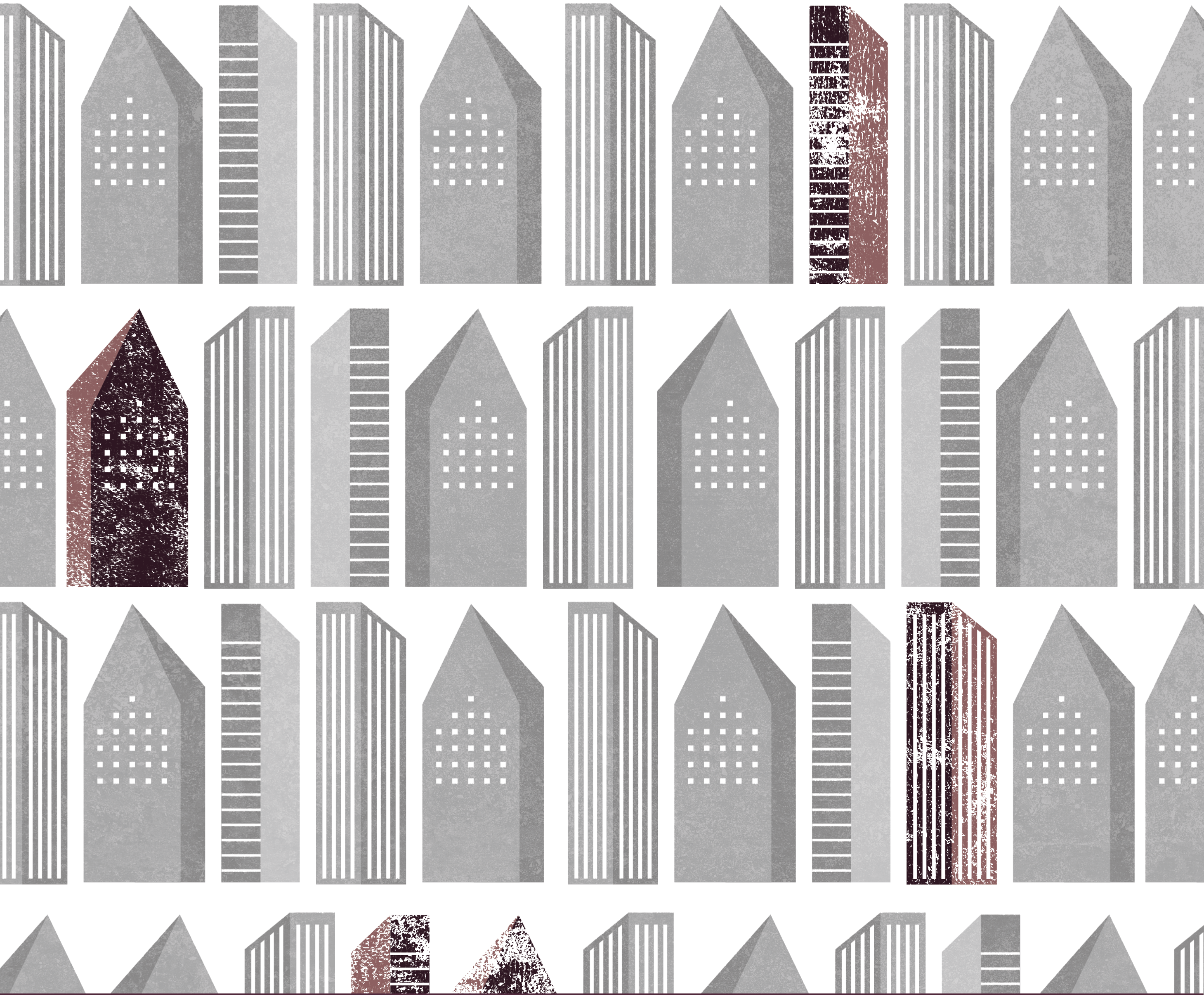

The Organizational Sentencing Guidelines

Thirty Years of Innovation and Influence

United States Sentencing Commission
August 2022

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INTRODUCTION

As ultimately promulgated in 1991, the guidelines in Chapter Eight of the *Guidelines Manual* represented a collaborative process between the United States Sentencing Commission ("Commission"), federal agencies, businesses, industry advocacy groups, academia, and many other stakeholders. The organizational guidelines reflect a set of principles identified during this process and incorporated into the guidelines to achieve the goals of the Sentencing Reform Act of 1984 ("SRA") and address the concerns raised by Congress. Although initially resisted by some commentators, the organizational guidelines have since been embraced for their innovative approach to organizational sentencing: (1) incentivizing organizations to self-police their behavior; (2) providing guidance on effective compliance and ethics programs that organizations can implement to demonstrate efforts to self-police; and (3) holding organizations accountable based on specific factors of culpability.

The organizational sentencing guidelines have wielded significant influence on corporate America. Chapter Eight was designed to incentivize corporate self-policing through its "carrot and stick" philosophy[1] and it has "catalyzed vigorous efforts by companies to promote ethical performance and reduce organizational misconduct."[2] Thirty years have elapsed since their original promulgation and the hallmarks for an effective compliance and ethics program found in the guidelines continue to set the gold standard for designing and evaluating effective compliance and ethics programs.[3]

This publication summarizes the history of Chapter Eight's development and discusses the two substantive changes made to the elements of an effective compliance and ethics program. It then provides policymakers and researchers a snapshot of corporate sentencing over the last 30 years. Finally, the publication describes Chapter Eight's impact beyond federal sentencing.

KEY FINDINGS

1 The major innovations of the organizational guidelines are (1) incentivizing organizations to self-police their behavior; (2) providing guidance on effective compliance and ethics programs that organizations can implement to demonstrate efforts to self-police; and (3) holding organizations accountable based on specific factors of culpability.

2 The most significant achievement of Chapter Eight has been the widespread acceptance of the organizational guidelines' criteria for developing and maintaining effective compliance and ethics programs to prevent, detect, and report criminal conduct.

3 During the 30-year period since promulgation of the organizational guidelines, 4,946 organizational offenders have been sentenced in the 94 federal judicial districts. The majority of organizational offenders are domestic (88.1%), private (92.2%), and smaller organizations with fewer than 50 employees (70.4%).

4 Six offense types accounted for 80.4 percent of all organizational offenders from fiscal years 1992 through 2021.

- Fraud (30.1%) and environmental (24.0%) offenses, accounted for more than half (54.1%) of all organizational offenses.
- Other common offense types were antitrust (8.4%), food and drug (6.6%), money laundering (6.1%), and import and export crimes (5.2%).

5 Commission data suggests that the lack of an effective compliance and ethics program may be a contributing factor to criminal prosecutions against organizations.

- Since fiscal year 1992, the overwhelming majority of organizational offenders (89.6%) did not have any compliance and ethics program.
- Only 11 of the 4,946 organizational offenders sentenced since fiscal year 1992 received a culpability score reduction for having an effective compliance and ethics program.
- More than half (58.3%) of the organizational offenders sentenced under the fine guidelines received a culpability score increase for the involvement in or tolerance of criminal activity.
- Few organizational offenders (1.5% overall) received the five-point culpability score reduction for disclosing the offense to appropriate authorities prior to a government investigation in addition to their full cooperation and acceptance of responsibility.
- Since fiscal year 2000, courts ordered one-fifth (19.5%) of organizational offenders to implement an effective compliance and ethics program.

6 Since fiscal year 1992, the courts have imposed nearly $33 billion in fines on organizational offenders. The average fine imposed was over $9 million and the median amount was $100,000.

7 Since fiscal year 1992, courts sentenced over two-thirds of organizational offenders (69.1%) to a term of probation and the average length of the term of probation imposed was 39 months.

CHAPTER ONE

The Sentencing Reform Act and its Statutory Mandate to Develop Organizational Guidelines

One of the primary motivations for the SRA was to eliminate unwarranted disparity in sentencing and to address the inequalities created by unfettered sentencing discretion.[4] While much of the Congressional concern focused on individual sentencing, the Senate report accompanying the SRA also detailed Congress's observations regarding the sentencing of organizations. It stated that

> [c]urrent law . . . rarely distinguishes between individuals and organizations for sentencing purposes[;] [t]hus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations.[5]

The Senate report also noted concerns that white collar criminals were being sentenced to minimal fines, creating "the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business."[6]

As part of the SRA, Congress created the Commission as an independent agency within the judicial branch of the federal government and tasked it with the responsibility of developing federal sentencing policy.[7] The SRA directed the Commission to promulgate guidelines that federal judges would use for selecting sentences within the prescribed statutory range.[8] The SRA also specified that an organization[9] may be sentenced to a term of probation[10] or a fine, or a combination of these sanctions,[11] and required that "[a]t least one of such sentences must be imposed."[12] Additionally, the SRA made clear that an organization could "be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution."[13]

History of the Organizational Guidelines

Original Organizational Guidelines

Consistent with its statutory mandate and the observations of Congress, the Commission began exploration of guidelines for use by federal courts to sentence organizations convicted of a federal offense. The initial Chapter Eight organizational guidelines were the product of an extensive multiyear process conducted by the Commission.[14] The Commission held its first public hearing devoted exclusively to consideration of organizational sanctions in June 1986[15] and continued to solicit and consider public comment from many stakeholders, including from the U.S. Departments of Justice ("DOJ"), Treasury, Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, the U.S. Postal Service, and the U.S. Securities and Exchange Commission ("SEC") about offenses occurring within their areas of responsibility.[16]

