



## Organizational Sentencing Guidelines Confidential: Does Chapter Eight Still Matter to Compliance and Ethics? And if So, Why?

September 16, 2019  
National Harbor, MD

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## Agenda

- History of the Organizational Guidelines
- Regulatory Guidance
- Overlooked Guidance
- Organizational Data
- Future Developments

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## U.S. Sentencing Commission's Role

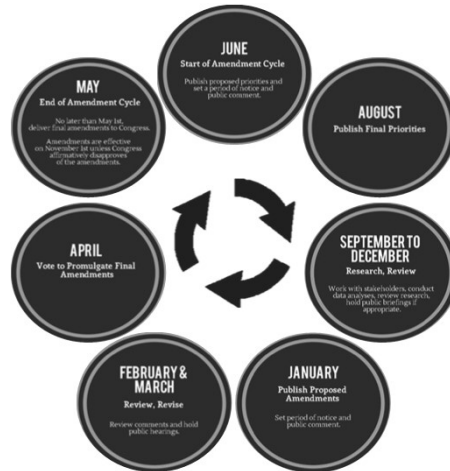
- Independent Agency in Judicial Branch
- 7 voting, 2 non-voting commissioners (judges and non-judges)
- Develop sentencing guidelines for use by courts
- Study and research sentencing issues
- Educate

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## Amendment Cycle

### Delivery of Amendments

- Amendments delivered to Congress no later than May 1<sup>st</sup>
- Amendments become effective November 1<sup>st</sup> unless Congress affirmatively disapproves



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## Initial Development of the Organizational Guidelines

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

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## General Principles of Chapter 8: “Organizational Sentencing Guidelines”

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

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## Amendment 673

Effective Nov. 1, 2004

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

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

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## Amendment 744

Effective Nov. 1, 2010

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

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## Amendment 744 (cont.)

Effective Nov. 1, 2010

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

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## **Threads of Compliance**

*The Intersection of the Guidelines and Recent Guidance  
and Best Practices*



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## ***A Risk-Based Approach***

What the USDOJ has said they are looking for

Started appearing in NPA's and DPA's in the 2000's encouraging risk-based mapping of initiatives by area and region

*Building off of language in the Organizational Sentencing Guidelines §8B2.1(b)(5)(B), "evaluate periodically the effectiveness of the organization's compliance and ethics program" and §8B2.1(c), "the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct"*



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## A Risk-Based Approach

What the USDOJ has said they are looking for

Spelled out in the FCPA Guidance in November 2012: *"DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction."*

Sound familiar?

The point of Chapter Eight of the Guidelines is to provide *credit* for an "effective" program. *"The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility."* Chapter Eight, Introductory Commentary.

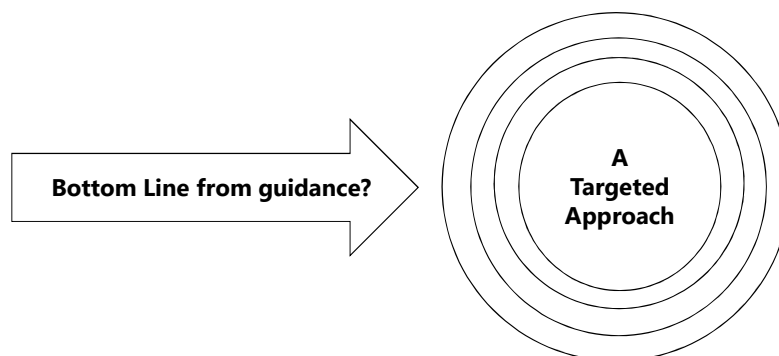
*"The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct."* §8B2.1(a).



