9th Cir. 1996) .

(n10) Footnote 10. ***Bank of New England.*** 821 F.2d 844 (1st Cir. 1987) .

(n11) Footnote 11. 821 F.2d at 848. 31 U.S.C. § 5322(b) .

(n12) Footnote 12. 821 F.2d at 857.

(n13) Footnote 13. ***Giraldi.*** 86 F.3d 1368 (5th Cir. 1996).

(n14) Footnote 14. ***Erickson.*** 75 F.3d 470 (9th Cir. 1996).

(n15) Footnote 15. 75 F.3d at 474, 480.

(n16) Footnote 16. ***Stein Distrib. Co.*** 779 F.2d 1407 (9th Cir. 1986).

(n17) Footnote 17. 779 F.2d at 1412-1413.

(n18) Footnote 18. ***Camuti.*** 78 F.3d 738 (1st Cir. 1996).

(n19) Footnote 19. 78 F.3d at 741.

(n20) Footnote 20. 78 F.3d at 744.

(n21) Footnote 21. 78 F.3d at 744.

(n22) Footnote 22. **Totality of employees' knowledge.** United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir. 1987) .

(n23) Footnote 23. **Intent and knowledge collectively attributed.** 821 F.2d at 855-856. *See also*--

4th Circuit United States v. T.I.M.E.-DC, Inc., 381 F. Supp. 730, 740-741 (W.D. Va. 1974) .

9th Circuit United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1454 (9th Cir. 1986) .

(n24) Footnote 24. **Collective knowledge.** United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (quoting United States v. T.I.M.E.-DC, Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974)).

(n25) Footnote 25. ***Shortt Accountancy Corp.*** 785 F.2d 1448 (9th Cir. 1986).

(n26) Footnote 26. *See* 785 F.2d at 1454.

(n27) Footnote 27. 785 F.2d at 1454.

§ 15.03 Principles of Corporate Prosecution.

The government has announced a policy that encourages federal prosecutors to put the law of corporate criminal liability to greater use. In 1999, the U.S. Department of Justice issued its "Guidance on Prosecutions of Corporations" (the "DOJ Guidelines," attached at Appendix Q), intended to be a guide to prosecutors for the evaluation of prosecutions against corporations. The DOJ Guidelines, like the Sentencing Guidelines, stress the importance of organizational controls and compliance efforts in the government's evaluation of whether to prosecute a corporation and, if so, what the severity of the monetary penalty should be. The DOJ Guidelines enumerate the following factors to be considered in the prosecutive decision:

> (1) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime.
>
> (2) The pervasiveness of wrongdoing within the corporation, including management's complicity or whether corporate management condoned the wrongdoing.
>
> (3) The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it.
>
> (4) The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the attorney-client and work product privileges.
>
> (5) The existence and adequacy of the corporation's compliance program.
>
> (6) The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.
>
> (7) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable.
>
> (8) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

These factors are intended to be illustrative, rather than exhaustive. The factors, however, provide a useful framework for introducing preventative measures in a corporation's organizational systems and management, as well as for arguing against a criminal prosecution should the federal government develop an enforcement interest in the corporation's activities.

§ 15.04 Chapter Eight's Organizing Principles.

As a preliminary matter, the general rule that the sentencing court must apply the Sentencing Guidelines in effect on the date of sentencing applies equally to organizational sentencing.n1 The only exception to the rule is that the Guidelines in effect on the date the offense was committed must be used if those Guidelines would result in a more lenient punishment.n2 If, due to *ex post facto* concerns, the earlier Guidelines must apply, they must be applied in their entirety; a sentencing court cannot pick and choose, taking one provision from the earlier Guidelines and another from the later.n3

Chapter Eight addresses the sentencing of organizations for all felony and class A misdemeanor offenses. An "organization" means "a person other an individual." USSG § 8A1.1 , comment. (n.1). This term is inclusive of corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments, and political subdivisions thereof, and non-profit organizations. USSG § 8A1.1 , comment. n.1. The introductory Commentary reflects the following general principles regarding the sentencing of corporate defendants:

> This chapter is designed so that the sanctions imposed upon organizations and their agents,[n4] taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.n5

Thus, the sentences meted out to individual defendants must be factored into whatever sentence is imposed upon a company.

Further, Chapter Eight reflects four basic underlying principles. First, "the court must, whenever practicable, order the organization to remedy any harm caused by the offense."n6 The Commentary makes clear that "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."n7

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 of its assets."n8 This principle and the guideline implementing it (USSG § 8C1.1) are inapplicable, absent unusual circumstances, to a legitimate business and its subsidiaries.

Third,

> [T]he fine range ... 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 the involvement in or tolerance of the offense by certain personnel, and the organization's conduct after an offense has been committed.n9

Although the sentencing court will ultimately be guided in setting the fine by all of the factors enumerated in the statutory scheme underlying the guidelines, the "culpability" factors emphasized in this Commentary will doubtlessly be critical ones.

Fourth, "probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure steps will be taken within the organization to reduce the likelihood of future criminal conduct."n10

A discussion of these principles follows.

FOOTNOTES:

(n1) Footnote 1. **Apply Guidelines in effect on date of sentencing.** USSG § 1B1.11(a), p.s. The courts have uniformly adopted this rule. United States v. Mooneyham, 938 F.2d 139, 140 (9th Cir. 1991) . The position of the Department of Justice is that the Guidelines are not retroactive. Robert S. Mueller, III, Asst. Atty. Gen., Memorandum dated Nov. 7, 1991. Under DOJ's own policies, then, the organizational guidelines should only apply to offenses committed on or after November 1, 1991.

(n2) Footnote 2. **Exception.** USSG § 1B1.11(b)(1), p.s.

1st Circuit United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990) .

9th Circuit United States v. Warren, 980 F.2d 1300, 1304 (9th Cir. 1992) .

(n3) Footnote 3. **Amending the Guidelines.** USSG § 1B1.11(b)(2), p.s.; *Warren*, 980 F.2d at 1305. "If earlier Guidelines are used, subsequent amendments may be considered to the extent that such amendments are clarifying rather than substantive changes." United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996) .

(n4) Footnote 4. "Agent" is defined as "any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organizations." USSG § 8A1.2 , comment. (n.3(d)).

(n5) Footnote 5. USSG, Ch.8, intro. comment.

(n6) Footnote 6. USSG, Ch.8, intro. comment.

(n7) Footnote 7. USSG, Ch.8, intro. comment.

(n8) Footnote 8. USSG, Ch.8, intro. comment.

(n9) Footnote 9. USSG, Ch.8, intro. comment.

(n10) Footnote 10. USSG, Ch.8, intro. comment. The probation provisions are perhaps the most controversial, permitting as they do an unprecedented level of court intervention into the business operations of private entities. *See* § 15.05[3] *below.*

§ 15.05 The Sentencing of Organizations.

The sentencing analysis for an organization begins with USSG § 8A1.2, which sets forth instructions and a four-step process to determine: first, the sentencing requirements and options relating to remedying the harm caused by the criminal conduct (restitution, remedial orders, community service, and notice to the victims); second, the sentencing requirements and options relating to fines; third, the sentencing requirements and options relating to probation; and last, the sentencing requirements and options relating to special assessments, forfeitures, and costs.

[1]--Remedying the Harm Caused by the Criminal Conduct.

[a]--The Guidelines.

Turning first to the question of remediation, the current § 8B1.1 would apply if an offense were committed on or after November 1, 1997.n1 For earlier offenses, however, that Guideline mandates the application of former USSG § 8B1.1.n2

[i]--Restitution.

If the offense of conviction is one under Title 18 and restitution is authorized by 18 U.S.C. § § 3663-3664 , the sentencing court may enter a restitution order.n3 If the statutes would authorize such a restitution order but for the fact that the offense is not set out in Title 18, the court may still impose restitution, but must do so by sentencing the organization to probation with a condition requiring the payment of restitution.n4

USSG § 8B1.1 sets two limitations on the imposition of restitution. One limitation is that the sentencing court need not impose restitution "when the organization has made full restitution."n5 Second, and more fundamentally, the court need not impose restitution:

> to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.n6

USSG§ 8B1.2 (policy statement)n7 permits the imposition of a remedial order as a condition of probation that requires a corporation "to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm."n8 In addition, "[i]f the magnitude of the expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm."n9 The sentencing court is specifically directed to coordinate any remedial order with any action taken by the appropriate governmental regulatory agency.n10 Examples of remedial orders include a product recall for a food and drug violationn11 or a clean-up order for an environmental violation.

[ii]--Community Service.