On October 1, 1986, the Commission published in the *Federal Register* the *Preliminary Draft of the Sentencing Guidelines*.[17] This draft laid out two possible approaches to the development of organizational sanctions based on the just punishment and deterrence philosophies. The just punishment approach emphasized an organization's culpability[18] and its ability to pay a fine, while the deterrence approach focused on the harmfulness of an organization's conduct and the likelihood of detection of the crime.[19] Noting the competing concerns raised by the just punishment and deterrence purposes,[20] the Commission sought public comment on "whether its approach to fines should emphasize the organization's culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection."[21] The Commission also identified the mandatory and discretionary conditions of probation authorized by statute,[22] and it sought comment about the types of probation conditions that might be imposed on an organization and the circumstances justifying their imposition.[23]

Because of the complexity of the subject matter and tight deadlines imposed by the SRA,[24] the Commission deferred action on the organizational guidelines until completion of the guidelines for individual defendants.[25] Shortly after delivery of the first *Guidelines Manual* to Congress,[26] the Commission turned its attention back to corporate sanctions. In July 1988, the Commission published the *Discussion Materials on Organizational Sanctions* to gather comment and analysis on the development of sentencing standards for organizations.[27] Those materials included a Commission staff working paper on organizational sentencing policy recognizing that "[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts."[28]

Two Commission hearings followed the release of the *Discussion Materials on Organizational Sanctions*.[29] Witnesses, including representatives from the President's Council of Economic Advisers, staff from the SEC, Environmental Protection Agency ("EPA"), Food and Drug Administration, the U.S. Probation Office, the Institutional Shareholders Services, academics, and others,[30] testified on the importance of internal corporate controls as a means of deterring organizational crime and supported involving the organization in the development of a compliance plan.[31] During these hearings the discussion of compliance programs as a mitigating factor first arose,[32] an idea that attracted the Commission's interest.[33]

In 1988, the Commission formed a working group of private defense attorneys to develop a set of practical principles for sentencing organizations.[34] In its May 1989 report, *Recommendations Regarding Criminal Penalties for Organizations*, the working group asserted that organizational sanctions should serve dual purposes: punishment and deterrence by incentivizing organizations to take steps to prevent crimes.[35] The report also identified a number of factors that should ameliorate the criminal fine amount.[36]

On November 8, 1989, the Commission published for public comment a set of proposed organizational sentencing guidelines as a new chapter to the *Guidelines Manual: Chapter Eight—Sentencing of Organizations* that provided for fine reductions for compliance efforts in certain circumstances.[37] The Commission held public hearings on the published proposed guidelines.[38] Witnesses from a broad spectrum of special interest groups, including the National Association of Manufacturers, the American Corporate Counsel Association, the U.S. Chamber of Commerce, and the American Bar Association ("ABA"), along with representatives from federal agencies, academics, and the general counsels of various private businesses, testified about the elements of successful compliance programs, among other subjects.[39] Ultimately, the Commission came to the consensus that staff should develop draft guidelines to reflect self-policing through economic incentives as an alternative to the previous draft guidelines.[40]

Although the Commission had anticipated promulgating the organizational guidelines at its meeting on April 10, 1990, the matter was deferred until after the appointment of new members.[41] Once three new commissioners were sworn in on July 24, 1990, the now fully constituted Commission agreed on a set of general principles to be used in drafting guidelines on organizational sanctions.[42] These principles included incentives for organizations to minimize the likelihood of criminal behavior and ensure that, if detected, such wrongdoing would be reported by the organizations.[43]

On November 5, 1990, the Commission published for comment proposed organizational guidelines.[44] The draft defined the requirements of an effective compliance program, making clear that the hallmark of such programs is the exercise of the organization's due diligence to prevent and detect criminal conduct by its agents, and recognized such programs as a mitigating factor for a fine reduction of the applicable fine range. The draft also provided that an organization would not ordinarily qualify for the effective compliance program mitigating factor unless it also qualified for the mitigating factor, which required that no compliance personnel or person with substantial managerial authority knew about the violation.[45]

On December 13, 1990, the Commission held a final public hearing on the organizational guidelines.[46] The witnesses generally favored including an effective compliance program as one of the mitigating factors and believed that giving credit for an effective compliance program would deter future criminal activity.[47] Several witnesses expressed the view that the Commission correctly identified the essential elements of an effective compliance program in the published commentary.[48]

After further refinement to the published draft, the Commission unanimously voted to promulgate the organizational guidelines and submit them to Congress for a 180-day review period.[49] The newly promulgated Chapter Eight, titled "Sentencing of Organizations," took effect on November 1, 1991.[50] The Commission expressed the aspiration that "organizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance."[51] Moreover, if a corporate crime was committed, "the sentencing guideline incentives would drive the corporate actor toward swift and effective disclosure and other remedial actions."[52]

General Principles Embodied in Chapter Eight of the *Guidelines Manual*

The Chapter Eight guidelines and policy statements reflect several general principles relating to the sentencing of organizations. The guidelines are "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[53] "First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense . . . as a means of making victims whole for the harm caused."[54] Second, any organization that operated primarily for a criminal purpose or by criminal means should receive a fine sufficiently high to divest the organization of all its assets.[55] "Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization."[56] "The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table."[57] "Culpability generally will be determined by six factors that the sentencing court must consider."[58] The four aggravating factors are: "(i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice."[59] "The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective

The guidelines are "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."

compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility."[60] Finally, probation is an appropriate sentence for an organization "when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."[61]

Evolution of Chapter Eight

The structure of Chapter Eight and its general principles have remained largely unchanged since its original promulgation. Nevertheless, after initial promulgation, commentators offered suggestions for amendments to Chapter Eight.[62] After the President nominated and the Senate confirmed seven new commissioners in 1999, the Commission developed an interest in re-examining Chapter Eight.[63] Judge Diana E. Murphy, the new Commission Chair, and the other commissioners "became aware of the wide impact the [organizational] [g]uidelines have on organizations . . . extend[ing] far beyond their use in the context of criminal cases."[64] Under Chair Murphy, the Commission began to consider whether ethics was "an implicit component of effective compliance programs, or whether ethics should now explicitly be incorporated into the compliance program criteria in the organizational guidelines."[65]

In 2001, in light of the public comment it received regarding the organizational guidelines, the Commission solicited public input on the formation of an ad hoc advisory group to identify any changes needed to improve their operation.[66] Informed by the response, the Commission, on February 21, 2002, formed an ad hoc advisory group to review the organizational guidelines with particular emphasis on examining the criteria for an effective program to ensure compliance with the law by an organization.[67] The 15-member group was composed of industry representatives, scholars, and experts in compliance and business ethics.[68]

Five months after the Commission created the advisory group, Congress enacted the Sarbanes-Oxley Act of 2002.[69] Section 805 of the Sarbanes-Oxley Act directed the Commission to "review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, [C]hapter [Eight], are sufficient to deter and punish organizational criminal misconduct."[70] The Commission used the advisory group's work to inform its response to that directive.

The advisory group sought public comment on the organizational guidelines[71] and identified its primary focus on the criteria for an effective compliance program and how those criteria affected the operation of Chapter Eight as a whole.[72] The advisory group received significant public interest to both its initial and a subsequent request for comment.[73] A public hearing on November 14, 2002, with testimony from witnesses with a broad range of perspectives, further informed the advisory group's work.[74]

On October 7, 2003, the advisory group presented a comprehensive report to the Commission on possible changes to the organizational guidelines.[75] The report concluded that the organizational sentencing guidelines were successful in encouraging organizations to develop compliance programs to prevent and detect wrongdoing, but recommended greater guidance regarding the factors for an *effective* program.[76] Specifically, the advisory group recommended that the Commission promulgate a stand-alone guideline defining effective compliance programs and make changes to the definitions and requirements of such programs.[77]

Informed by the public comment[78] and hearing testimony,[79] the Commission on April 8, 2004, unanimously promulgated an amendment that elevated the criteria for an effective compliance program from commentary into a separate guideline, §8B2.1 (Effective Compliance and Ethics Program).[80] The amendment also strengthened the existing criteria by, for example, requiring organizations to establish standards and procedures to prevent and detect criminal conduct, more precisely defining the oversight responsibilities of the organization's governing authority, and making compliance and ethics training a requirement, specifically extending the training requirement to the upper levels of an organization.[81] The amendment added a requirement to conduct periodic risk assessments as a condition of probation.[82] The amendment also added the requirement that organizations "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[83]

The Commission also took steps to address concerns regarding the lack of incentives for small organizations to develop compliance programs.[84] First, the Commission provided additional guidance regarding the implementation of compliance and ethics programs by small organizations.[85] Next, the commentary

Timeline of the Organizational Guidelines

Initial Promulgation

Preliminary draft of Guidelines solicits comment on organizational sanctions	Publication of proposed Organizational Guidelines	Chapter Eight became effective
Oct. 1986	**Nov. 1989** **Nov. 1990**	**Nov. 1991**

encouraged larger organizations to promote the adoption of compliance and ethics programs by smaller organizations with which they conducted business.[86] The Commission also replaced the automatic preclusion for compliance program credit provided at §8C2.5(f) with a rebuttable presumption to allow smaller organizations to argue for a culpability score reduction based upon an effective compliance and ethics program.[87] The amended organizational guidelines became effective on November 1, 2004.