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## An Effective Program



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### Benefits of a Targeted, Risk-Based Approach

- Saves resources
- Focuses on Enterprise-Specific Risks
- Aligns with Expectations and Best Practices
- Is Measurable (or can be)
- Is Scalable
- Utilized cross-functionality and drives responsibilities downstream

*Ideally both "effective" in  
Regulator's eyes –  
and cost-effective.*



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### "Evaluation of Corporate Compliance Programs"

- **Version One: February 2017**
  - The checklist that's not a checklist
- **Version Two: April 2019**
  - Combines the earlier memo and the FCPA guidance framework
- <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- [www.compliancebeat.com](http://www.compliancebeat.com)

U.S. Department of Justice



U.S. Department of Justice  
Criminal Division

Evaluation of Corporate Compliance Programs

Guidance Document  
Updated: April 2019



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## A Grain of Salt

- Focus of 2017 guidance is heavily on third-party risk / anti-corruption – that history still shines through in the 2019 update
- The (now former) DAG had previously announced that “informal guidance” will be integrated into the US Attorney’s Manual – and that process has begun – but now that he’s gone...
- Old wine in a new bottle?



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## Introduction of the April 2019 Guidance

The DOJ “does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company’s risk profile and solutions to reduce its risks warrant particularized evaluation.” – i.e. “Risk-Based” evaluation.

“There are, however, common questions that we may ask in making an individualized determination.”

“A prosecutor should ask ...” Three questions:



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**Is it well designed?**

**Is it being applied in good faith?**

**Does it work?**



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**I. Is the Corporation's Compliance Program Well Designed?**

***"[The program] shall be reasonably designed, implemented, and enforced so that the program is generally effective [...]" §8B2.1(a)***

**A. Risk Assessment**

*"[E]valuate periodically the effectiveness of the organization's compliance and ethics program" §8B2.1(b)(5)(B), and "the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct" §8B2.1(c).*

**B. Policies and Procedures**

*"The organization shall establish standards and procedures to prevent and detect criminal conduct." §8B2.1(b). "Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct." §8B2.1, Application Note 1.*



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## I. Is the Corporation's Compliance Program Well Designed?

### C. Training and Communication

*"The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program [...] by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities." §8B2.1(b)(4)(A).*

### D. Confidential Reporting and Investigation

*"[T]o have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. §8B2.1(b)(7).*



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## Application of Third-Party Risks? Maybe Future Guideline Amendments?

E. Third Party Management

F. Mergers and Acquisitions



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**II. Is the Corporation's Compliance Program Being Implemented Effectively?**  
***"[The program] shall be reasonably designed, implemented, and enforced so that the program is generally effective [...]" §8B2.1(a)***

**A. Commitment by Senior and Middle Management**

*"High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program." §8B2.1(B).*

**B. Autonomy and Resources**

*"To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority." §8B2.1(b)(2)(C).*

**C. Incentives and Discipline**

*"The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct." §8B2.1(b)(6).*



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**III. Does the Corporation's Compliance Program Work in Practice?**  
***"[The program] shall be reasonably designed, implemented, and enforced so that the program is generally effective [...]" §8B2.1(a)***

**A. Continuous Improvement, Periodic Testing, and Review**

*"[The organization shall take reasonable steps [...] to evaluate periodically the effectiveness of the organization's compliance and ethics program." §8B2.1(b)(5).*

**B. Investigation of Misconduct**

*"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," and "[the guidelines] contemplate that the organization will be allowed a reasonable period of time to conduct an internal investigation." §8B2.1(b)(7) and §8C2.5, Application Note 10.*

**C. Analysis and Remediation of Any Underlying Misconduct**

*"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." §8B2.1(b)(7).*



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**Sometimes Overlooked and Misunderstood:  
What are we potentially missing about the guidelines?**



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**1. Know Your “Personnel”**

There is often confusion about the differences between “high-level personnel” and “substantial authority personnel”.

*“High-level personnel of the organization means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest”, “High-level personnel of a unit of the organization [...] means agents within the unit who set the policy for or control that unit.” §8A1.2, Application Note 3(B) and §8C2.5, Application Note 3.*



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## Know Your “Personnel”

*"Substantial authority personnel means individuals who **within the scope of their authority** exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although **not a part of an organization's management**, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a **case-by-case basis**." §8A1.2, Application Note 3(C)*



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And this matters because...



