Guidelines’ Historical Context

- Why is it important?

- Sentencing Reform Act of 1984
  - A Landmark *Criminal Law*
  - Bipartisan, well-considered
  - Concern about sentencing disparities, inappropriately lenient sentences
  - Created the U.S. Sentencing Commission
  - Tasked to develop sentencing guidelines for individuals and organizations
Development of the Organizational Sentencing Guidelines

- Commission used national and regional public hearings; advisory group report
- Various approaches, multiple drafts considered over several years
- Goals: Punish violators more uniformly; Deter and Prevent crime; encourage good business practices
- Guidelines provided more severe penalties, mitigated by *Cooperation* and *Effective Compliance Programs* (up to 95% reduction)

Overview of Organizational Guidelines

- Chapter 8 reflects general principles
  -- Organizations should remedy harm caused by offense
  -- Organizations with criminal purpose should be divested
  --“Carrot and Stick Approach” - Fine ranges determined by seriousness of offense and culpability
  -- Probation to implement sanctions and reduce recidivism

- Goal: provide “structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program.”
Effective Compliance Program Features

(7 Steps)

• Establish Policies and Practices to achieve & maintain compliance
• Ensure high level responsibility for compliance program
• Train regularly
• Discipline violators appropriately but effectively
• Avoid delegating responsibility to known problem persons
• Monitor and Audit program
• Remedy problems promptly and effectively

Implementation Developments over the Next Decade+ (1991-2004)

• Commission supported continuing public education about compliance; regular training programs established
• Compliance professionals became part of business structures, organized professional associations of compliance officers established
  --Ethics Officers Assoc. (now ECOA)
  --Health Care Compliance Assoc.
  --Society of Corporate Compliance and Ethics
• Cottage industry of specialists to support training, “hotlines,” investigations, auditing, legal advice, etc.
• Federal regulatory, enforcement actions incorporated sentencing guideline compliance principles
Federal Regulatory, Enforcement Actions (cont.)

- Environmental Protection Agency enforcement initiatives
- Health Care Financing Administration requirements (Integrity Agreements)
- Others; Most recent—Federal contractor regulatory requirements
- Justice Department, Securities & Exchange Commission prosecution principles
  -- Emphasize cooperation first, but also stress compliance

Key Court Decisions

- Caremark decision by Delaware Chancery Court (1995)
  -- Shareholder derivative suit
  -- Board admonished to heed federal sentencing guideline compliance principles

- Booker decision by U. S. Supreme Court (2006)
  -- Made federal sentencing guidelines only advisory for judges
  -- Guideline penalty ranges must still be correctly calculated; judges then have flexibility within statutory ranges to achieve sentencing goals
  -- Little effect on compliance program aspects; Enforcement agency approaches largely unchanged; Guidelines still consulted for model elements and guidance
Significance of Organizational Guidelines –
The Bottom Line

• **For Enforcement Agencies** – The Organizational GL’s are the benchmark for government agencies in evaluating appropriate disposition of investigations of organizations

• **For Organizations**
  • Minimal requirements in § 8B2.1 provide organizations with a framework for effective ethics and compliance programs
  • If an organization becomes subject to investigation, the Organizational GL’s provide roadmap to mitigate potential penalties

Inadequacies of 1991 Guidelines

• No mention of ethics
• No mention of risk assessments
• No mention of Board responsibilities
• Inadequately reaching and addressing compliance deficiencies in smaller businesses
• Seven elements generally in need of updating and strengthening
2004 Amendments – Development Process

• Commission formed *ad hoc* Advisory group of experts
  --Diverse compliance backgrounds, practices
  --Commission provided charter, staff assistance, independence
  --Advisory Committee developed ideas, held public hearing, made detailed report and recommendations to Commission
• Congress intervened with 2003 Sarbanes Oxley Act
  --Variety of legal and regulatory changes
  --Noted work of Commission and its Advisory Group; mandated updating and strengthening compliance program features
• Commission received Advisory report, developed slightly modified proposals, published for comment, held public hearing, made modest changes, sent Amendments to Congress, became effective November 1, 2004