The Commission considered further changes during the 2009–2010 amendment cycle. Mindful of the fact that "even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization,"[88] the Commission actively solicited input on the proposed amendment[89] from groups known to have an interest in Chapter Eight. As a result, the Chapter Eight proposed amendment received more public comment than any other proposed amendment in 2010.[90] Commentators included government agencies, including the Departments of Health and Human Services, and Commerce,[91] the Commission's standing advisory groups,[92] ethics and compliance industry professionals, for example, the Society of Corporate Compliance and Ethics ("SCCE"), the Ethics and Compliance Officers Association, and the Ethisphere Institute,[93] and non-profit research organizations, such as the Ethics Resource Center and Washington Legal Foundation.[94]

After considering the voluminous comments[95] and hearing testimony,[96] the Commission expanded the scope of the culpability score reduction at §8C2.5(f) to make it available to organizations of all sizes and clarified certain requirements needed for an effective compliance and ethics program.[97] The amendment also added an application note describing the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C) and provided encouragement, by means of potential sentence mitigation, for organizations to adopt "compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary."[98] The amended organizational guidelines became effective on November 1, 2010.[99]

Amendments

July 2002	Nov. 2004	Nov. 2010
Sarbanes-Oxley Act to review and amend Chapter Eight	Amendments to Chapter Eight elevating and strengthening the criteria for an effective compliance program become effective	Amendment to §8B2.1 became effective

CHAPTER TWO

Organizational Sentencing Data

Introduction

Because criminal prosecutions resulting in a sentencing are only one method by which an organization's violations of the law can be addressed by the authorities,[100] Commission sentencing data cannot fully measure the prevalence of corporate crime.[101] Nevertheless, by providing a snapshot of organizational offenders and offenses, this data may inform policymakers and researchers regarding the trends in corporate sentencing and may also contribute to the continuing dialogue about the importance of effective compliance and ethics programs and identify areas for further refinement in existing programs.

Methodology

The Commission's organizational datafile consists of information about organizations that have been convicted and sentenced for a federal criminal offense.[102] From the court documents submitted, the Commission collects information including company demographic information (*e.g.*, size, business classification), guideline application, and the details of the sentence such as fines and restitution. This report provides information on organizational offenders sentenced between fiscal year 1992 and fiscal year 2021. However, because the process to collect this data has changed over this time, not all analyses can be presented for the entire period.

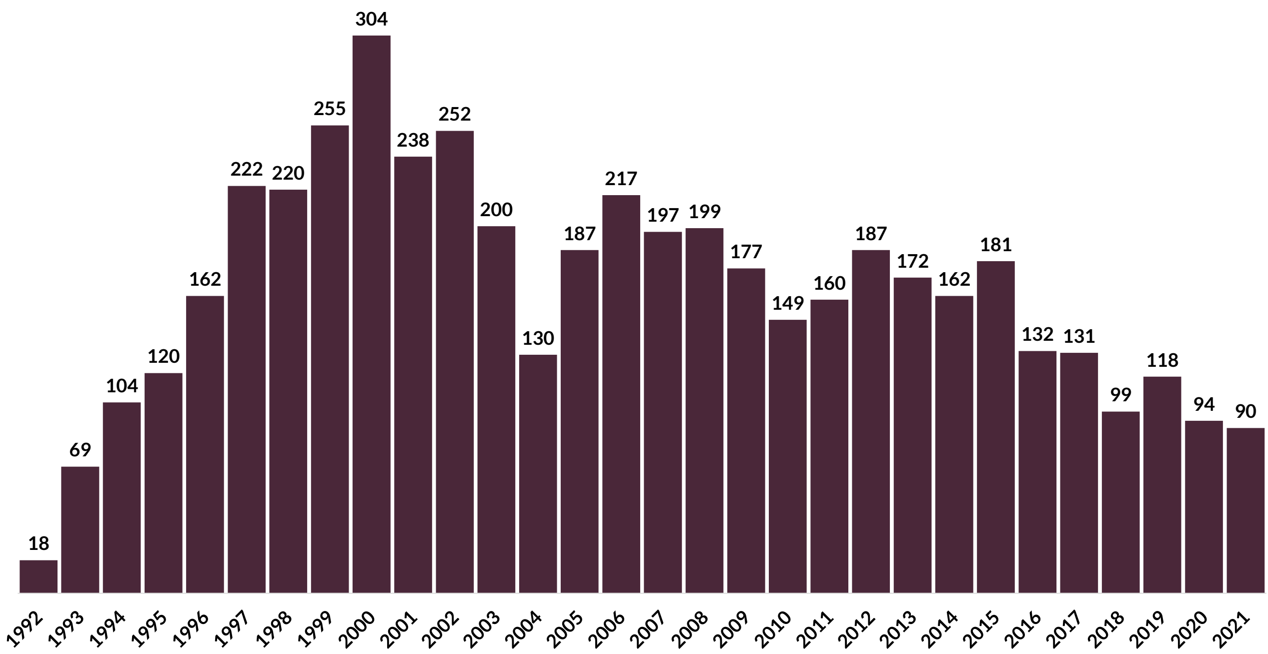
Organizational Offenders

During the 30-year period since promulgation of the organizational guidelines, 4,946 organizational offenders have been sentenced in the 94 federal judicial districts.[103] This compares to nearly two million individual federal offenders sentenced within the same period.[104]

The Commission observed a fairly steady increase in the number of organizational offenders from fiscal year 1992 to fiscal year 2000. As demonstrated in Figure 1, courts sentenced 18 organizational offenders in fiscal year 1992, compared to a high of 304 offenders in fiscal year 2000. From this peak in fiscal year 2000, the number of organizational offenders has gradually declined to below 100 in the most recent two fiscal years.

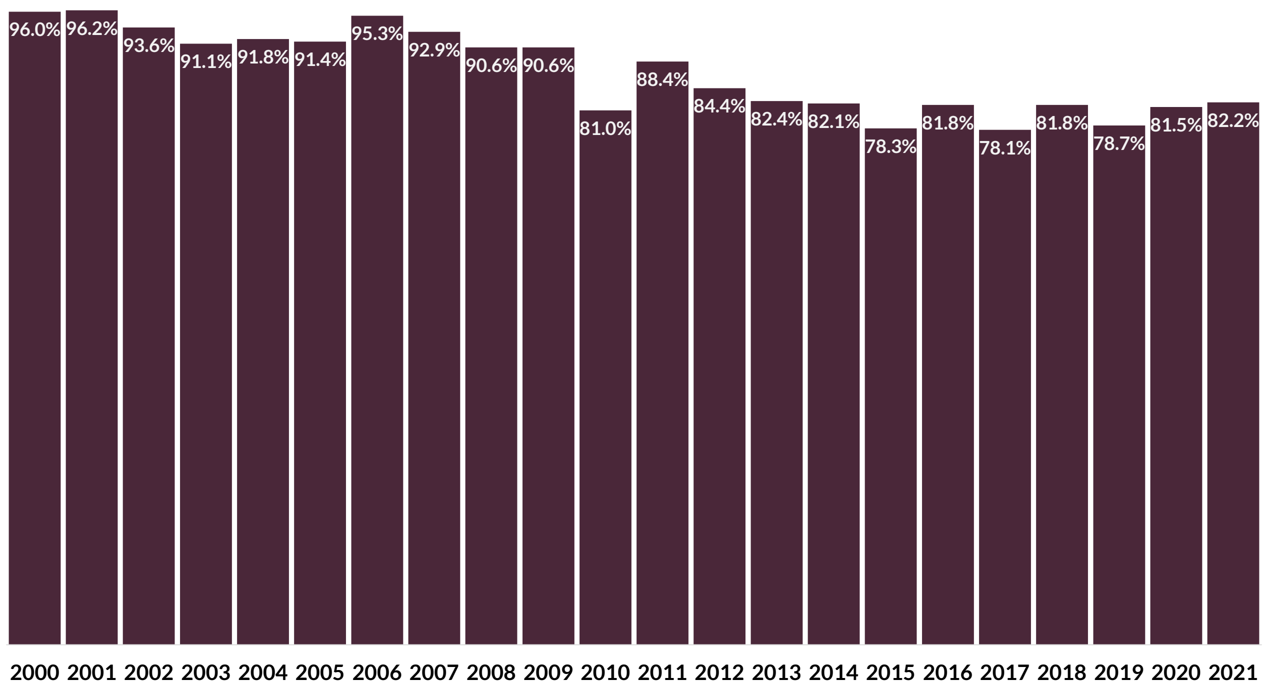
Organizational offenders represent a small proportion of all federal offenders (0.2% in fiscal year 2021). Although organizational offenders have sentencing trends distinct from those of individual offenders, the Commission has also observed a decline in the number of individual offenders sentenced since the reported high in fiscal year 2011 through the current fiscal year.[105]

Figure 1. Number of Organizational Offenders Fiscal Years 1992–2021



In fiscal year 2000, the Commission expanded its data collection to record whether an organization was a domestic or foreign organization. The majority of organizational offenders (88.1%) are domestic organizations. The highest percentage of domestic organizations was reported in fiscal year 2001 (96.2%) (Figure 2). Since then, the proportion of domestic organizations has been gradually declining, with the lowest rate (78.1%) reported in fiscal year 2017.