Community service may be ordered as a condition of probation where "such community service is reasonably designed to repair the harm caused by the offense."n12 Although the Commentary expresses a preference for the imposition of direct monetary sanctions as compared to a condition of probation requiring community service, the Commentary notes that the latter may be preferable where "the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense."n13 Whatever community service is ordered must provide "a means for preventive or corrective action directly related to the offense."n14

[iii]--Notice to Victims.

In addition, the court may order the corporate defendant to pay the cost of giving notice to all of the victims pursuant to 18 U.S.C. § 3555 .n15 "This cost may be offset against any fine imposed if the court determines that imposition of both sanctions would be excessive."n16 In offenses involving fraud or other intentionally deceptive practices, the court may order the defendant to "give reasonable notice and explanation of the conviction, in such a form as the court may approve" to the victims of the offense.n17 In determining whether notice is appropriate, the court considers the sentencing factors listed in 18 U.S.C. § 3553(a) n18 and the cost involved in giving the notice compared to the loss caused by the crime.n19

If such an order of notice to the victims is under consideration, the court must notify the government and the defendant. Upon motion of either party, or on its own motion, the court must, among other things, permit the parties to submit affidavits and memoranda relevant to the imposition of such an order and, if such order is issued, state its reasons for doing so.n20

[b]--Statutory Limits on Restitution.

The initial question regarding statutory limits on restitution is which of two acts to apply: The Mandatory Victims Restitution Act of 1996 ("MVRA"), or its predecessor statute, the Victim and Witness Protection Act ("VWPA"). The MVRA, enacted on April 24, 1996, states that it "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act."n21 The question of whether the MVRA would be applicable in a case against a corporation (i.e., whether it is "constitutionally permissible") may have material consequences because it made changes to the VWPA that may be detrimental.n22

There is a split among the circuits regarding the retroactive application of the MVRA. The Second, Third, Ninth, and Eleventh Circuits have held that restitution under the MVRA is punishment,n23 thereby triggering *ex post facto* analysis. The Seventh and Eighth Circuits, on the other hand, have held that the MVRA is functionally a tort statute and so may be retroactively applied.n24

To fall within the traditional *ex post facto* prohibition, "a law must be retrospective--that is it must apply to events occurring before its enactment--and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime."n25 If applying the MVRA rather than the VWPA would have such effect, a corporation could argue, the latter must be applied.n26

The organizational defendant would want the VWPA to apply if for no other reason than to preserve a measure of the court's discretion.n27 One supporting argument would be premised on *ex post facto* principles. A second argument would be predicated on the terms of the MVRA itself. The MVRA states that it will not apply to fraud convictions and convictions for other offenses against property under Title 18,n28 if the court finds, from facts on the record, that:

> the number of identifiable victims is so large as to make restitution impracticable; or determining complex issues of fact related to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.n29

Under the VWPA, numerous limitations have been placed upon the court's ability to order restitution. In *United States v. Vaknin* ,n30 the First Circuit held that the government must not only show that a particular loss would not have occurred but for the offense of conviction, but also that the causal connection between the conduct and the loss is not too attenuated, either factually or temporally.n31

[2]--Fines.

[a]--Fine Authorized by Statute.

The Sentencing Commission has developed detailed procedures to determine fines for certain specified offenses (*e.g.*, theft, fraud, money laundering, *etc*.) as listed in USSG § 8C2.1 . For offenses not listed in § 8C2.1, the Commission has not yet promulgated detailed fine guidelines, instead directing the sentencing court to determine an appropriate fine by applying 18 U.S.C. § § 3553 and 3572 ,n32 the general statutory provisions governing sentencing.n33 Thus, for offenses not listed in § 8C2.1, although the same general considerations will apply, the court need not engage in the numerical calculations mandated by the detailed guidelines.

Regardless of whether specific guidelines apply, 18 U.S.C. § 3571 establishes the statutory maximum for permissible fines. No guideline, or court seeking to depart upwardly from a guideline, may go higher than these statutory limits. Section 3571, in relevant part, provides:

> (c) Fines for organizations. Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of
>
> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $ 500,000;
>
> (d) Alternative fine based on gain or loss. If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.
>
> (e) Special rule for lower fine specified in substantive provision. If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Under the reasoning of *Burgos v. United States* ,n34 all federal offenses are governed by the general fine statute. If the courts of appeal adopt that reasoning, 18 U.S.C. § 3571 would apply to set the maximum fine, even when an offense provides a lower fine for its violation if the statute does not by specific reference exempt the offense.n35

[b]--Fine Authorizes by the Guidelines.

[i]--Preliminary Determination: Applicability of the Guidelines and Ability to Pay.

Turning to the Guidelines, USSG § 8C2.1 (Applicability of Fine Guideline) determines fines for organizations not operating primarily for a criminal purpose or by criminal means. That Guideline mandates the application of the fine provisions of § § 8C2.2 through 8C2.9 to offenses enumerated in § 8C2.1--those for which pecuniary loss or harm can be more easily quantified, such as fraud,n36 theft, and tax offenses.n37 In addition, the sentencing guidelines for antitrust offenses, money laundering violations, and most bribery and kickback crimes contain specific formulations for calculating fines for organizations.n38 For each count of the charged offenses for which the applicable guideline offense level is determined under USSG § 8C2.1, the Chapter Two guidelines are used to determine the base offense level and the appropriate adjustments.n39

The preliminary step for a sentencing court is to determine whether the organizational defendant has the ability to pay restitution or a fine.n40 If it is "readily ascertainable" that the organization cannot and is not likely to become able to pay restitution, there is no need to determine the pertinent guideline fine range.n41 If, after preliminarily determining the pertinent guideline fine range, the court determines that the corporate defendant cannot and is not likely to be able to pay the minimum guideline fine, there is no need to further determine the applicable fine range.n42

[ii]--Offense Level.

Assuming the ability to pay is not an issue, the next step is the determination of the offense level.n43 The Guidelines assign a "base offense level" to each federal crime. The base offense level acts as the starting point for the calculation of the total offense level.

The offense level is then raised or lowered depending on the facts of the case, including: the amount of money involved,n44 whether the conduct was repeated, whether the offensen45 involved more than minimal planning, whether

the offense involved some sophisticated means to avoid detection, whether the offense involved the risk of serious bodily injury, and whether the offense involved the obstruction or attempted obstruction of the investigation.n46

[iii]--Base Fine.

The next step is to calculate the base fine. As a general rule, the base fine measures the seriousness of the offense. The ultimate goal is to produce a fine range appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.n47 The base fine is the *greatest* of:

> (1) the amount set forth in the fine table for the offense level,
>
> (2) "the pecuniary gain to the organization from the offense," or
>
> (3) "the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly."n48

The Guidelines fine table in Chapter Eight sets out base fines that start at $ 5,000 for an offense level six or less and increase to $ 72,500,000 for an offense level 38.n49

Pecuniary gain is defined as "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense."n50 This gain may be the result of either additional revenue or cost savings.n51 Pecuniary loss is defined as "the value of the money, property, or services unlawfully taken."n52 Note 2 of the Commentary to USSG § 8C2.4 states:

> Under 18 U.S.C. § 3571(d) , the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. *See* Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.n53

The Background Commentary to Section 8C2.4 states that "in order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine."n54 Similarly, in order "to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances."n55

Special considerations may apply when the offense involves multiple participants, that is, multiple organizations or an organization and individuals unassociated with it.n56 In determining the offense level, "apportionment of gain from or loss caused by the offense" is disregarded.n57 If the sentencing court uses either pecuniary gain or pecuniary loss, however, in a case involving multiple participants, the court *may* apportion gain or loss "considering the defendant's relative culpability and other pertinent factors."n58

[iv]--Culpability Score.

Once the base fine is determined, the next step is to calculate the culpability score under Section 8C2.5. The culpability score starts with the base level of five points and increases based upon the size of the organizationn59 and the involvement of "high-level"n60 or "substantial authority personnel."n61

According to the background notes to Section 8C2.5, the increased culpability scores are based on the following rationales:

> First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations

and professionalism of management, subsection (b) gradually increases the culpability score based upon the size of the corporation and extent of the substantial authority personnel involved.n62

[A]--Factors that Increase the Culpability Score.

[I]--Involvement in or Tolerance of Criminal Activity.

The culpability score can increase based on the size of the company or business unit involved and the involvement of senior management. Specifically, if "an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense,"n63 or (ii) "tolerance of the offense by substantial authority personnel was pervasive throughout such an organization," and the organization had 5,000 or more employees, the culpability score can increase by up to five points.n64 The government may make the allegations, in the alternative or in addition, that these same facts pertained in "the unit of the organization within which the offense was committed."n65 "Pervasiveness" is case specific and will "depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense."n66 Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority.n67

[II]--Prior History.