2004 Amendments – Highlights

• Expressly joined concepts of Ethics and Compliance, emphasizing importance of corporate culture
• Added feature of Risk Assessments to inform development of all compliance program features
• Emphasized importance of Board and Management program oversight, personal training
• Strengthened other program elements, including hotlines, use of incentives as well as discipline, regular internal program auditing to check effectiveness
• Added incentives to encourage Small Business implementation of compliance programs
2010 Amendments to the Organizational Sentencing Guidelines

Guideline Amendment Process

- Sentencing priorities are established mid-summer
- Policy teams are established and conduct empirical study, informal outreach, and other forms of research through the fall
- Proposed amendments are published in the federal register
- Public comment period extends into spring
- Public hearing in March
- Submission to Congress May 1st
- Effective date November 1st
Final Promulgated Amendments – 3 Principal Changes

• Application note that clarifies the type of “reasonable steps” that an organization should take to respond to criminal conduct and prevent further criminal conduct (Seventh Minimal Requirement)

• Extension of mitigation credit to organizations with effective compliance and ethics programs even when high-level or substantial authority personnel are involved in criminal conduct

• Consolidation and simplification of organizational probation terms

First Change: The Seventh Minimal Requirement under § 8B2.1(b)(7)

After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.

What should an effective compliance and ethics program include to respond to criminal conduct?
• Application of Subsection (b)(7).—Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.
Second Change: Former “Blocker” for Credit for An Effective Compliance and Ethics Program in § 8C2.5

(3)(A) Except as provided in subdivision (B) subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in § 8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—(i) within high-level personnel of a small organization; or (ii) within substantial authority personnel, but not within high-level personnel, of any organization, participated in, condoned, or was willfully ignorant of, the offense.

Bottom line: 5 Organizations in 19 years have qualified

New Subdivision Under § 8C2.5
Credit for Effective Compliance and Ethics Program

(C) Subparagraphs (A) and (B) shall not apply if—[4 conditions are met]

(i) the individual or individuals with operational responsibility for the compliance and ethics program (see § 8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);
Application Note 11, § 8C2.5:”Direct Reporting Obligations”

[Definition]

11. For purposes of subsection (f)(3)(C)(i), an individual has "direct reporting obligations" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof

(A) promptly on any matter involving criminal conduct or potential criminal conduct, and

(B) no less than annually on the implementation and effectiveness of the compliance and ethics program.

New Subdivision Under § 8C2.5 Credit for Effective Compliance and Ethics Program (cont.)

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.
Operation of § 8C2.5(f)(3)(C)(ii) & (iii)

- Whistle blower report will not necessarily cause the organization to lose credit for an effective compliance and ethics program.

- Application Note 10: no reporting is required if the organization “reasonably concluded, based on the information available, that no offense had been committed.”

Third Change: § 8D1.4 - Recommended Conditions of Probation

- Removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason.

- All conditional probation terms are available for consideration by the court in determining an appropriate sentence.
Organizational Sentencing Data

Number of Organizational Cases FY01-FY10

Primary Offenses of Organizational Cases FY10

- Fraud: 27.7%
- Environmental: 23.8%
- FDA: 8.8%
- Bribery: 6.1%
- Embezzlement/Theft/Larceny: 3.4%
- Tax: 3.4%
- Immigration: 3.4%
- Import/Export: 4.1%
- Antitrust: 4.7%
- Money Laundering: 4.7%
- Other: 9.9%


Fraud Offenses in Organizational Cases FY10

- Mail & Wire Fraud: 28.5%
- False Statement: 28.5%
- Health Care: 33.3%
- Other: 4.8%
- Bank Fraud: 4.8%

Number of Environmental Organizational Cases FY10

- Water, 26
- Wildlife, 6
- Hazardous Waste, 2
- Air, 1

Percentage of Organizational Cases Receiving Probation Fiscal Year 2006-2010

- FY06: 70%
- FY07: 80%
- FY08: 66%
- FY09: 70%
- FY10: 71%

Size of Organizations Sentenced By Number of Employees in Fiscal Year 2010

- <50 Employees: 1%
- 50-99 Employees: 8%
- 100-499 Employees: 6%
- 500-999 Employees: 15%
- ≥1000 Employees: 70%