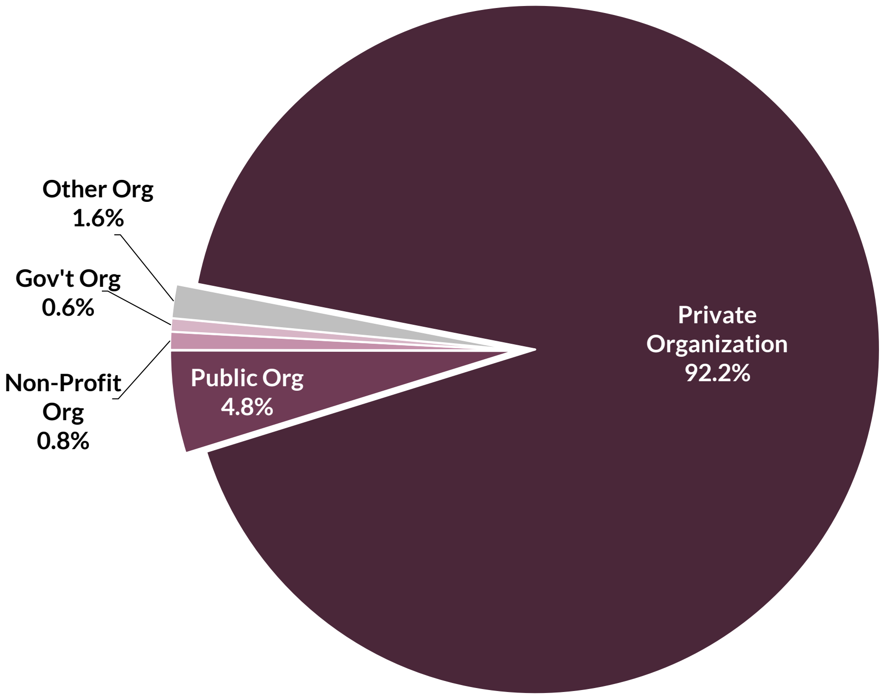
Figure 2. Percentage of Domestic Organizational Offenders
Fiscal Years 2000–2021



Ownership Structure

The Commission also collects information about the ownership structure of organizational offenders. Although the Commission has revised the categories of ownership structure of organizational offenders over time,[106] these ownership structures can be grouped within the following five broad categories: private organization,[107] public organization,[108] non-profit organization,[109] governmental organization,[110] and other organization.[111] The overwhelming majority of organizations were private organizations (92.2%) (Figure 3). The next most common ownership structure was the public organization (4.8%).

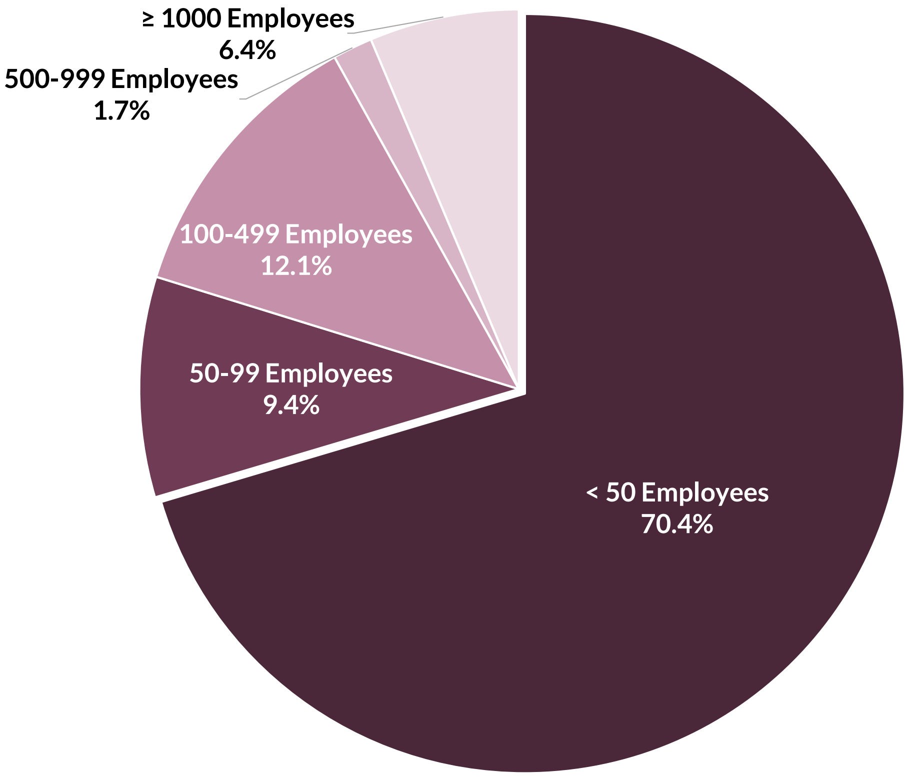
Figure 3. Ownership Structure of Organizational Offenders Fiscal Years 1992–2021



Size of Organization

The majority (70.4%) of organizational offenders sentenced are smaller organizations with fewer than 50 employees (Figure 4). Organizations with 50-to-99 employees (9.4%) and 100-to-499 employees (12.1%) were the next most common organizational sizes. Less than ten percent (8.1%) of organizations had greater than 500 employees.

Figure 4. Size of Organizational Offenders Fiscal Years 1992–2021

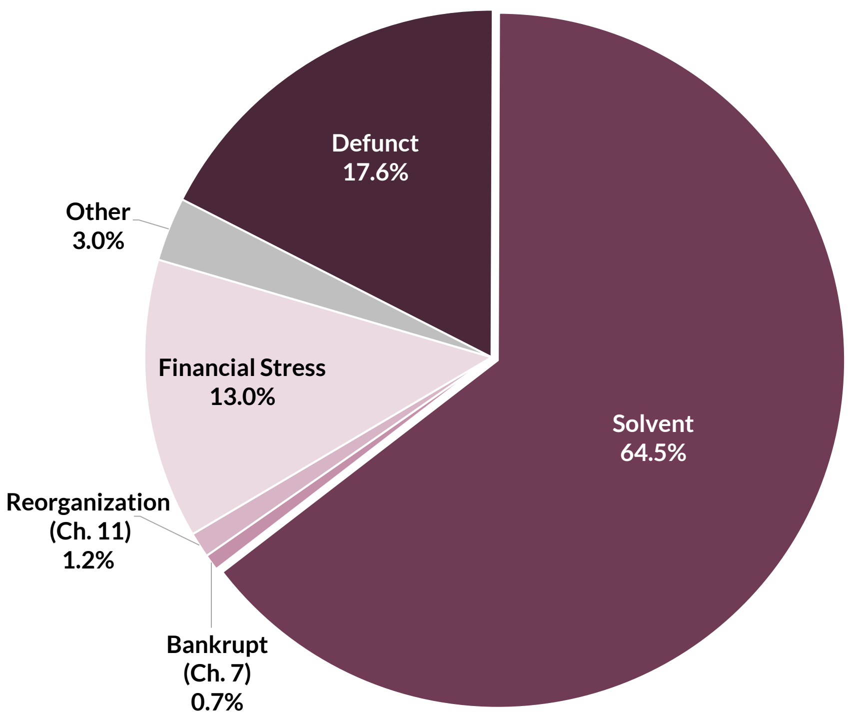


Financial Status at Sentencing

The criminal prosecution and sentencing of an organization may impact its financial status. The stigma of a criminal conviction may drive away an existing or potential customer base, thereby threatening the organization's ability to survive. Moreover, organizational sentences typically include monetary sanctions, such as restitution and fines. These monetary sanctions may cause additional financial stress to an already vulnerable organization. To understand these effects, the Commission collects data on the organization's financial status at the time of sentencing.

With few exceptions, the majority (64.5%) of organizations sentenced each fiscal year remained solvent and operating at the time of sentencing (Figure 5). However, approximately 30 percent were either defunct (17.6%) or in financial stress (13.0%) at the time of sentencing.

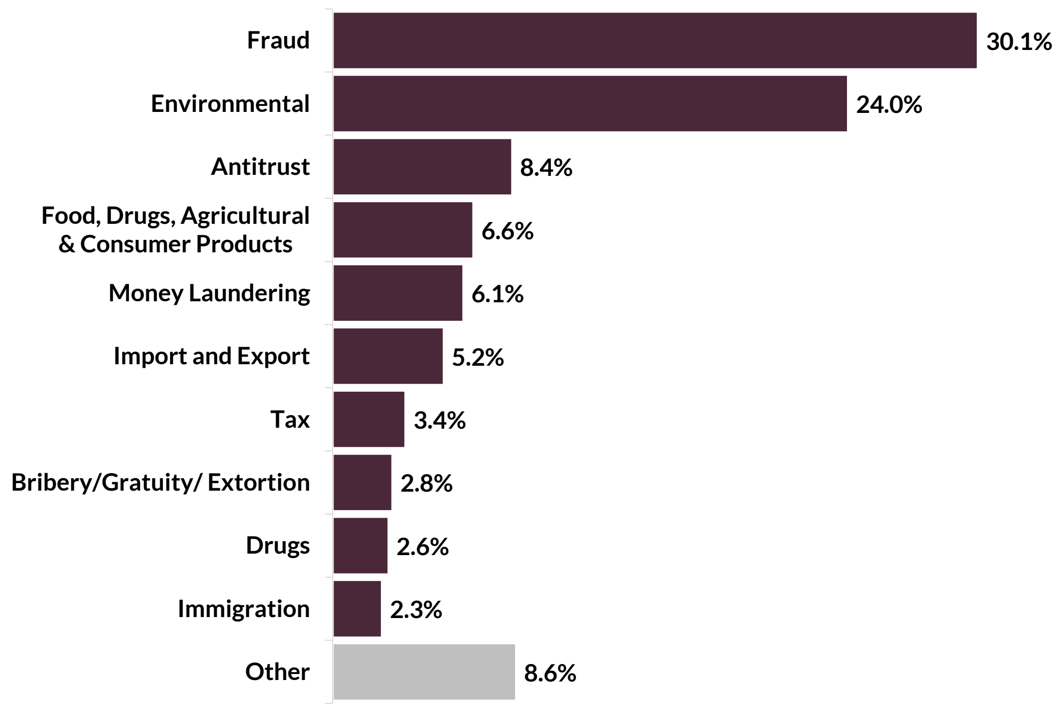
Figure 5. Financial Status of Organizational Offenders Fiscal Years 1992–2021



Offense and Industry Types

The Commission classifies 24 organizational offense types. Six offense types accounted for 80.4 percent of all organizational offenders from fiscal years 1992 through 2021 (Figure 6). Two of these offense types, fraud (30.1%) and environmental (24.0%) offenses, accounted for more than half (54.1%) of all organizational offenses. Other common offense types were antitrust (8.4%), food and drug (6.6%), money laundering (6.1%), and import and export crimes (5.2%).