Prior history is factored into the calculation of the culpability score in specified ways. If the organization committed any part of the offense less than ten years after a criminal adjudication based on similar instances of misconduct,n68 or a civil or administrative adjudication based on two or more separate instances of similar misconduct, the culpability score increases by one point.n69 If the organization committed any part of the offense less than five years after such adjudications, the culpability score increases by two points.n70

The relevant prior history may be confined to a business unit or subsidiary where that unit is a "separately managed line of business." A "separately managed line of business" is a subsidiary or division that "has a high degree of autonomy from higher managerial authority and maintains its own separate books of account."n71 If the business unit meets this test, only the prior conduct of that specific business unit should be considered in determining whether to increase the culpability score.

The Guidelines recognize that businesses are subject to mergers and other transactions. Thus, in determining the prior history of the business unit, "the conduct of the underlying entity shall be considered without regard to legal structure or ownership."n72 For example, if two companies merged and became separately managed divisions under section 8C2.5's definition (i.e., by having managerial autonomy and separate books) within the newly merged company, each division would retain the prior history of the predecessor company.n73 On the other hand, if the transaction involved an asset purchase only, the prior history of the seller could not be transferred with its assets to the buyer.n74

Prior history can also be significant in evaluating the organizational defendant's eligibility for reductions in the culpability score.n75 Recurrence of malfeasance "similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct."n76 Thus, the sentencing court can factor an organization's prior history against a reduction for an "effective program to prevent and detect violations of the law." The theory appears to be that the organization's prior history puts it on notice of the types of offenses that it should have taken actions to prevent; the failure to do so makes the compliance program ineffective.n77

[III]--Violation of an Order.

If the commission of the offense violated a judicial order or injunction, other than a violation of a condition of probation, or if the organization violated a condition of probation by engaging in similar misconduct, *i.e.* misconduct similar to that for which it was placed on probation, the culpability score increases by two points.n78 If the commission of the instant offense violated a condition of probation through any action other than "similar misconduct," the culpability score increases by one point.n79

[IV]--Obstruction of Justice.

If the organization willfully obstructed or impeded, or attempted, aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, the culpability score increases by three points.n80 Document destruction can, of course, under certain circumstances, trigger the application of this section, so an organization must take special care to suspend document destruction policies and preserve documents

once a legal obligation arises to do so, such as by the service of a grand jury subpoena. However, this provision does not apply "where an individual or individuals have attempted to conceal their misconduct from the organization."n81

[B]--Factors that Decrease the Culpability Score.

[I]--Effective Program to Prevent and Detect Violations of Law.

If the offense occurred despite an effective program to prevent and detect violations of the law, three points are subtracted from the culpability score.n82 An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that, in general, it will be effective in preventing and detecting violations of the law.n83 The Guidelines require that the entity exercised due diligence in seeking to prevent and detect criminal conduct by its employees, agents, and independent contractors.n84 Due diligence requires the following, at a minimum:

> (1) The organization has established compliance standards and procedures to be followed by its employees and agents.
>
> (2) One (or more) specific, high-level personnel is assigned responsibility to oversee the compliance program.
>
> (3) The organization has not delegated substantial discretionary authority to individuals whom the organization knew, or should have known, were likely to commit crimes.
>
> (4) The organization must have taken steps to communicate its compliance program to all employees and agents, such as by holding training sessions or distributing the compliance program.
>
> (5) The organization must have taken steps to ensure that its compliance program is adhered to, such as by using monitoring and auditing systems and by having a reporting system that can be used by employees without fear of retaliation.
>
> (6) The compliance program must have been enforced through discipline commensurate to the offense.
>
> (7) After an offense has been detected, the organization must have taken steps to respond appropriately to the offense and to implement changes to prevent future offenses.n85

The type of program required will vary with the size of the organization, the nature of its business, and its prior history.n86 Larger organizations will require more formal programs than smaller companies. The programs should be designed to prevent the types of offenses likely to occur in the industry involved.n87 Moreover, where industry practices on ethics have evolved, the failure to follow the industry norm will be viewed as evidence that the program is not effective.n88

Guideline 8C2.5(f) provides three provisions limiting the application of this mitigating credit. The first excludes a reduction if the organization or business unit has 200 or more employees and "high-level personnel" participated in, condoned,n89 or was willfully ignorantn90 of the offense, or, regardless of the size of the organization, if the compliance officer was similarly involved, aware, or deliberately avoided knowledge of the offense. The second creates a rebuttable presumption that a compliance plan is not effective if "substantial authority personnel" participated. The third denies the reduction if the organization delayed in reporting the offense to the appropriate governmental authorities.

> [T]his subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.n91

The Sentencing Commission, commenting on the latter proviso, noted that the organization is allowed a reasonable period of time to conduct an internal investigation, and that no reporting is required, "if the organization reasonably concluded, based on the information then available, that no offense had been committed."n92

[II]--Self-Reporting, Cooperation, and Acceptance of Responsibility.

USSG § 8C2.5(g) provides for a reduction in the culpability score for self-reporting a violation, cooperation in the ensuing investigation, and acceptance of responsibility for any offenses, as follows:

> If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract five points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract two points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract one point.

To qualify for the maximum reduction set forth in (g)(1), the organization must have given the direction to make the report to appropriate governmental authorities, i.e., those law enforcement, regulatory, or program officials having jurisdiction over the matter.n93 To qualify for the reduction under either (g)(1) or (g)(2), the cooperation must be timely, defined as beginning "essentially at the same time as the organization is officially notified of a criminal investigation," and thorough, defined as "the disclosure of all pertinent information known by the organization."n94 The definitive test for whether the disclosure is thorough is "whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct."n95 The cooperation that the sentencing court must measure, however, is the cooperation of the organization, not of particular employees. If neither law enforcement nor the organization are able to identify the responsible individuals within the organization because of a lack of cooperation of particular individuals, "the organization may still be given credit for full cooperation" if it has made efforts to do so.n96

As with section 3E1.1, the reduction for acceptance of responsibility is ordinarily applied when an organization enters a plea of guilty and admits its involvement in the offense and related conduct.n97 The sentencing court may require the chief executive officer or highest ranking employee of an organization to appear at sentencing to demonstrate the organization's affirmative acceptance of responsibility.n98

Conduct inconsistent with an acceptance of responsibility, however, may outweigh a guilty plea.n99 Moreover, the adjustment is not intended to apply when the organization puts the government to its proof at trial, denies the essential factual elements of guilt, and only admits guilt and expresses remorse after conviction.n100 In rare circumstances, an organization may demonstrate an acceptance of responsibility even though it exercises its constitutional rights by going to trial, such as when it goes to preserve a constitutional issue or statutory challenge unrelated to factual guilt.n101 In such an instance, the court must make its evaluation based on the organization's pretrial conduct and statements.n102

[v]--Multipliers.

The next step in the analysis uses the culpability score from Section 8C2.5 and, applying any special instruction for fines, determines the applicable minimum and maximum fine multipliers.n103

The minimum of the guideline fine range is determined by multiplying the base fine by the applicable minimum multiplier.n104 The maximum of the guideline fine range is determined by multiplying the base fine by the applicable maximum multiplier.n105 The simple equation is therefore:

Base Fine x Minimum Multiplier = Minimum of the Applicable Range.

Base Fine x Maximum Multiplier = Maximum of the Applicable Range.

The Guidelines incentivize the institution of compliance programs and early reporting of violations by reducing the multiplier range to 5-20 percent of the base fine for a culpability score of 0, while raising the multiplier range as high as 200-400 percent of the base fine for a culpability score of ten.n106

The statutory fine provisions place a ceiling on the maximum permissible fine. Under 18 U.S.C. § 3571(d) , that ceiling is twice the gross gain or loss. In the event the sentencing court were to agree that it is simply impossible to calculate the relevant gain or loss, the maximum fine would then be $ 500,000 *per felony offense*.

[vi]--Determining the Fine Within the Range.

The court next determines the fine *within* the range by considering the following list pursuant to Section 8C2.8(a):

(1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

(2) the organization's role in the offense;n107

(3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;n108

(4) any nonpecuniary loss caused or threatened by the offense;n109

(5) whether the offense involved a vulnerable victim;

(6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;n110

(7) any prior civil or criminal misconduct of the organization other than that counted under USSG § 8C2.5(c);n111

(8) any culpability score higher than ten or lower than zero;

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in the culpability-score guideline; and

(10) any factor listed in 18 U.S.C. § 3572(a) .n112

The court may also consider "the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factors used to determine the culpability score."n113 Application Note 7 states that subsection (b) allows the sentencing court to use any factor previously considered to determine the range in determining the fine within the range.n114

[vii]--Disgorgement.