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## One of the Seven Hallmarks: Due Diligence

What does this mean in practical terms?

*"The organization shall use reasonable efforts not to include within the **substantial authority personnel** of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." §8B2.1(b)(3).*

- Not just high-level personnel – not just compliance personnel
- Could include third parties.
- Could include personnel considered "low level" ("not part of the organization's management")
- What to do?
  - What is the background check process and what is the ongoing process for monitoring "substantial authority personnel"?
  - COI disclosures
  - Process for screening those who have any approvals or authorities



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## 2. "It's the Chief Compliance Officer's Role"

- Important to note that "chief compliance officer" doesn't appear in the guidelines. *"Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program."* §8B2.1(b)(2)(B)
- Operational compliance: *"Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program."* §8B2.1(b)(2)(C)
- It's not a legal role (interesting note: in Public Comment in March 2010 USDOJ suggested reporting to the Board *and* General Counsel. The USSC did not include this).
- Comes up because some form of General Counsel/CCO/Chief Auditor is saying: "The day-to-day compliance officer doesn't need to regularly see the Board"



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## Why They Think It Is Okay

"Individual(s) with operational responsibility shall report periodically to high-level personnel **and, as appropriate**, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program." §8B2.1(b)(2)(C).

"[T]he individual(s) with day-to-day operational responsibility for the program **typically should**, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program." §8B2.1, Application Note 3.

### The "Failsafe"

"To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, **and direct access** to the governing authority or an appropriate subgroup of the governing authority." §8B2.1(b)(2)(C).



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## There's more than just §8B2.1!

§8C2.5(f) Under "Culpability Score" has a discussion of what makes an "effective" program for sentencing purposes (2010 Amendments).

- You don't get credit if you "unreasonably delay" reporting to the government.
- You don't get credit if a "high-level" person in a small organization (less than 200 employees), or a "**substantial authority**" person in any organization "participated in, condoned, or was willfully ignorant of, the offense".
- So, prior to 2010, how would you get credit?

Then the amendment added a wrinkle...



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## The Carrot

...you do get credit for an effective program if:

“(i) [T]he 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 [...]; (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.” §8C2.5(f)(3)(C).



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## The Carrot

“**[D]irect reporting obligations**” to the governing authority means “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.” 8C2.5, Application Note 11.



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## WHY IS THIS IMPORTANT?

- Because the operational compliance personnel have to have reasonable access to be effective.
- In practical terms – if they just have some sort of “failsafe” to ask for an audience in extraordinary circumstances how likely is it they are going to pull the trigger? They need the periodic reporting to establish a relationship.
- Question: How do you determine the “individuals with the day-to-day operational responsibility”?
  - Who monitors misconduct and investigates?
  - Who is responsible for communication and training?
  - Who is responsible for updating, maintaining and making standards accessible?



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### 3a. Periodically is not the Same as “Never”

*“[The organization shall take reasonable steps [...] to evaluate periodically the effectiveness of the organization’s compliance and ethics program.”  
§8B2.1(b)(5)(B).*

- What goes into an evaluation? Look to the seven hallmarks.
- What is “periodically”? Benchmarking tells us that 70% of organizations conduct some sort of program review or assessment every 3 years or less.
- How do you measure effectiveness? By testing and benchmarking.
- Can be part of audit plan, ERM or done in pieces.



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### 3b. Periodically is not the Same as “Never”

*“[T]he organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify [the program].” §8B2.1(c).*

- Not the same as (b)(5), this is not an assessment of the effectiveness of the program, it's looking at compliance risks.
- Assessing risks *and* testing the program to “take appropriate steps to design, implement or modify” the program – apply risks to controls (seven hallmarks) to determine effectiveness.
- Survey data has shown that over two thirds of organizations conduct some sort of compliance risk assessment on a 3-year basis.
- Sophistication of risk assessment can vary quite a bit, and the guidelines do not provide for any particular methodology



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### The Guidelines Matter in 2019 Because...