Figure 6. Offense Type of Organizational Offenders Fiscal Years 1992–2021

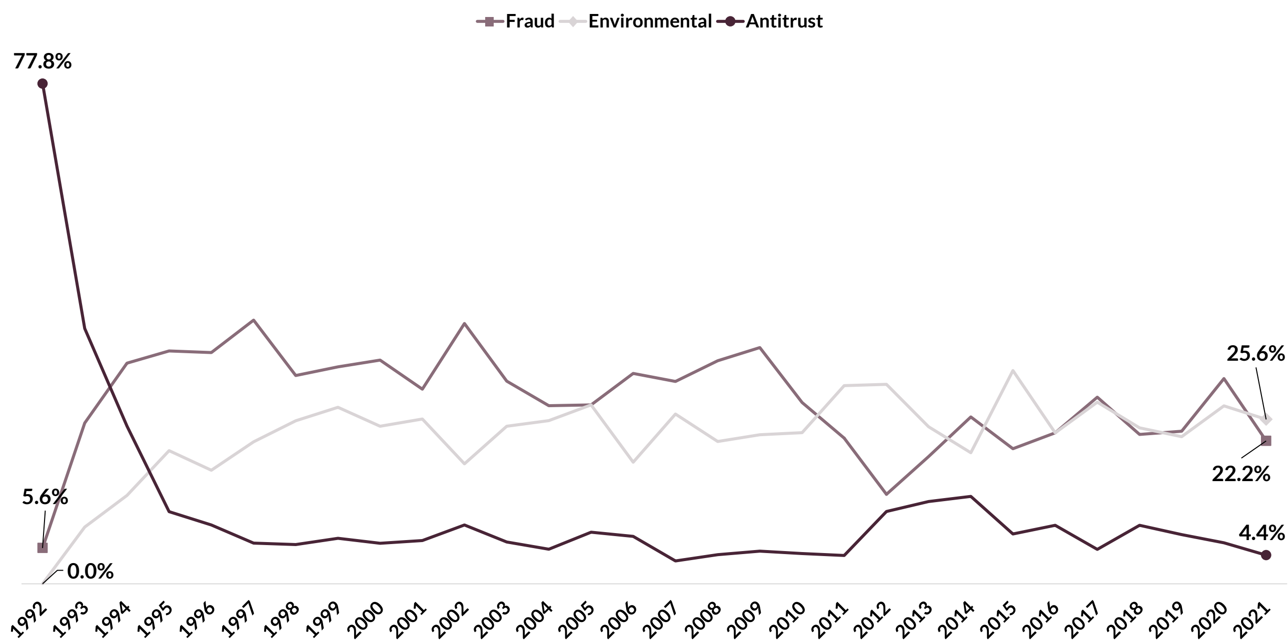


NOTE: "Other" Offense Type includes: Administration of Justice, Larceny/Theft/Embezzlement, Copyright/Trademark, Firearms, Racketeering/Extortion, Gambling, Contraband, Obscenity, Civil Rights, Food Stamps, Motor Vehicle, Archeological Damage, Forgery, and Other Offenses.

During the 30-year period that the Commission has collected organizational sentencing data, it has observed several notable changes relating to offense type. For example, during the first two years of data collection, few organizational offenders were sentenced and in these initial years, antitrust was the most common offense type observed (Figure 7). Notably, the Commission included a special instruction about antitrust organizational fines in the original guidelines, even before promulgation of Chapter Eight.[112]

The Commission observed a change in offense types in fiscal year 1994, when antitrust was overtaken by fraud as the most common offense type. From fiscal year 1994 through fiscal year 2010, fraud continued to be the most common offense type. That pattern changed in fiscal year 2005, when the number of environmental offenses equaled fraud offenses. Since then, environmental offenses have replaced fraud as the most common offense type during several different fiscal years in the past decade.

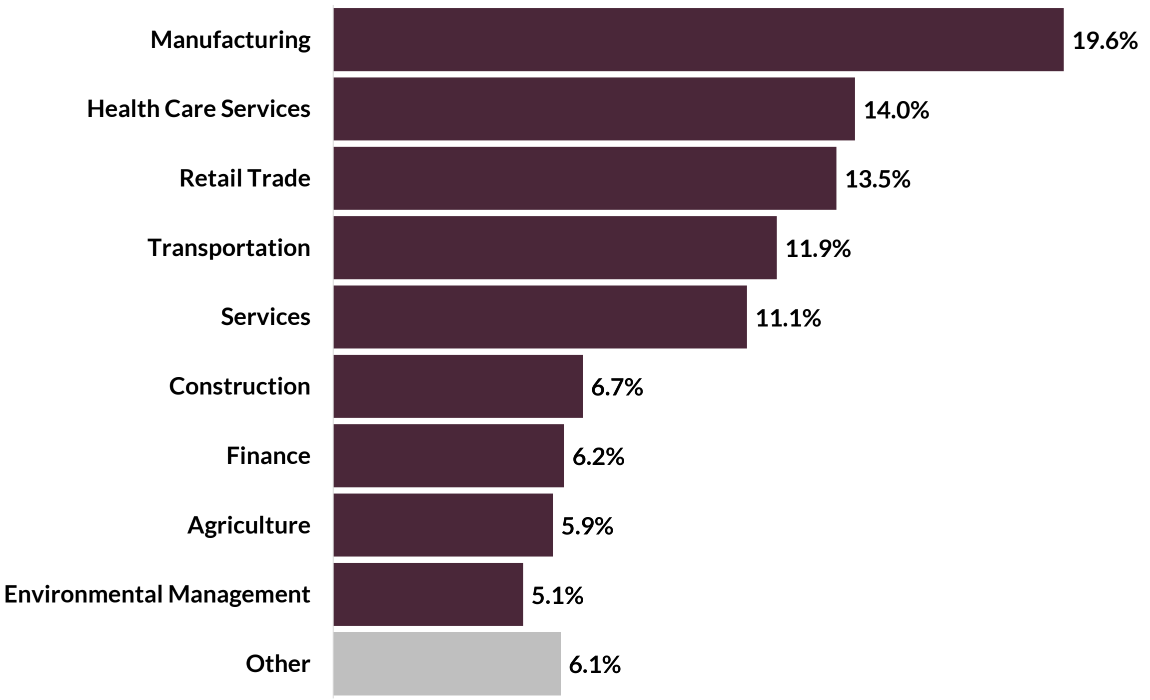
Figure 7. Offense Type of Organizational Offenders Fiscal Years 1992–2021



NOTE: Markers and percentages indicate highest offense type in FY.

Beginning in fiscal year 2000, the Commission began collecting information on the industry in which organizational offenders were doing business. Of the 13 industry categories[113] identified by the Commission, manufacturing (19.6%), health care services (14.0%), and retail trade (13.5%) organizations were the most common industries (Figure 8). Other common industries included the transportation (11.9%) and services (11.1%) industries. These five industry categories accounted for 70.1 percent of all organizational offenders from fiscal years 2000 through 2021.

Figure 8. Industry Type of Organizational Offenders Fiscal Years 2000–2021



NOTE: "Other" Industry Type includes: Mining, Organizations, Associations, Charities, Public Administration, and Other Industries.

Although the most common offense type in the 13 industries varied between environmental and fraud offenses,[114] certain offense types were more commonly associated with certain industries (Figure 9). For example, environmental offenses were the most common in the manufacturing, transportation, agricultural, environmental management, mining, and public administration industries. Fraud offenses were most common in the health care services, retail trade, services, construction, and finance industries.

Figure 9. Top Five Offense Types of Organizational Offenders by Industry Fiscal Years 2000–2021

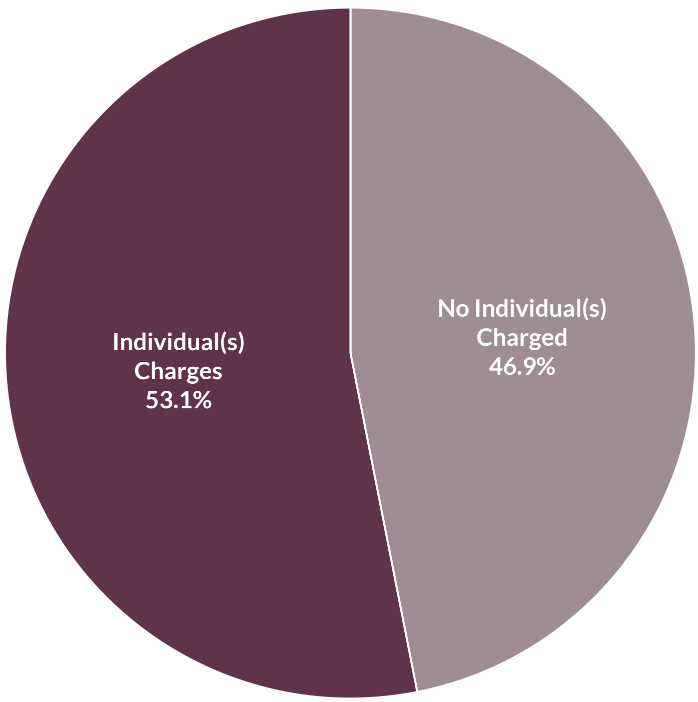
	Antitrust	Environment	Import and Export	Fraud	Money Laundering
	%	%	%	%	%
Manufacturing (n=694)	18.1%	24.9%	9.3%	22.0%	2.5%
Health Care Services (n=493)	0.8%	0.8%	1.8%	54.0%	3.3%
Retail Trade (n=478)	3.6%	9.0%	13.6%	17.0%	15.1%
Transportation (n=419)	15.3%	47.7%	5.5%	20.1%	0.7%
Services (n=391)	4.1%	16.1%	4.1%	32.7%	8.7%
Construction (n=237)	4.2%	26.6%	0.4%	39.2%	5.1%
Finance (n=219)	4.1%	11.0%	1.4%	47.0%	18.7%
Agriculture (n=207)	0.5%	54.1%	5.8%	14.0%	1.5%
Enviro Management (n=179)	2.2%	66.5%	0.6%	21.8%	1.1%
Mining (n=73)	1.4%	46.6%	4.1%	21.9%	1.4%
Orgs, Ass'ns, Charities (n=23)	0.0%	8.7%	8.7%	17.4%	21.7%
Public Admin (n=21)	4.8%	57.1%	9.5%	23.8%	0.0%
Other (n=98)	4.1%	19.4%	10.2%	26.5%	14.3%

These basic metrics may help inform businesses in certain industry sectors of areas to prioritize when to "periodically assess the risk of criminal conduct" and "take appropriate steps to design, implement, or modify" its compliance and ethics program to reduce the risk of the criminal conduct identified.[115] For example, as noted above, the data demonstrates that health care service organizations were most commonly sentenced for fraud offenses (54.0%). As such, a company operating in the health care sector may wish to tailor its compliance and ethics program to prioritize fraud prevention in order to best protect against the types of issues its employees are most likely to face.