Pursuant to USSG § 8C2.9, "[t]he court shall add to the fine under § 8C2.8 (Determining the Fine Within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures." This disgorgement provision "is designed to ensure that the amount of any gain that has not and will not be taken from the organization for remedial purposes will be added to the fine."n115 It typically applies when the offense did not involve harm to identifiable victims, such as "money laundering, obscenity, and regulatory reporting offenses."n116 This section will not apply if the cost of remedial efforts made by the organization equals or exceeds the gain from the offense, and, in any event, monies spent in such efforts will be treated as gain already disgorged.n117

[c]--Departures.

Typically, a court can depart from the Guidelines if it justifiably finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."n118 USSG § § 8C4.1 through 8C4.11 give examples of these factors in the context of organizational sentencing, suggesting to the sentencing courts specific factors that "may not have been adequately taken into consideration by the guidelines."n119

The list of departures provided in USSG § § 8C4.1-8C4.11 is not exhaustive. The introductory Commentary states that the policy statements from Chapter Five, Part K (Departures) is also relevant to the organization.n120 The upward departures found in Part C(4) that are potentially applicable to cases in which a corporation might be involved include § 8C4.2, p.s. (risk of death or bodily injury), § 8C4.3, p.s. (threat to national security), § 8C4.4, p.s. (threat to the environment), § 8C4.5, p.s. (threat to a market), and § 8C4.6, p.s. (official corruption). Potentially applicable downward departures include § 8C4.7, p.s. (public entity), § 8C4.8, p.s. (members or beneficiaries of the organization as victims), § 8C4.9, p.s. (remedial costs that greatly exceed gain), and § 8C4.1, p.s. (substantial assistance to authorities).n121

Certain provisions in Part C(4) can provide the basis for either an upward or a downward departure. For example, USSG § 8C4.10, p.s. (mandatory programs to prevent and detect violations of law), if an organization implemented its program in response to a specific court or administrative order, and if the organization's culpability score is reduced under § 8C2.5(f) as a result, the sentencing court may depart upwards to offset, in whole or in part, that reduction. Similarly, under USSG § 8C4.11, p.s. (exceptional organizational culpability), the court may depart upwards if the organization's

culpability score is greater than ten. If, on the other hand, the organization has exceptionally low culpability, the sentencing court may depart downwards from the applicable fine range. To meet the test of "exceptionally low culpability," however, the organizational defendant must meet three criteria: (1) no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; (2) the organization, at the time of the offense, had an effective program to prevent and detect violations of the law; and (3) the base fine was determined on the basis of the offense level, pecuniary loss, or a special instruction for fines in Chapter Two.n122 However, if the sentencing court determined the fine on the basis of pecuniary gain, it should not depart downwards for exceptionally low culpability, regardless of the amount of the gain.n123

[d]--Implementing the Fine.

In no event may the fine imposed by the sentencing court exceed the statutory maximum for the offense.n124 As with fines imposed on individual defendants, however, the sentencing court may impose a maximum fine equal to the total statutory maximum for all counts of conviction.n125

[i]--Time of Payment.

When an organizational defendant operated primarily for a criminal purpose or primarily by criminal means, the sentencing court must require immediate payment of the fine.n126 In any other case, the court must require immediate payment unless it finds that the organization is "financially unable to make immediate payment or that such payment would pose an undue burden on the organization."n127 If the court does not require immediate payment, it must require full payment by the earliest date, whether by establishing a date certain or by setting up an installment payment schedule.n128 In no case shall the installment schedule be longer than five years.n129

[ii]--Reduction of Fine for Inability to Pay.

Chapter Eight creates an order of priority that favors the payment of restitution over fines and disgorgement. If the sentencing court is convinced that the payment of fines or disgorgement would impair the organization's ability to make restitution to victims, it may reduce the fine below that otherwise required by USSG § 8C1.1 (Determining the Fine--Criminal Purpose Organizations) or Sections 8C2.7 (Guideline Fine Range--Organizations) and USSG § 8C2.9 (Disgorgement).n130

The sentencing court also *may* reduce the fines required by Chapter Eight if it finds that the organization does not have the financial ability to pay a fine within the applicable guideline range, even with the implementation of an installment schedule.n131 The fine reduction "shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."n132 However, a sentencing court may not permit a criminal purpose organization to remain in business in order to pay restitution.n133

[iii]--Closely Held Organizations.

The sentencing court may, but is not required to, offset the fine imposed on a closely held organization when one or more owners has been fined for the same criminal conduct for which the organization is being sentenced.n134 The organization need not meet the legal test of a closely held organization under the federal securities laws; instead, "an organization is closely held, regardless of its size, when relatively few individuals own it."n135 To qualify for the offset, the individual defendant must own at least a five percent interest in the organization and have been fined for the same offense conduct.n136 The sentencing court can offset the fine on the organization in an amount that does not exceed "the amount resulting from multiplying the total fines imposed on those individuals by those individuals' total percentage interest in the organization."n137

[3]--Probation.

18 U.S.C. § 3561(a) authorizes the district court to impose a term of probation on an organization.n138 Chapter Eight, Part D addresses organizational probation.n139 USSG § 8D1.1(a) states the circumstances under which a term of probation shall be ordered. Any number of these may be applicable to a case involving an organizational defendant. The court must order a term of probation:

> (1) if such sentence is necessary to secure payment of restitution (§ 8B1.1), enforce a remedial order (§ 8B1.2), or ensure completion of community service (§ 8B1.3);

(2) if the organization is sentenced to pay a monetary penalty (*e.g.*, restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of the law;

(4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) if the sentence imposed upon the organization does not include a fine;n140 or

(8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) .n141

The term of probation is limited by 18 U.S.C. § 3561(c) , which provides that in the case of a felony, the term shall be at least one year but not more than five years. The Guidelines merely adopt this provision.n142 The Application Note provides that "the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation."n143

USSG § 8D1.3 and 18 U.S.C. § 3563 address the conditions of probation. It is mandatory that "the organization not commit another federal, state, or local crime during the term of probation."n144 In the case of a felony, absent "extraordinary circumstances ... that would make such condition plainly unreasonable," at least one of the following conditions is also mandated: restitution, notice to the victims (under 18 U.S.C. § 3555), or an order requiring the organization to reside, or refrain from residing, in a specified place or area.n145 Regarding discretionary conditions, the Guidelines provide that "[t]e court may impose other conditions that (1) are reasonably related to the nature and circumstance of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing."n146 The Sentencing Commission, in a policy statement at § 8D1.4,n147 sets out the following "recommendations" relating to conditions of probation:

(a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

(b) If probation is imposed under § 8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:

(1) The organization shall make periodic submission to the court or probation officer, at intervals specified by the court, reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received.n148

(2) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(3) The organization shall be required to notify the court or probation officer immediately upon learning of: (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major

civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (1) restitution; (2) fine; and (3) any other monetary sanction.

(c) If probation is ordered under § 8D1.1(a)(3), (4), (5) or (6), the following conditions may be appropriate:

(1) The organization shall develop and submit to the court a program to prevent and detect violations of law, including a schedule of implementation.

(2) Upon approval by the court of a program to prevent and detect violations of the law, the organization shall notify its employees and shareholders of its criminal behavior and its program to prevent and detect violations of law. Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program to prevent and detect violations of law. Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) In order to monitor whether the organization is following the program to prevent and detect violations of law, the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Courts are specifically directed to "consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense."n149 In addition, the court may employ appropriate experts "[t]o assess the efficacy of a program to prevent and detect violations of law submitted by the organization."n150

The court may, subsequent to imposing conditions of probation as part of the sentence, make changes. Thus, 18 U.S.C. § 3563(c) provides:

The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.

18 U.S.C. § 3564(c) permits early termination of a term of probation at any time for a misdemeanor and at any time after the expiration of one year for a felony if the court "is satisfied that such action is warranted by the conduct of the defendant and the interest of justice."

Finally, should an organization violate a condition of its probation and the court so find, "the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization."n151 The court may only do so following a hearing,n152 and it may preserve the option of taking no action even in the face of a violation.n153 In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.n154

[4]--Special Assessments, Forfeiture, and Costs.

[a]--Special Assessments.

There may be a small, additional cost due to "special assessments."n155 The amounts are statutorily mandated as $ 400, if the organization is convicted of a felony committed on or after April 24, 1996, and $ 200, if it is convicted of a felony committed prior to that date.n156

[b]--Forfeiture.

USSG § 8E1.2 directs that § 5E1.4 is to be applied to forfeiture for organizations. USSG § 5E1.4, in turn, provides that, "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute."n157 Thus if any of the alleged offenses provide for forfeiture, the company would be subject to those provisions upon its conviction.n158

[c]--Costs of Prosecution.