Source: United States Sentencing Commission, 2010 Datafile

Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Year 2006 - 2010

- FY06: 0%
- FY07: 20%
- FY08: 40%
- FY09: 60%
- FY10: 80%

Types of Monetary Sentences FY10

- Fine/No Restitution: 64%
- No Fine or Restitution: 12%
- Fine and Restitution: 12%
- Restitution/No Fine: 12%

Median Fine and Restitution for Organizations FY01-FY10

FY04 data consists of only pre-Blakely data from October 1, 2003 through June 24, 2004. FY05 data consists of only post-Booker data from January 12, 2005 through September 30, 2005.

## Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) - Fiscal Year 2010

<table>
<thead>
<tr>
<th>Fines</th>
<th>Restitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food &amp; Drug</td>
<td>$1,195.0</td>
</tr>
<tr>
<td>Bribery</td>
<td>$400.0</td>
</tr>
<tr>
<td>Antitrust</td>
<td>$38.0</td>
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<tr>
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<td>$30.0</td>
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<td>Bribery</td>
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<tr>
<td>Racketeering</td>
<td>$28.2</td>
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<tr>
<td>Bribery</td>
<td>$27.4</td>
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<td>Bribery</td>
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<td>$14.1</td>
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<tr>
<td>Antitrust</td>
<td>$9.0</td>
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<tr>
<td>Fraud</td>
<td>$200.0</td>
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<tr>
<td>Fraud</td>
<td>$200.0</td>
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<tr>
<td>Fraud</td>
<td>$16.2</td>
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<tr>
<td>Money Launder</td>
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<tr>
<td>Bribery</td>
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</tr>
<tr>
<td>Fraud</td>
<td>$.8</td>
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<tr>
<td>Fraud</td>
<td>$.7</td>
</tr>
<tr>
<td>Fraud</td>
<td>$.6</td>
</tr>
</tbody>
</table>

**SOURCE:** United States Sentencing Commission, 2010 Datafile.

## Relationship of Individual Offender Cases to Organizational Cases in Fiscal Year 2009 & 2010

<table>
<thead>
<tr>
<th>FY09</th>
<th>FY10</th>
</tr>
</thead>
<tbody>
<tr>
<td>56% At Least One Individual Co-Defendant</td>
<td>52% No Individual Co-Defendants</td>
</tr>
<tr>
<td>44% No Individual Co-Defendants</td>
<td>48% At Least One Individual Co-Defendant</td>
</tr>
</tbody>
</table>

**SOURCE:** United States Sentencing Commission, 2009 and 2010 Datafile.
Percentage of Individual Offenders Who Were “High-Level” Officials of Co-Defendant Organizations Fiscal Year 2009 & 2010

**FY09**
- 10% Owners
- 17% Board Members
- 63% Not High-Level Officials

**FY10**
- 39% Not High-Level Officials
- 41% Owners
- 8% Board Members

**Percentage of Organizational Cases Receiving Reduction in Culpability Score Under § 8C2.5(g) Fiscal Year 2006 - 2010**

<table>
<thead>
<tr>
<th>Year</th>
<th>Self-Reported Offense</th>
<th>Cooperated with Investigation</th>
<th>Accepted Responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>0.9</td>
<td>48.6</td>
<td>28.8</td>
</tr>
<tr>
<td>FY07</td>
<td>4.5</td>
<td>44.9</td>
<td>27.0</td>
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<tr>
<td>FY08</td>
<td>1.0</td>
<td>57.7</td>
<td>20.6</td>
</tr>
<tr>
<td>FY09</td>
<td>1.0</td>
<td>59.4</td>
<td>30.2</td>
</tr>
<tr>
<td>FY10</td>
<td>1.7</td>
<td>55.0</td>
<td>30.0</td>
</tr>
</tbody>
</table>

Percentage of Organizations Sentenced that Obstructed Justice (§ 8C2.5(e)) Fiscal Year 2006 - 2010

[Bar chart showing percentages from 0% to 25% for FY06 to FY10]


Deferred Prosecution and Non-Prosecution Agreements