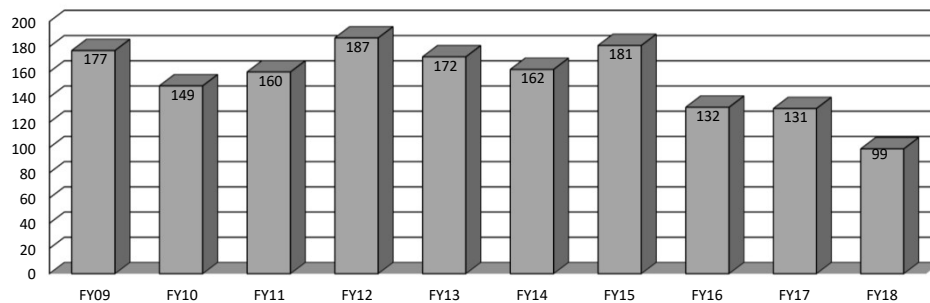
- USDOJ memos can be withdrawn, re-written or (maybe) consolidated into the US Attorney's Manual. The USSC has a public, deliberative process.
- Chapter Eight underpins most other guidance and is a model outside of the USA.
- It's all in there. The concepts being deciphered from the latest and greatest guidance reside in Chapter Eight to a great degree.
- Chapter Eight is straightforward, applies to all organizations and is better tailored for application across any organization.
- The organizational sentencing dataset is still the most consistent data on the consequences for misconduct.



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### Number of Organizational Cases Fiscal Years 2009-2018

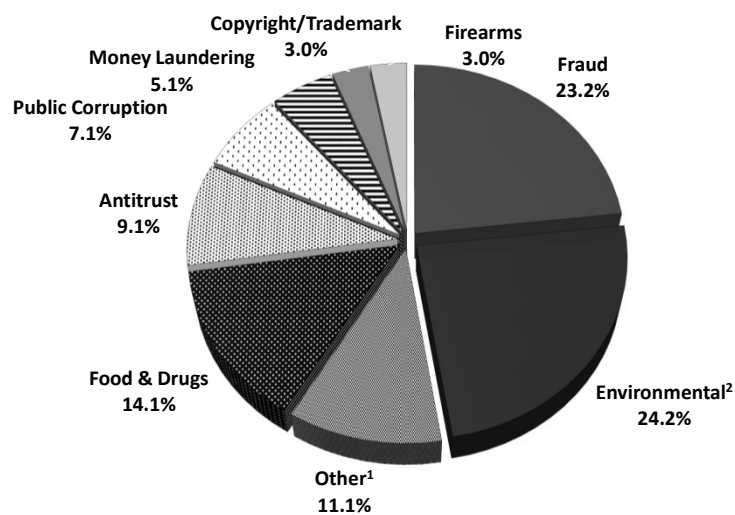


SOURCE: United States Sentencing Commission, 2009-2018 *Sourcebooks of Federal Sentencing Statistics*.

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### Primary Offense in Organizational Cases Fiscal Year 2018

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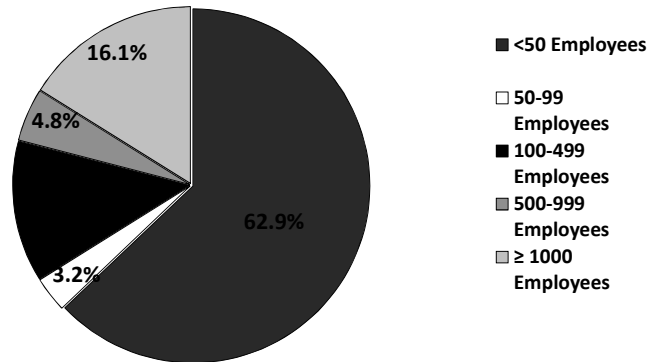
<sup>1</sup> The Other category includes the following offense types: Copyright/Trademark Infringement, Drugs (not FDA), Firearms, Food Stamps, Gambling, Obstruction of Justice, Racketeering, Tax, and Other.