USSG § 8E1.3 provides that "the court may order the organization to pay the costs of prosecution," as provided by 28 U.S.C. § 1918, in addition to other specific statutory provisions that mandate the assessment of costs. This matter is left completely to the court's discretion, both on the question of whether to impose such costs at all and, if so, their amount. The authority of the court to assess prosecution costs against the defendant, however, is limited by 28 U.S.C. § 1920 , which provides an exhaustive list of the costs that may be assessed.n159 Thus, any such costs imposed on the company would be limited to:

> (1) fees of the clerk and marshal;
>
> (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) fees and disbursements for printing and witnesses;
>
> (4) fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) docket fees under 28 U.S.C. § 1923; and
>
> (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

FOOTNOTES:

(n1) Footnote 1. USSG § 8B1.1(f) .

(n2) Footnote 2. USSG § 8B1.1(f) . *See* USSG App. C, amend. 571.

(n3) Footnote 3. USSG § 8B1.1(a)(1) .

(n4) Footnote 4. USSG § 8B1.1(a)(2) .

(n5) Footnote 5. USSG § 8B1.1(b)(1).

(n6) Footnote 6. USSG § 8B1.1(b)(2). *See also* 18 U.S.C. § 3663(a)(1)(B)(ii) .

(n7) Footnote 7. **Policy statements.** Policy statements are treated somewhat differently than other guidelines. District courts are required to consider policy statements, but are not bound by them. United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133, 136 (2d Cir. 1998) .

(n8) Footnote 8. USSG § 8B1.2(a) .

(n9) Footnote 9. USSG § 8B1.2(b) .

(n10) Footnote 10. USSG § 8B1.2 , comment. (backg'd).

(n11) Footnote 11. **Remedial order example.** *See, e.g.*, United States v. C.R. Bard, Inc., 848 F. Supp. 287, 292 (D. Mass. 1994) (requiring corporation to reorganize to minimize the risk that its criminal conduct will recur, including implementing a corporate compliance program, hiring a vice president for medical and regulatory affairs, creating a regulatory compliance committee of the board of directors, retaining an outside consultant to inspect the company once a year and report to the company and the FDA, and adopting additional reporting obligations to the FDA).

(n12) Footnote 12. USSG § 8B1.3 , p.s.

(n13) Footnote 13. USSG § 8B1.3 , comment. (backg'd).

(n14) Footnote 14. USSG § 8B1.3 , comment. (backg'd).

(n15) Footnote 15. USSG § 8B1.4, *citing* § 5F1.4.

(n16) Footnote 16. USSG § 5F1.4.

(n17) Footnote 17. USSG § 5F1.4 , comment. (backg'd) (quoting 18 U.S.C. § 3555).

(n18) Footnote 18. These factors include: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; the need for adequate deterrence to criminal conduct; and the need to protect the public from further crimes of the defendant.

(n19) Footnote 19. USSG § 5F1.4 , comment. (backg'd) (citing 18 U.S.C. § 3555).

(n20) Footnote 20. USSG § 5F1.4 , comment. (backg'd).

(n21) Footnote 21. Pub. L. No. 104-32, § 211, 110 Stat. 1241 (1996).

(n22) Footnote 22. **Conflicting provisions.** For example, the VWPA authorized but did not *compel* a district court to order restitution and *required* the court to consider the defendant's ability to pay. Thus, for example, a dissolved corporation could not be compelled to pay restitution because it would not have a future ability to earn or acquire money. United States v. Apex Roofing, Inc., 49 F.3d 1509, 1516 (11th Cir. 1995) . The MVRA, by contrast, *mandates* full restitution for certain offenses (*e.g.*, mail fraud), including all victim expenses incurred as a result of the investigation and prosecution of the offense, which shall be paid "without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A) .

(n23) Footnote 23. **Circuits holding MVRA not retroactive.**

2d Circuit United States v. Thompson, 113 F.3d 13, 15 n.1 (2d Cir. 1997) .

3d Circuit United States v. Edwards, 162 F.3d 87 (3d Cir. 1998) .

9th Circuit United States v. Dubose, 146 F.3d 1141 (9th Cir. 1998) .

11th Circuit United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000) .

(n24) Footnote 24. **Circuits holding MVRA retroactive.**

7th Circuit United States v. Bach, 172 F.3d 520, 522 (7th Cir.), *cert. denied*, 528 U.S. 950 (1999) .

8th Circuit United States v. Williams, 128 F.3d 1239 (8th Cir. 1997) .

(n25) Footnote 25. **Traditional ex post facto analysis.** Lynce v. Mathis, 519 U.S. 433, 441, 116 S. Ct. 1671, 134 L. Ed. 2d 775 (1997) .

(n26) Footnote 26. **Apply VWPA.** United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997) .

(n27) Footnote 27. **Discretion of court.** For example, under the MVRA, the sentencing court need not consider the economic circumstances of the defendant, as it must under the VWPA. United States v. Futrell, 209 F.3d 1286, 1291-1292 (11th Cir. 2000) . *See also* United States v. Jackson, 155 F.3d 942, 949 n.3 (8th Cir. 1998) .

(n28) Footnote 28. **MVRA applicable to Title 18.** The question as to whether the MVRA is applicable to offenses under other Titles is an open one. *See* Burgos v. United States, 968 F. Supp. 380 (N.D. Ill. 1997) (suggesting that it would be held to be applicable).

(n29) Footnote 29. 18 U.S.C. § 3663A(c)(3)(A)-(B) .

(n30) Footnote 30. ***Vaknin.*** 112 F.3d 579 (1st Cir. 1997).

(n31) Footnote 31. **VWPA requires causal connection.**

1st Circuit United States v. Gibbens, 25 F.3d 28 (1st Cir. 1994) (the government is not a victim under the VWPA when it lost money as a result of crimes that it actively provoked during an investigation); United States v. Cronin, 990 F.2d 663 (1st Cir. 1993) (restitution under the pre-amendment version of the VWPA is limited to the specific amounts in the substantive counts of mail fraud alleged in the indictment).

9th Circuit United States v. Reed, 80 F.3d 1419 (9th Cir. 1996) (no restitution for damages caused by defendant's flight because flight not an element of offense of conviction); United States v. Dayea, 73 F.3d 229 (9th Cir. 1995) (no restitution for wife of slain police officer for loss of husband's salary since she was not herself physically injured); United States v. Salcedo-Lopez, 907 F.2d 97 (9th Cir. 1993) (no restitution for investigative and prosecutorial costs incurred by the government).

(n32) Footnote 32. In addition to the factors listed in 18 U.S.C. § 3553(a), 18 U.S.C. § 3572, specifically addressing the imposition of fines, includes such factors as the burden that the fine will impose on the defendant, the pecuniary loss inflicted on others, the need to deprive the defendant of illegally obtained gains, whether the defendant can pass on to consumers the expense of the fine, and the size of an organizational defendant and its remedial efforts.

(n33) Footnote 33. USSG § 8C2.10 .

(n34) Footnote 34. ***Burgos.*** 968 F. Supp. 380 (N.D. Ill. 1997).

(n35) Footnote 35. Should the court find that the section 3571(d) calculation would not be unduly complicated, however, the company would have to argue for limitation that any analysis of gain or loss under section 3571(d) must focus solely on the counts of conviction (i.e., no so-called relevant conduct may be considered). By its terms, 18 U.S.C. § 3571 applies to "a defendant who has been *found guilty of an offense*." 18 U.S.C. § 3571(a) (emphasis added). Section 3571(d) instructs that "[i]f any person derives pecuniary gain *from the offense*," a greater fine than the $ 500,000 maximum may be imposed, depending on the amount of gain or loss. The explicit limitation of the fine to the gain *from the offense* arguably restricts the court to the counts of conviction in making the determination of gain. *See also* USSG § 8C3.1(a) ("Except to the extent restricted by the maximum fine authorized by statute," the fine is determined under the Guidelines).

(n36) Footnote 36. The fraud guidelines accounted for over 33 percent of the organizational sentences in 1999. United States Sentencing Commission, *Annual Report 1999*, Ch. 5, at 45.

(n37) Footnote 37. USSG § 8C2.1 . Among the most important offenses for which an organizational defendant is sentenced pursuant to the statutory provisions of 18 U.S.C. § § 3553 and 3572 , rather than the organizational sentencing guidelines in Chapter Eight, are offenses involving racketeering (USSG § § 2E1.1-2E2.2), civil rights (USSG Part 2H), the administration of justice (USSG Part 2J), national defense (USSG Part 2M), food, drug, and agricultural products (with the exception of USSG § 2N3.1), and the environment (USSG Part 2Q). USSG § 8C2.1 .