Individual Co-Defendants and Their Relationship to the Organizational Offenders

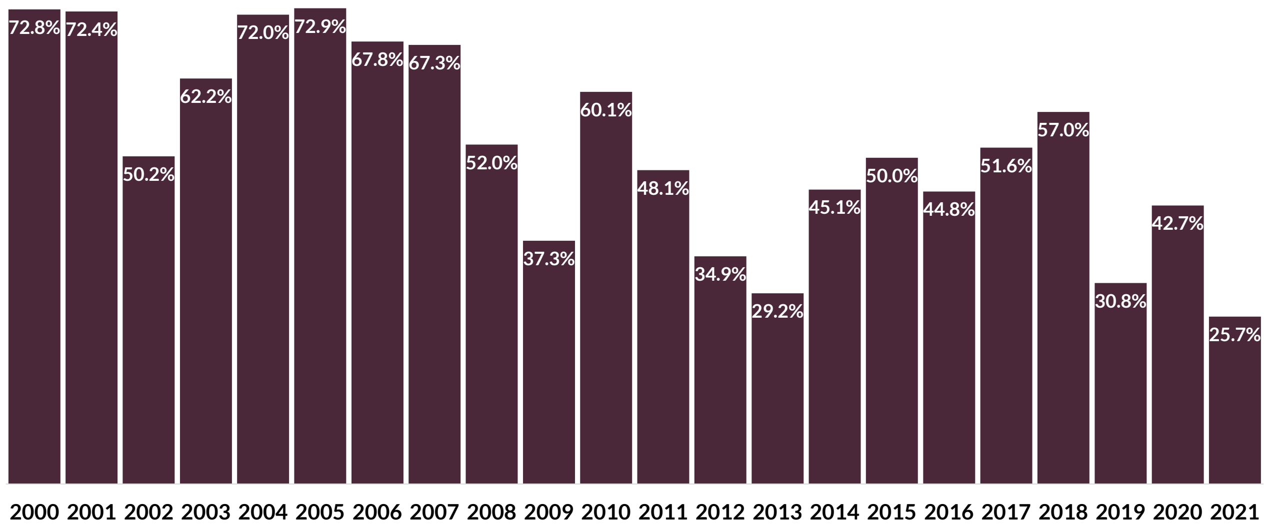
In fiscal year 2000, the Commission began collecting data on cases against organizational offenders with individual co-defendants and the individual co-defendant's relationship to the organization. Slightly more than half (53.1%) of the organizational offenders had at least one co-defendant (Figure 10). The number of co-defendants fluctuated throughout the fiscal years as well, with a high of 448 individuals indicted in fiscal year 2002 and a low of 135 individuals in fiscal year 2018. The number of co-defendants by fiscal year was not associated with the number of organizational offenders; however, the average number of co-defendants per organization increased from one co-defendant in fiscal year 2000 to two co-defendants in fiscal year 2021.

Figure 10. Organizational Offenders Charged With at Least One Individual Co-Defendant Fiscal Years 2000–2021



The Commission categorizes the relationship of individual co-defendants to the organization into two categories: high-level authority[116] and not high-level authority.[117] From fiscal year 2000 through fiscal year 2008, half to a majority of individual co-defendants fell within the category of high-level authority (Figure 11). Starting in fiscal year 2009, with a few exceptions,[118] high-level authority individual co-defendants constituted about half or fewer individual co-defendants.

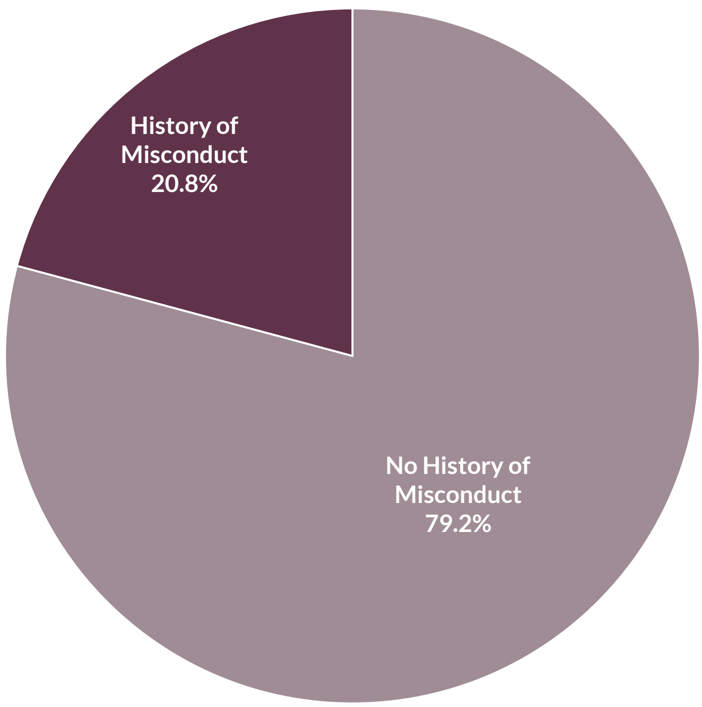
Figure 11. Percentage of High-Level Authority Individual Co-Defendants Fiscal Years 2000–2021



Prior Misconduct

This section reports on all instances in which an organizational offender was involved in any prior misconduct. Presentence reports provide additional background information about organizational offenders, even if the information does not impact the guideline calculations. For example, an organizational presentence report details all prior instances of misconduct by the organization. This includes not only previous criminal adjudications, but also civil or administrative adjudications against the organization. Those instances where the misconduct impacted the guideline fine calculation are discussed below. The majority of organizations sentenced each fiscal year did not engage in any prior misconduct (79.2%) (Figure 12).

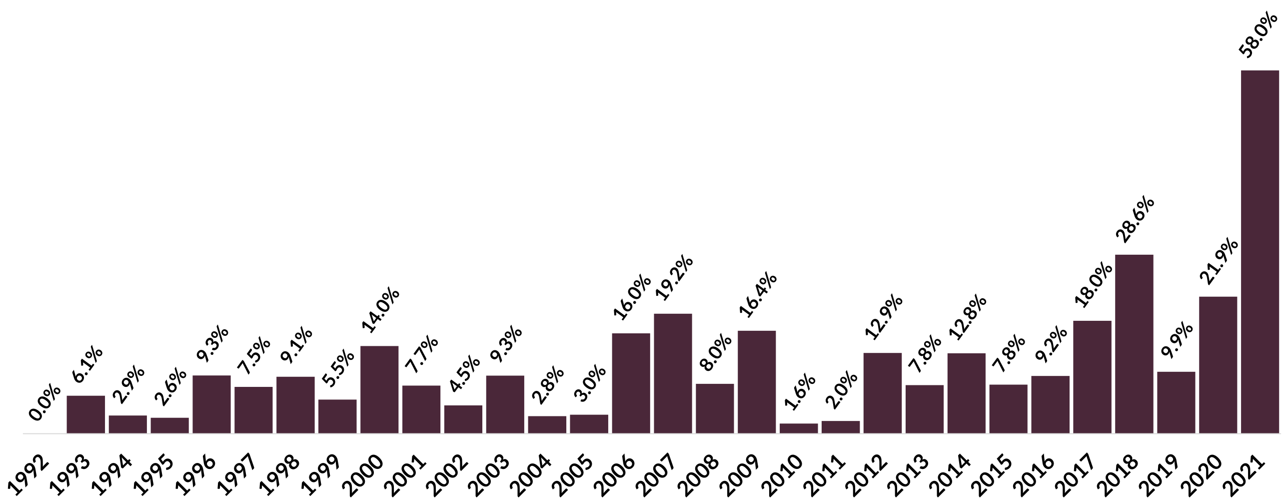
Figure 12. Organizational Offenders With a History of Misconduct
Fiscal Years 1992–2021



Compliance and Ethics Programs

Presentence reports for organizational offenders typically identify whether the organization had an existing compliance and ethics program.[119] As discussed in more detail below, an organization with an effective compliance and ethics program receives a culpability score reduction, thereby lowering its fine range. Since fiscal year 1992, the overwhelming majority of organizational offenders (89.6%) did not have a compliance and ethics program,[120] and even fewer had a compliance and ethics program for which they received a culpability score reduction. Only 398 organizational offenders (10.4%) had any compliance and ethics program before sentencing. The reported presence of a compliance and ethics program varied each fiscal year but remained below 20.0 percent until fiscal year 2018 (Figure 13). Fiscal year 2021 is the only year in which more than half of the organizational offenders (58.0%) reported having a compliance and ethics program.