<sup>2</sup> The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.

SOURCE: United States Sentencing Commission, 2018 Datafile, CORP18.

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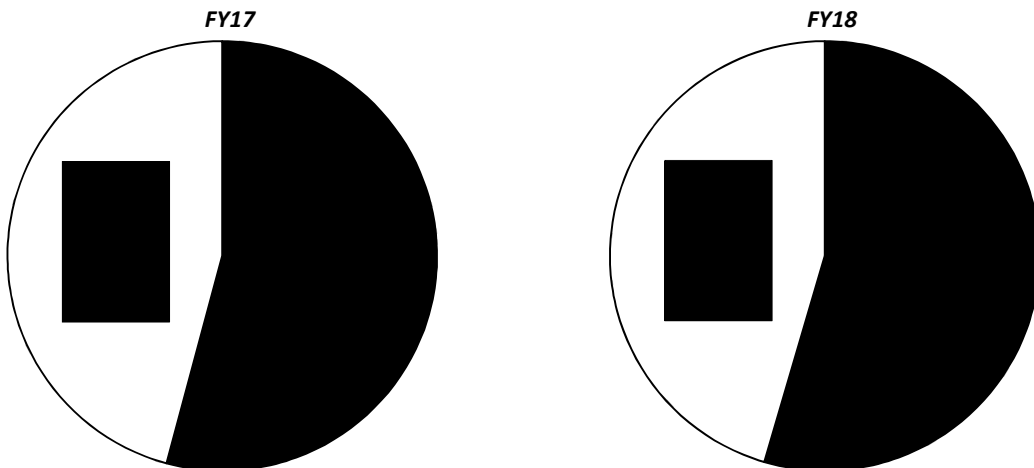
### Size of Organizations Sentenced By Number of Employees Fiscal Year 2018



SOURCE: United States Sentencing Commission, 2018 Datafile, CORP18

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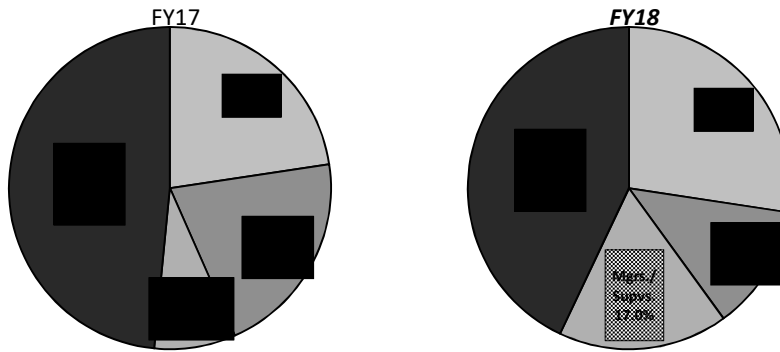
### Relationship of Individual Offender To Organizational Cases Fiscal Years 2017-2018



SOURCE: United States Sentencing Commission, 2017-2018 Datafiles, CORP17 and CORP18.