(n38) Footnote 38. *See* USSG § § 2B4.1(c), 2C1.1(d), 2R1.1(d), and 2S1.2(c) .

(n39) Footnote 39. USSG § 8C2.3 .

(n40) Footnote 40. The one exception is when the sentencing court determines that an organization was operated for primarily for a criminal purpose or primarily by criminal means. In such a case, the fine shall be set at an amount, subject to the statutory maximum for the offense, sufficient to divest the organization of all of its net assets. USSG § 8C1.1 . "Net assets" means the assets remaining after the payment of all legitimate claims by known innocent bona fide creditors. § 8C1.1, comment. (n.1).

(n41) Footnote 41. USSG § 8C2.2(a) .

(n42) Footnote 42. **Submission of financial information.** USSG § 8C2.2(b) . However, a corporate defendant that tries to "game" the determination of its ability to pay by submitting limited financial information may find itself hostage to a district court's imposition of a fine. United States v. Electrodyne Sys. Corp., 147 F.3d 250, 254-255 (3d Cir. 1998) ("We do not believe the district judge must be a puppet dancing to whatever financial disclosure strings a defendant corporation wishes to pull. We can think of no reason why the district judge does not have the power to require production of necessary financial documents so as to have a basis in fact for any fine which is to be imposed. Should the defendant corporation fail to produce financial documentation requested by the probation office and/or the court, the necessity for the district judge to have a basis in fact for establishing the amount of fine is reduced. Similarly, the sentencing judge is not controlled by, but may accept, a fine amount negotiated by the corporate defendant and the government. If the judge accepts the negotiated fine, no detailed finding of ability to pay is necessary because the defendant has implicitly acknowledged its ability by virtue of the agreement.").

(n43) Footnote 43. USSG § 8C2.3 .

(n44) Footnote 44. For a discussion on calculating the amount of loss, see Ch. 2, *The Offense Guidelines and Relevant Conduct*.

(n45) Footnote 45. The Guidelines define *offense* as "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." USSG § 8A1.2 , comment. (n.3(a)).

(n46) Footnote 46. *See, e.g.*, USSG § § 2F1.1, 3C1.1 .

(n47) Footnote 47. USSG § 8C2.4 , comment. (backg'd).

(n48) Footnote 48. USSG § 8C2.4(a) .

(n49) Footnote 49. USSG § 8C2.4(d) .

(n50) Footnote 50. USSG § 8A1.2, comment. (n.3(h)) .

(n51) Footnote 51. USSG § 8A1.2, comment. (n.3(h)) . Application Note 3(h) provides the following examples:

[A]n offense involving odometer tampering can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the automobiles appeared to have less mileage, *i.e.*, the difference between the price received or expected for the automobiles with the apparent mileage and the fair market value of the automobiles with the actual mileage. An offense involving defense procurement fraud related to defective product testing can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved because the product was not tested in the required manner.

(n52) Footnote 52. USSG § 8A1.2, comment. (n.3(i)) (incorporating the term "loss" as used in USSG Chapter Two).

(n53) Footnote 53. USSG § 8C2.4 , comment. (n.2). If the offense involves an attempt or a conspiracy, the gain or loss is determined pursuant to USSG § 2X1.1. USSG § 8C2.4 , comment. (n.3).

(n54) Footnote 54. USSG § 8C2.4 , comment. (backg'd).

(n55) Footnote 55. USSG § 8C2.4 , comment. (backg'd).

(n56) Footnote 56. USSG § 8C2.4 , comment. (n.4).

(n57) Footnote 57. USSG § 8C2.4 , comment. (n.4). The sentencing court must apply any special instructions under the applicable sentencing guideline to the determination of the fine.

(n58) Footnote 58. ***Defendant's relative culpability.*** USSG § 8C2.4 , comment. (n.4). For antitrust offenses under USSG § 2R1.1(d)(1), the volume of commerce attributable to the defendant only is used as a proxy for loss. USSG § 2R1.1(b)(2) . In a price-fixing conspiracy, some courts have held that the government, however, must still prove that the prices charged were "affected by" the conspiracy. There may be intervals when the illegal agreement was ineffectual and had no effect or influence on prices; sales during those time periods should be excluded from the volume of commerce calculation. *See* United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 91 (2d Cir. 1999) *But see* United States v. Hayter Oil Co., 51 F.3d 1265, 1273-1274 (6th Cir. 1995) (measure of loss is the volume of commerce attributable to the defendant during the entire time period of the conspiracy; success of the price-fixing conspiracy at achieving a target price is irrelevant).

(n59) Footnote 59. **Fluctuating size.** If the size of the organization fluctuates and is a disputed factor, the sentencing court must make factual findings about the number of days during a relevant time period that the organization exceeded one of the threshold organizational sizes. United States v. Electrodyne Sys. Corp., 147 F.3d 250, 255 (3d Cir. 1998) (district court failed to make adequate factual findings regarding the number of days that the defendant corporation exceeded 50 employees).

(n60) Footnote 60. The phrase *high-level personnel* is defined as "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." USSG § 8A1.2 , comment. (n.3(b)).

(n61) Footnote 61. The phrase *substantial authority personnel* is defined as "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 ... 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... . Whether an individual falls within this category must be determined on case-by-case basis." USSG § 8A1.2 , comment. (n.3(c)).

(n62) Footnote 62. USSG § 8C2.5 , comment. (backg'd).

(n63) Footnote 63. USSG § 8C2.5, n.3 . Application Note 3 also requires an analysis of how the manager whose conduct is at issue fits into the management structure of the business unit involved and the overall organization. Conceivably, even if the conduct is confined to the business unit, but the manager sets policy for or controls the organization, the entity's culpability score can increase.

With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees was also within high-level personnel of the entire organization, four points (rather than three) would be added under subsection (b)(2).

(n64) Footnote 64. USSG § 8C2.5(b) . Section 8C2.5 applies a decreasing number of culpability points for smaller organizations or business units. For organizations or business units with between 1,000 and 5,000 employees, the court must add four points to the culpability score. USSG § 8C2.5(b)(2). For organizations or business units with between 200 and 1,000 employees, the court must add three points to the culpability score. USSG § 8C2.5(b)(3). For organizations--but not business units--with between 50 and 200 employees, the court must add two points to the culpability score. USSG § 8C2.5(b)(4). For organizations--but not business units--with between ten and 50 employees, the court must add one point to the culpability score. USSG § 8C2.5(b)(5).

(n65) Footnote 65. USSG § 8C2.5(b) .

(n66) Footnote 66. USSG § 8C2.5 , comment. (n.4). For organizations with less than 200 employees, however, a court cannot rely on a finding of "pervasiveness," and must instead find that substantial authority personnel participated in, condoned, or was willfully ignorant of the offense. USSG § 8C2.5(b)(4), (5) .

(n67) Footnote 67. USSG § 8C2.5 , comment. (n.4).

(n68) Footnote 68. The organizational guidelines adopt a broad definition of what constitutes similar misconduct. The prior offense need not meet the legal test of prior bad acts under Fed. R. Evid. 404(b) , for example. Instead, " '(s)imilar 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." USSG § 8A1.2 , comment. (n.3(f)).

(n69) Footnote 69. USSG § 8C2.5(c)(1) .

(n70) Footnote 70. USSG § 8C2.5(c)(2) .

(n71) Footnote 71. USSG § 8C2.5 , comment. (n.5).

(n72) Footnote 72. USSG § 8C2.5 , comment. (n.6). The one exception is if the purchase of a company is made in response to a solicitation by "appropriate government officials," in which case the prior history of the business unit is not considered. USSG § 8C2.5 , comment. (n.6).

(n73) Footnote 73. USSG § 8C2.5 , comment. (n.6). The negative implication of Application Note 6 is that, if the new divisions did not have their own management or separate books, the new entity would retain the prior history of both divisions.

(n74) Footnote 74. USSG § 8C2.5 , comment. (n.6).

(n75) Footnote 75. *See* § 15.05[2][b][iii][B] *below*.

(n76) Footnote 76. USSG § 8A1.2 , comment. (n.3(k)(iii)).

(n77) Footnote 77. USSG § 8A1.2 , comment. (n.3(k)(iii)).

(n78) Footnote 78. USSG § 8C2.5(d)(1)(A)-(B) . Subsection (d) similarly applies to separately managed lines of business. USSG § 8C2.5 , comment. (n.5).

(n79) Footnote 79. USSG § 8C2.5(d)(2) .

(n80) Footnote 80. USSG § 8C2.5(e) . Section 8C2.5(e) cross-references the Commentary to USSG § 3C1.1 for the types of conduct that can constitute obstruction.

(n81) Footnote 81. USSG § 8C2.5(e) , comment. (n.9).