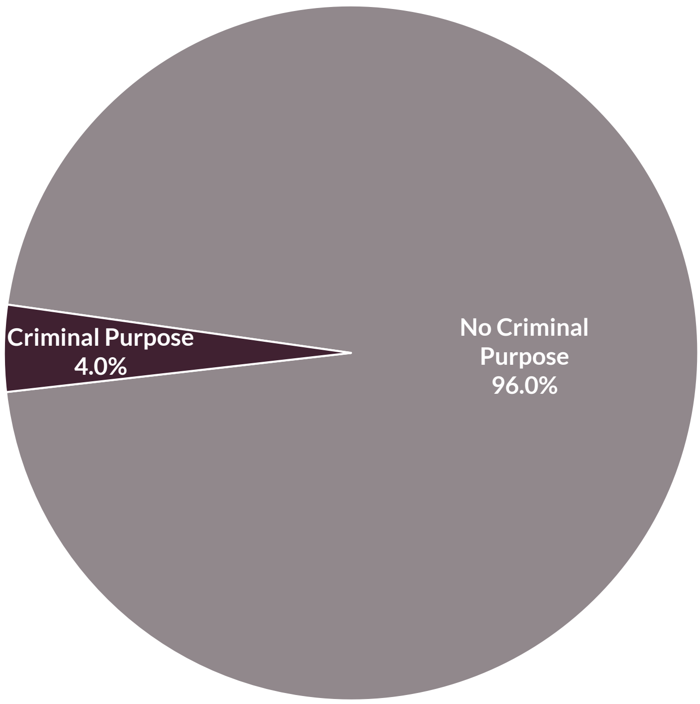
Figure 13. Organizational Offenders With a Compliance Program Fiscal Years 1992–2021



CRIMINAL PURPOSE ORGANIZATIONS

When imposing a fine, the court must first determine whether the organizational offender operated primarily for a criminal purpose or primarily by criminal means,[121] that is, it had no legitimate business purpose. Should the court make such a finding, the guidelines instruct the court to impose a fine amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.[122] The Commission intended that such a fine would effectively put the organization out of business. Commission data reflects that courts infrequently arrive at the determination that an organization had no legitimate business purpose. Since fiscal year 1992, only 4.0 percent of organizational offenders have been identified as operating for a criminal purpose under the guidelines (Figure 14).

Figure 14. Criminal Purpose Organizations Fiscal Years 1992–2021

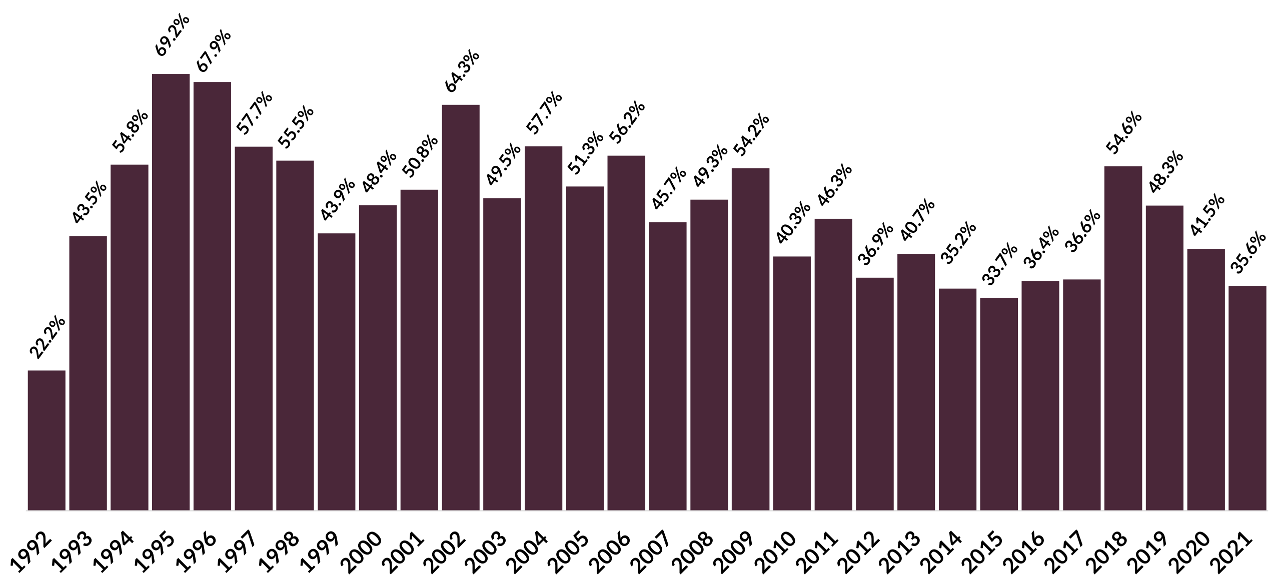


APPLICATION OF CHAPTER EIGHT FINE GUIDELINES

Courts are not required to calculate the Chapter Eight guideline fine range under two additional circumstances. First, the fine guidelines in Chapter Eight exclude certain types of offenses, including environmental, most food, drug, and agricultural, and the import and export offenses.[123] These offenses make up a significant percentage of organizational offenders.[124] In cases where the Chapter Eight fine guidelines are not applicable, the court will impose an applicable fine pursuant to the statutes of conviction.[125] Second, §8C2.2 limits the application of the fine guidelines if the court ascertains that the organization (1) cannot and is not likely to become able to pay restitution, or (2) cannot and is unlikely to become able to pay the minimum guideline fine.[126] Under either prong, a court does not have to determine the guideline fine range.[127]

Since fiscal year 1992, courts have applied the fine guidelines in Chapter Eight of the *Guidelines Manual* to 2,421 organizational offenders (49.0%). The application rates ranged from a low of 22.2 percent in fiscal year 1992, when the Chapter Eight guidelines first became effective, to a high of 69.2 percent in fiscal year 1995 (Figure 15). The changes in these application rates may be related to the changes in offense types over time discussed above. In the past ten fiscal years (2012–2021), courts applied the guideline fine provisions to 39.2 percent of organizational offenders.

Figure 15. Organizational Offenders With Chapter Eight Fine Guidelines Applied Fiscal Years 1992–2021



Chapter Eight Culpability Score

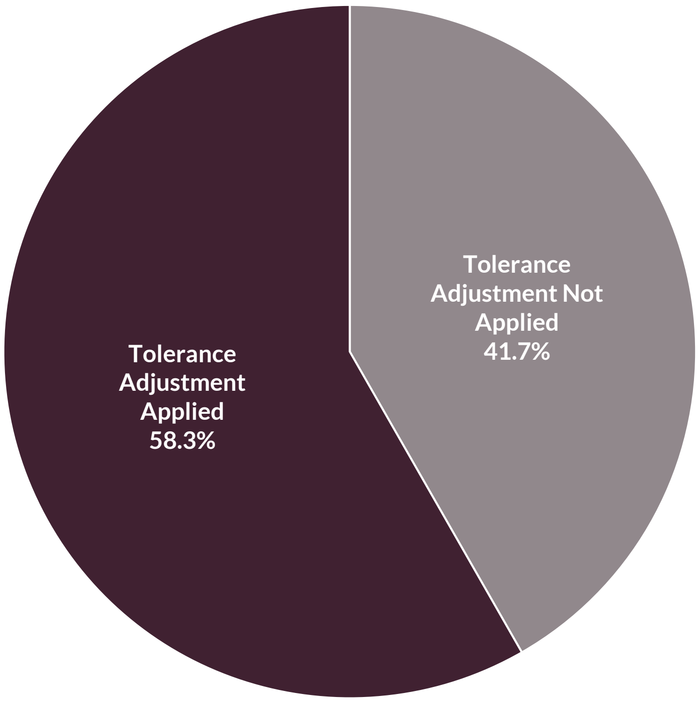
The Chapter Eight culpability score reflects the Commission's "carrot and stick" approach to the organizational sentencing scheme that bases the fine range, in part, on the culpability of the organization.[128] The guidelines instruct courts to determine culpability by considering six factors. The four aggravating factors, that is, those "that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice."[129] The two mitigating factors are: "(i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility."[130] This section of the publication provides cumulative data on the percentage of cases in which courts either increased or decreased an organization's culpability score due to the presence of any of these factors. It then reports on any trends that the Commission observed over the 30-year period since the promulgation of the organizational guidelines.