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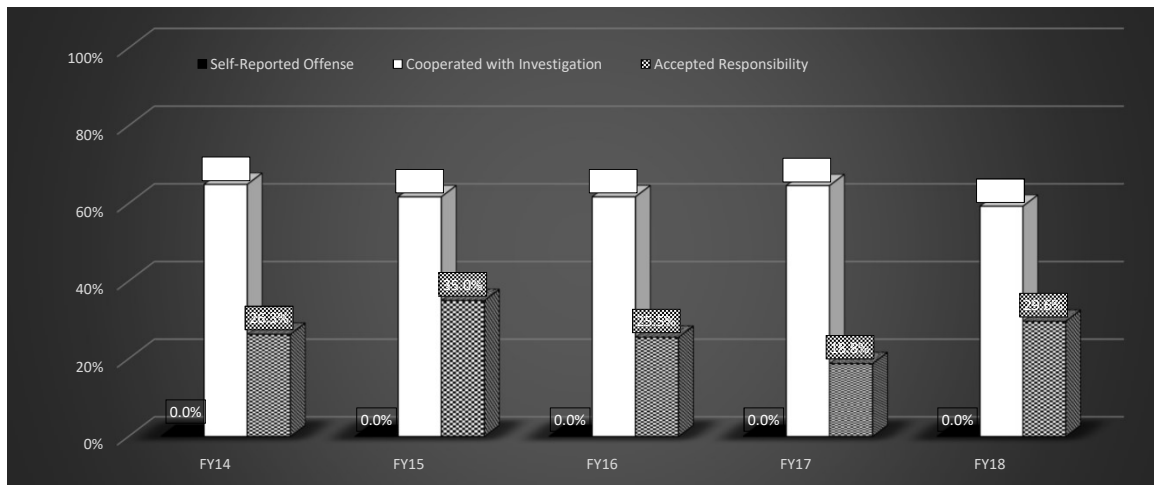
Percentage of Individual Offenders Who Were  
"High-Level" Officials of Co-Defendant Organizations  
Fiscal Years 2017-2018



SOURCE: United States Sentencing Commission, 2017-2018 Datafiles, CORP17 and CORP18.

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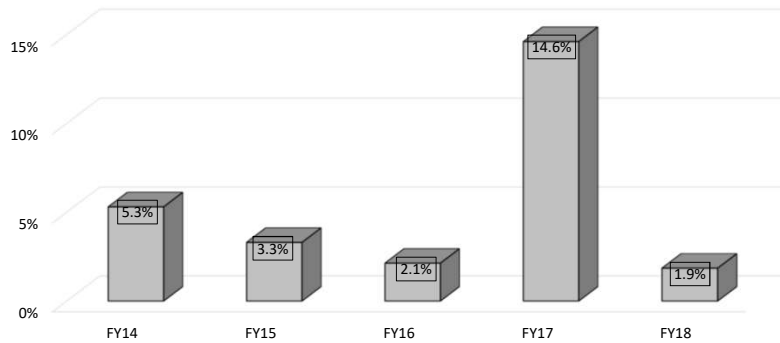
Percentage of Organizational Cases Receiving  
Reduction in Culpability Score under §8C2.5(g)  
Fiscal Years 2014-2018



SOURCE: United States Sentencing Commission, 2014-2018 Sourcebooks of Federal Sentencing Statistics.

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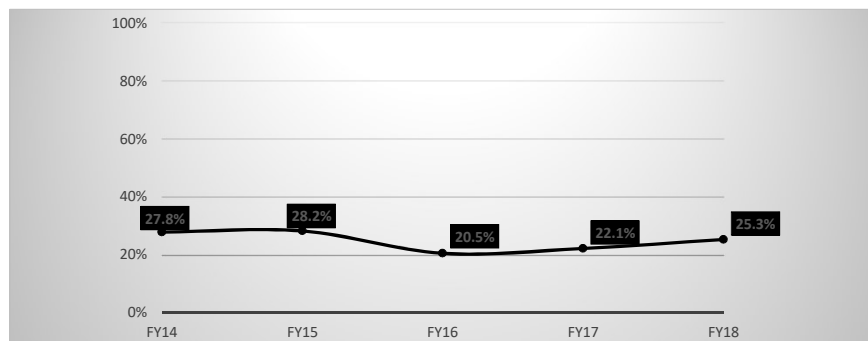
### Percentage of Organizations Sentenced that Obstructed Justice (§8C2.5(e)) Fiscal Years 2014-2018



SOURCE: United States Sentencing Commission, 2014-2018 *Sourcebooks of Federal Sentencing Statistics*.