(n82) Footnote 82. USSG § 8C2.5(f) . Despite the importance of this reduction, only *two* of the 92 organizations sentenced in 2001 for which statistical information was available received this reduction. United States Sentencing Commission, 2001 Sourcebook of Federal Sentencing Statistics (hereinafter "2001 Sourcebook"), table 54, at 98.

(n83) Footnote 83. USSG § 8A1.2, comment. (n.3(k)) .

(n84) Footnote 84. USSG § 8A1.2, comment. (n.3(k)) .

(n85) Footnote 85. USSG § 8A1.2 , comment. (n.3(k)(1)-(7)).

(n86) Footnote 86. USSG § 8A1.2, comment. (n.3(k)(i)-(iii)).

(n87) Footnote 87. Section 8A1.2, comment. (n.3(k)(ii)) gives examples of how to apply this principle:

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.

(n88) Footnote 88. USSG § 8A1.2, comment. (n.3(k)).

(n89) Footnote 89. The Sentencing Guidelines go far beyond principles of vicarious liability by requiring high-level personnel and compliance officers to take affirmative steps to stop a criminal offense; if they do not, they will have "condoned" an offense. Indeed, according to Chapter Eight, "(a)n individual 'condoned' an offense if the individual knew of the offense and did not take reasonable steps to prevent or terminate the offense." USSG § 8A1.2 , comment. (n.3(e)).

(n90) Footnote 90. Chapter Eight's definition of "willful ignorance" is similarly strained. The organizational guidelines require high-level personnel and compliance officers to investigate possible offenses where a reasonable person would be on notice of the occurrence of criminal conduct, a concept somewhat far afield from the doctrine of deliberate ignorance as developed by the courts: "An individual was 'willfully ignorant of the offense' if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred." USSG § 8A1.2 , comment. (n.3(j)).

(n91) Footnote 91. USSG § 8C2.5(f) . "Appropriate governmental authorities" means "the federal or state law enforcement, regulatory, or program officials having jurisdiction" over the matter. USSG § 8C2.5 , comment. (n.11).

(n92) Footnote 92. USSG § 8C2.5 , comment. (n.10).

(n93) Footnote 93. USSG § 8C2.5 , comment. (n.11).

(n94) Footnote 94. USSG. § 8C2.5 , comment. (n.12). Of the organizations sentenced in 2001 for which statistical information was available, over 50 percent received a reduction in their culpability score for cooperation with the authorities. 2001 Sourcebook, table 54, at 98.

(n95) Footnote 95. USSG § 8C2.5 , comment. (n.12).

(n96) Footnote 96. USSG § 8C2.5 , comment. (n.12).

(n97) Footnote 97. USSG § 8C2.5 , comment. (n.13).

(n98) Footnote 98. USSG § 8C2.5 , comment. (n.14).

(n99) Footnote 99. USSG § 8C2.5 , comment. (n.13).

(n100) Footnote 100. USSG § 8C2.5 , comment. (n.13).

(n101) Footnote 101. USSG § 8C2.5 , comment. (n.13).

(n102) Footnote 102. USSG § 8C2.5 , comment. (n.13).

(n103) Footnote 103. USSG. § 8C2.6 . Thus, for example, USSG § 2R1.1 sets a floor for minimum and maximum multipliers for antitrust offenses involving bid-rigging, price-fixing, or market-allocation agreements among competitors.

(n104) Footnote 104. USSG. § 8C2.7(a) .

(n105) Footnote 105. USSG. § 8C2.7(b) .

(n106) Footnote 106. USSG § 8C2.6 .

(n107) Footnote 107. According to the Commentary, consideration of a corporation's role in the offense is "particularly appropriate if the guideline fine range does not take the organization's role in the offense into account." USSG § 8C2.8 , comment. (n.1). Thus, for an antitrust offense, the sentencing court should impose a higher fine within the range on an organization that was a leader in the offense. USSG § 8C2.8 , comment. (n.1).

(n108) Footnote 108. The Commentary counsels against considering collateral consequences that "merely make the victims whole." If criminal and civil sanctions are unlikely to make the victims whole, then the sentencing court should impose a higher fine within the range. Conversely, if the collateral sanctions are unduly punitive, the court may impose a lower fine within the range. USSG § 8C2.8 , comment. (n.2).

(n109) Footnote 109. This factor is more likely to be applicable when the guideline fine range is determined by pecuniary loss or gain, rather than by offense level, "because the Chapter Two offense levels frequently take actual or threatened nonpecuniary loss into account." USSG § 8C2.8 , comment. (n.3).

(n110) Footnote 110. As the Commentary explains, because "an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization." USSG § 8C2.8 , comment. (n.4).

(n111) Footnote 111. USSG § 8C2.5(c) includes prior similar misconduct, whether criminal, civil, or administrative, in the calculation of the culpability score. USSG § 8C2.5(c) . USSG § 8C2.8(a)(7), on the other hand, attempts to capture any other misconduct that is in the organization's history in determining the fine within the range. USSG § 8C2.8(a)(7) . To the extent that the sentencing court discerns "a pattern of illegality"--presumably involving prior similar misconduct only--it may depart upwards. USSG § 8C2.8(a)(7) .

(n112) Footnote 112. **Section 3572(a) factors.** 18 U.S.C. § 3572(a) factors include, among other things, defendant's financial resources, the burden of the fine on the defendant, pecuniary loss, whether restitution was ordered or made, cost to the government of probation, whether the defendant can pass on to consumers or other persons the expense of the fine and, if the defendant is an organization, the size of the organization, and any measure taken by the organization to discipline an officer, director, employee and agent of the organization responsible for the offense and to prevent recurrence of such an offense. A sentencing court is not required to state its application of each factor enumerated in 18 U.S.C. § 3572 on the record. Instead, if the record, taken as a whole, indicates that the sentencing court considered the section 3572 factors, those findings will be sufficient to withstand attack on appeal.

3d Circuit United States v. Seale, 20 F.3d 1279, 1284 (3d Cir. 1994) .

9th Circuit United States v. Eureka Lab., Inc., 103 F.3d 908, 913-914 (9th Cir. 1996) .

D.C. Circuit United States v. Mastropierro, 931 F.2d 905, 906 (D.C. Cir. 1991) .

4th Circuit But see United States v. Harvey, 885 F.2d 181, 182 (4th Cir. 1989) (requiring the court to make specific findings on the factors set forth in section 3572).

(n113) Footnote 113. USSG § 8C2.8(b), p.s.

(n114) Footnote 114. USSG § 8C2.8 , comment. (n.7). This application note allows the sentencing court to make some distinction between offenses that involve the same sentencing factors but different levels of seriousness, such as two fraud cases with the same offense level but different actual losses.

(n115) Footnote 115. USSG § 8C2.9(a) , comment. (n.1).

(n116) Footnote 116. USSG § 8C2.9(a) , comment. (n.1).

(n117) Footnote 117. USSG § 8C2.9(a) , comment. (n.1).

(n118) Footnote 118. **Justifiable departure.** *See* USSG Ch.8, Pt.C(4), intro. comment. (quoting 18 U.S.C. § 3553(b)) . As with individual defendants, the extent to which a district court chooses to exercise its discretion to depart downward from the applicable fine range imposed on a corporate defendant is not reviewable on appeal. United States v. Eureka Lab., Inc., 103 F.3d 908, 912-913 (9th Cir. 1996) . *See also* United States v. NHML, Inc., 225 F.3d 660 (6th Cir.) (table) (district court's decision not to depart from a guideline range is not reviewable where the court is aware of its discretion to depart from the guideline), *reported in full at* 2000 U.S. App. LEXIS 1389, *cert. denied sub nom.* Bayliss v. United States, 531 U.S. 827 (2000).

(n119) Footnote 119. **Specific organizational sentencing departure factors.** Ch.8, Pt.C(4), intro. comment. The sentencing court will make a careful evaluation of whether such consequences have been considered by Chapter Eight. For example, organizational defendants frequently face collateral consequences involving permissive or mandatory exclusion from federal health care programs or suspension and debarment from federal contracting. Some courts have indicated that such consequences are mitigating circumstances that are adequately considered by the Guidelines in determining the fine within the applicable range, and are therefore not a suitable basis for a downward departure.

9th Circuit See United States v. Cowden Gravel & Ready-Mix, Inc., 33 F.3d 60 (9th Cir. 1994) (table), *reported in full at* 1994 U.S. App. LEXIS 22096 (possible debarment is not a suitable basis for a departure).

4th Circuit Cf. United States v. Glymph, 96 F.3d 722, 724-725 (4th Cir. 1996) (citing cases) (debarment is a remedial measure, rather than a punitive sanction).

Because of the catastrophic consequences that exclusion or debarment can have on an organizational defendant's continued viability, however, this position should be challenged.

(n120) Footnote 120. USSG Chapter Five, Part K includes as potential grounds for upward departures: physical injury (§ 5K2.2, p.s.), extreme psychological injury (§ 5K2.3, p.s.), disruption of a government function (§ 5K2.7, p.s.), and significant endangerment of public welfare (§ 5K2.14, p.s.).

(n121) Footnote 121. The substantial assistance departure is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced but, rather, for help in the investigation or prosecution of other unaffiliated organizations and individuals. USSG § 8C4.1 comment. (n.1).

(n122) Footnote 122. USSG § 8C4.11 , p.s.

(n123) Footnote 123. USSG § 8C4.11 , p.s.

(n124) Footnote 124. USSG § 8C3.1(b) .

(n125) Footnote 125. USSG § 8C3.1, comment. (backg'd).

(n126) Footnote 126. USSG § 8C3.2(a) . An organization operated primarily for a criminal purpose includes "a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance," and an organization operated primarily by criminal means includes "a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste." USSG § 8C1.1, comment. (backg'd).

(n127) Footnote 127. **Determining ability to pay.** USSG § 8C3.2(b) . The sentencing court must make a careful assessment of the organization's present ability to pay a fine versus its future earnings capacity. For example, if the court does not factor the executory nature of existing contracts into its assessment of the organization's ability to pay, it may be found to have abused its discretion in ordering immediate payment of the fine.

3d Circuit See United States v. Nathan, 188 F.3d 190, 215-216 (3d Cir. 1999) (sentencing court abused its discretion in ordering immediate payment where corporate defendant had not yet received the payment that the district court used as the basis for assessing its ability to pay).

6th Circuit See also United States v. Spanish Cove Sanitation, Inc., 91 F.3d 145 (6th Cir. 1996) (table), *reported in full at* 1996 U.S. App. LEXIS 19131 (vacating fine imposed on a corporation for failure to consider the entity's insolvency).

(n128) Footnote 128. **Installment payments.** USSG § 8C3.2(b) . The determination of whether a fine must be paid immediately or on an installment basis is a substantive issue for which the defendant has a right to notice and a hearing. United States v. Nelson, 988 F.2d 798, 811 (8th Cir. 1993) . The fines of over 20 percent of organizations sentenced in 2000 were on installment schedules. 2000 Sourcebook, table 53.

(n129) Footnote 129. USSG § 8C3.2, comment. (n.1).

(n130) Footnote 130. **Restitution takes priority.** USSG § 8C3.3(a) . Over one quarter of the organizations sentenced in 1999 had their fines reduced or eliminated because of an inability to pay. 1999 Sourcebook, table 53. The sentencing court may appoint its own independent auditor to evaluate the organizational defendant's net worth and future earnings ability. *Eureka Lab.*, 103 F.3d 908, 914 (9th Cir. 1996).

(n131) Footnote 131. **Ability to pay may affect fine.** USSG § 8C3.3(b) . There is an important distinction between the ability to make restitution and the ability to pay a fine in section 8C3.3. Section 8C3.3 "does not prohibit a court from imposing a fine that jeopardizes an organization's continued viability. It permits, but does not require, a court in such circumstances and in its discretion, to reduce the fine. The only time a reduction is mandated under section 8C3.3 is if the fine imposed, without reduction, would impair the defendant's ability to make restitution to victims." *Eureka Lab.*, 103 F.3d at 912. Thus, unlike USSG § 5E1.2(a), the sentencing court does not have to determine whether a corporate defendant is financially able to pay a fine or whether the fine will affect the employment status of existing employees, so long as its ability to pay restitution is not impaired. 103 F.3d at 913-914.

(n132) Footnote 132. USSG § 8C3.3(b) .

(n133) Footnote 133. USSG § 8C3.3 , comment. (backg'd).

(n134) Footnote 134. **Offset is allowed.** USSG § 8C3.4 . The request for offset may be made at the time of sentencing, as Section 8C3.4 does not provide authority for the district court to later consider a motion to reduce sentence under Fed. R. Crim. P. 35 . United States v. Aqua-Leisure Indus., Inc., 150 F.3d 95, 96 (1st Cir. 1998) .

(n135) Footnote 135. USSG § 8C3.4 , comment. (n.1).

(n136) Footnote 136. USSG § 8C3.4 .

(n137) Footnote 137. USSG § 8C3.4 . Thus, where "an organization is owned by five individuals, each of whom has a twenty percent interest; three of the individuals are convicted; and the combined fines imposed on those three equals $ 100,000. In this example, the fine imposed upon the organization may be offset by up to 60 percent of their combined fine amounts, i.e., by $ 60,000." USSG § 8C3.4 , comment. (backg'd). The apparent--and questionable--logic behind the offset is that "(a)s a general rule in such cases, appropriate punishment may be achieved by offsetting the fine imposed upon the organization by an amount that reflects the percentage ownership interest of the sentenced individuals and the magnitude of the fines imposed on those individuals." USSG § 8C3.4 , comment. (backg'd). A more realistic measure might instead be to offset the total fines paid by individual owners directly against the fine assessed on the closely held corporation.

(n138) Footnote 138. The legislative history of the Sentencing Reform Act evidences a very conservative approach toward corporate probation. (*E.g.*, "It is not the intent of the committee that the courts manage as part of probation supervision." S. Rep. No. 225, 98th Cong., 2d Sess. 38,99 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3282). Nonetheless, as will be seen, the permissible intrusiveness is great.

(n139) Footnote 139. Of the 238 organizations sentenced under the organizational guidelines in 2000, 169 were placed on probation. 2000 Sourcebook, table 53, at 97.

(n140) Footnote 140. Under 18 U.S.C. § 3551(c) , imposition of a term of probation is required if the sentence imposed upon the organization does not include a fine. USSG § 8D1.1 , comment. (backg'd).

(n141) Footnote 141. These purposes are: the need for the sentence imposed (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care or, other correctional treatment in the most effective manner. 18 U.S.C. § 3552(a)(2) .

(n142) Footnote 142. USSG. § 8D1.2(a)(1) .

(n143) Footnote 143. USSG. § 8D1.2 , comment. (n.1).

(n144) Footnote 144. USSG § 8D1.3(a) ; 18 U.S.C. § 3563(a)(1) .

(n145) Footnote 145. USSG. § 8D1.3(b) ; 18 U.S.C. § 3563(a)(2) .

(n146) Footnote 146. USSG § 8D1.3(c) ; 18 U.S.C. § 3563(b) .

(n147) Footnote 147. This policy statement, by its own terms, is not binding on the district court.

(n148) Footnote 148. **Imposition of reporting requirement.** The reporting requirement may be imposed only on the organizational defendant. If, for example, the organization is composed of member organizations, such as a trade association or an agricultural cooperative, the sentencing court has no jurisdiction to impose reporting requirements on those non-parties. United States v. Sun-Diamond Growers, 138 F.3d 961, 977 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 964 (1999) .

(n149) Footnote 149. USSG § 8D1.4 , comment. (n.1).

(n150) Footnote 150. USSG § 8D1.4 , comment. (n.1).

(n151) Footnote 151. USSG § 8D1.5 , p.s.

(n152) Footnote 152. 18 U.S.C. § 3564(d) .

(n153) Footnote 153. USSG § 8D1.5, p.s. ; 18 U.S.C. § 3564(d) .

(n154) Footnote 154. USSG § 8D1.5 , comment. (n.1).

(n155) Footnote 155. USSG § 8E1.1 .

(n156) Footnote 156. *See* 18 U.S.C. § 3013 .

(n157) Footnote 157. USSG § 5E1.4 .

(n158) Footnote 158. **Forfeiture.** In *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) , the Supreme Court held that "a punitive forfeiture violates the Excessive Fines Clause [of the Eighth Amendment] if it is grossly disproportionate to the gravity of a defendant's offense." The Fifth Circuit, in applying this rule, has held that a forfeiture of $ 4,000,000 of a corporation's assets, even when imposed in addition to a $ 4,800,000 fine, was not grossly disproportionate to a money laundering transaction that involved $ 175,000 when the corporation was convicted of bribing a high-ranking parish official, the scheme continued for more than six years and involved the manipulation of various financial accounts and five individuals, and the property (a certificate of deposit, a bank account, and assets) was purchased with funds derived from a continuing criminal conspiracy. United States v. Wyly, 193 F.3d 289, 303 (5th Cir. 1999) .

(n159) Footnote 159. **Limitations on costs assessment.** *See, e.g.*, United States v. Hiland, 909 F.2d 1114, 1142 (8th Cir. 1980) ("Absent explicit statutory or contractual authorization to the contrary, federal district courts may tax as costs only those expenses listed in § 1920.").