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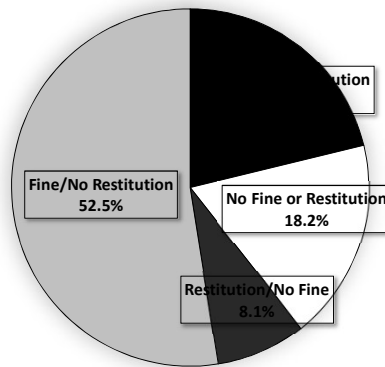
### Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Years 2014-2018



SOURCE: United States Sentencing Commission, 2014-2018 *Sourcebooks of Federal Sentencing Statistics*.

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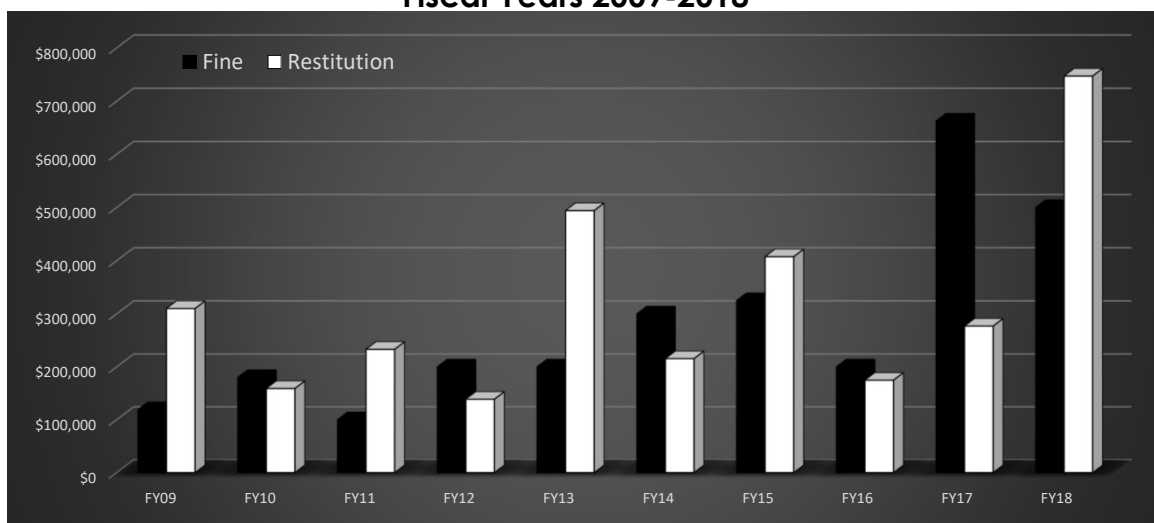
## Types of Monetary Sentences Fiscal Year 2018



SOURCE: United States Sentencing Commission, 2018 *Sourcebook of Federal Sentencing Statistics*.

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## Fine and Restitution Distribution Fiscal Years 2009-2018



SOURCE: United States Sentencing Commission, 2009-2018 *Sourcebooks of Federal Sentencing Statistics*.

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## Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) Fiscal Year 2018

Fines	
Antitrust/Price Fixing	\$ 54.6
Antitrust/Price Fixing	\$ 21.0
Fraud	\$ 12.9
Antitrust/Price Fixing	\$ 12.0
FDA	\$ 5.0
FDA	\$ 5.0
FDA	\$ 5.0
Environmental	\$ 5.0
Bribery	\$ 4.7
Environmental	\$ 4.6

Restitution	
Copyright/Trademark Infringement	\$ 58.4
Environmental	\$ 20.0
Fraud	\$ 11.4
Fraud	\$ 11.4
FDA	\$ 7.2
Fraud	\$ 6.7
Obstruction of Justice	\$ 4.5
Fraud	\$ 4.3
Fraud	\$ 2.3
Environmental	\$ 1.2

SOURCE: United States Sentencing Commission, 2018 Datafile, CORP18.

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## Questions?



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