Involvement in or Tolerance of Criminal Activity

The guidelines explicitly require that an organization promote an organizational culture that "encourages ethical conduct and a commitment to compliance with the law" in order to have an effective compliance and ethics program.[131] The antithesis of such an organizational culture is one in which the organization's leadership is either actively involved in, or seemingly indifferent to, the criminal activity. Thus, the guidelines provide for an increase in the culpability score for organizations whose leadership fails to encourage ethical conduct and compliance with the law under one of two circumstances. The score will be increased if either "an individual within high-level personnel of the organization[132] [or unit][133] participated in, condoned, or was willfully ignorant of the offense" or if "tolerance of the offense by substantial authority personnel[134] was pervasive throughout the organization."[135] This adjustment takes into account the size of the organization by increasing the adjustment from one- to five-points, with the higher number of points added for larger organizations.[136]

As reflected in Figure 16, more than half (58.3%) of the organizational offenders sentenced under the guideline fine provisions from fiscal year 1992 through fiscal year 2021 received a culpability score increase for the involvement in or tolerance of criminal activity. The most common increase applied for this factor was the one-point increase for organizations with at least ten employees and an individual within the substantial authority personnel participated in, condoned, or was willfully ignorant of the offense.[137]

Figure 16. Culpability Score Increase for Involvement in or Tolerance of Criminal Activity Fiscal Years 1992–2021

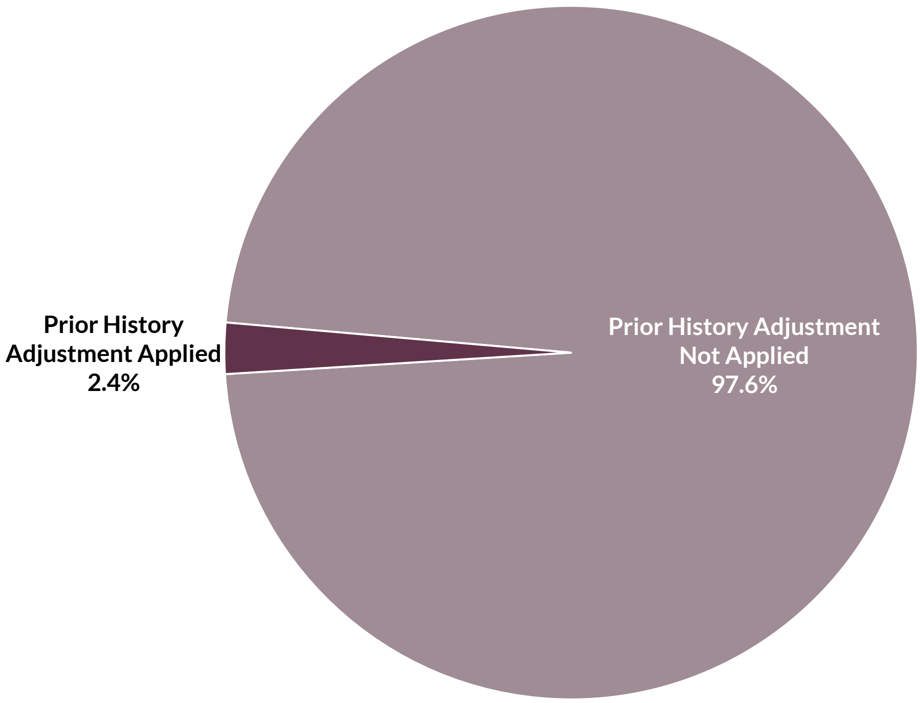


Prior History

The prior history increase in the culpability score only applies if the instant offense occurred within certain time frames after the prior similar misconduct.[138] Either one criminal adjudication for similar misconduct or civil or administrative adjudications based on two or more separate instances for similar misconduct will operate to trigger the increase.[139] If the offense of conviction occurred within less than five years from the prior history, the prior history receives a two-point increase.[140] A one-point increase is awarded if the instant offense occurred within less than ten years of the prior history.[141]

Organizational offenders infrequently received a culpability score increase for having prior history. As shown in Figure 17, courts applied this increase to 54 organizational offenders (2.4%) sentenced under the fine guidelines since fiscal year 1992. When courts did apply this adjustment, organizational offenders most commonly received the two-point increase for a criminal, civil, or administrative adjudication that occurred less than five years prior to the instant offense.[142]

Figure 17. Culpability Score Increase for Prior History (§8C2.5(c))
Fiscal Years 1992–2021

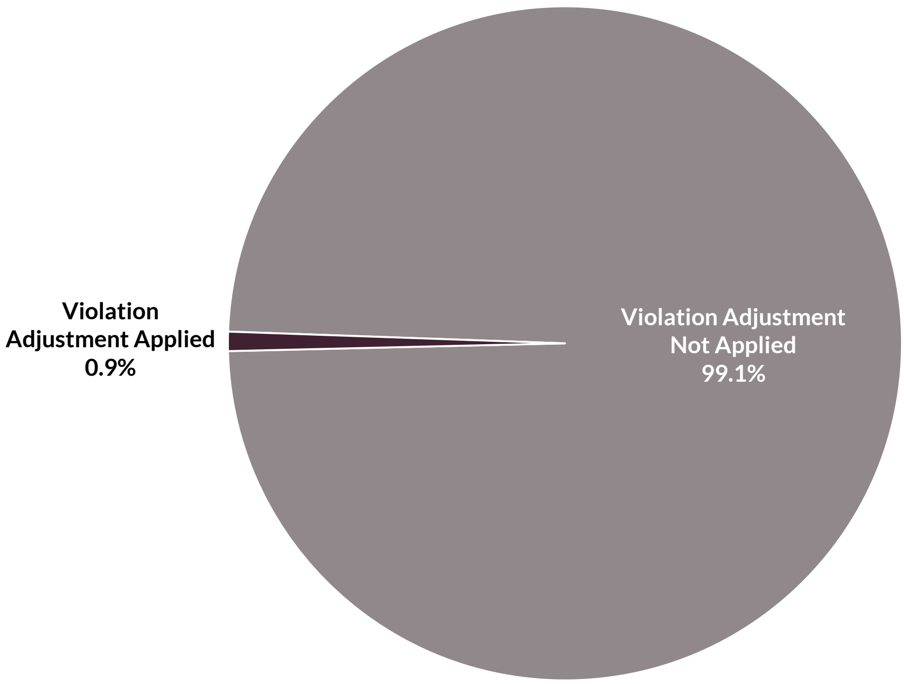


Violation of an Order

An organization's culpability score increases when the organization's commission of the instant offense violated either a judicial order, an injunction, or a condition of probation.[143] A two-point increase applies when the organization either violated a judicial order or injunction or the organization violated a condition of probation by engaging in similar misconduct.[144] The guidelines apply a one-point increase for any other violations of a condition of probation.[145]

The instances where organizational offenders received a culpability score increase for violating a judicial order were even more infrequent than the increases for prior history (Figure 18). This culpability score increase applied to 21 organizational offenders (0.9%) sentenced under the fine guidelines. Nearly all these 21 organizational offenders received the two-point increase for violating a judicial order or injunction or violating a condition of probation by engaging in similar misconduct (0.8%), rather than the one-point increase for a violation of a condition of probation (0.1%).[146]

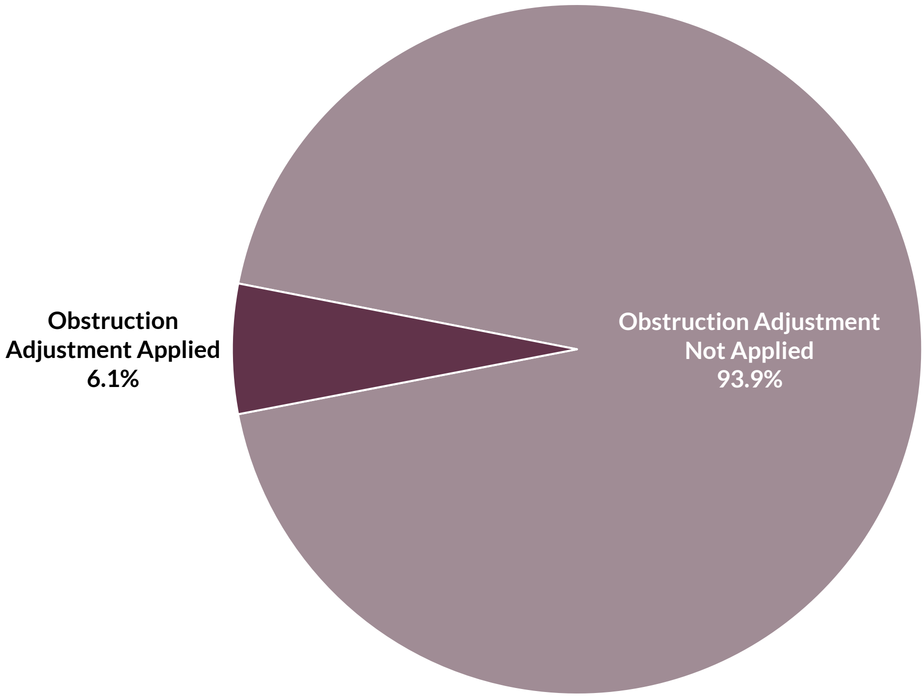
Figure 18. Culpability Score Increase for Violation of an Order (§8C2.5(d)) Fiscal Years 1992–2021



Obstruction of Justice

An organization receives an increase in the culpability score when it obstructs justice or otherwise impedes the investigation, prosecution, or sentencing of the instant offense, or failed to take reasonable steps to prevent the obstruction, impedance, or attempted obstruction or impedance.[147] The guidelines explain that this increase applies "where the obstruction is committed on behalf of the organization; it does not apply where an individual or individuals have attempted to conceal their misconduct from the organization."[148] The type of conduct that will trigger this increase is similar to the conduct that triggers the Chapter Three adjustment for obstruction of justice.[149] Courts applied a culpability score increase for obstruction of justice to 138 organizational offenders (6.1%) sentenced under the fine guidelines since fiscal year 1992 (Figure 19).

Figure 19. Culpability Score Increase for Obstruction of Justice (§8C2.5(e)) Fiscal Years 1992–2021



Effective Compliance and Ethics Program

The existence of an effective compliance and ethics program is a mitigating factor that reduces an organization's culpability score.[150] Courts rarely apply this culpability score decrease.[151] Only 11 organizational offenders (0.5%) have received this reduction in the past 30 years. These organizational offenders are discussed in more detail below.

Organizational Offenders Receiving a Culpability Score Reduction for an Effective Compliance and Ethics Program

As discussed in other sections of this report, §8B2.1 describes the minimum requirements for an effective compliance and ethics program.[152] Since fiscal year 1992, 11 organizational offenders have received a reduction for having an effective compliance and ethics program. Aware of public interest in compliance and ethics programs determined to be effective, the Commission examined the 11 organizational offenders that received this adjustment in order to provide more robust information about these offenders than previously available. However, the Commission is not able to provide details about how these programs complied with the requirements of §8B2.1 since the presentence reports do not include exhaustive descriptions of the programs.

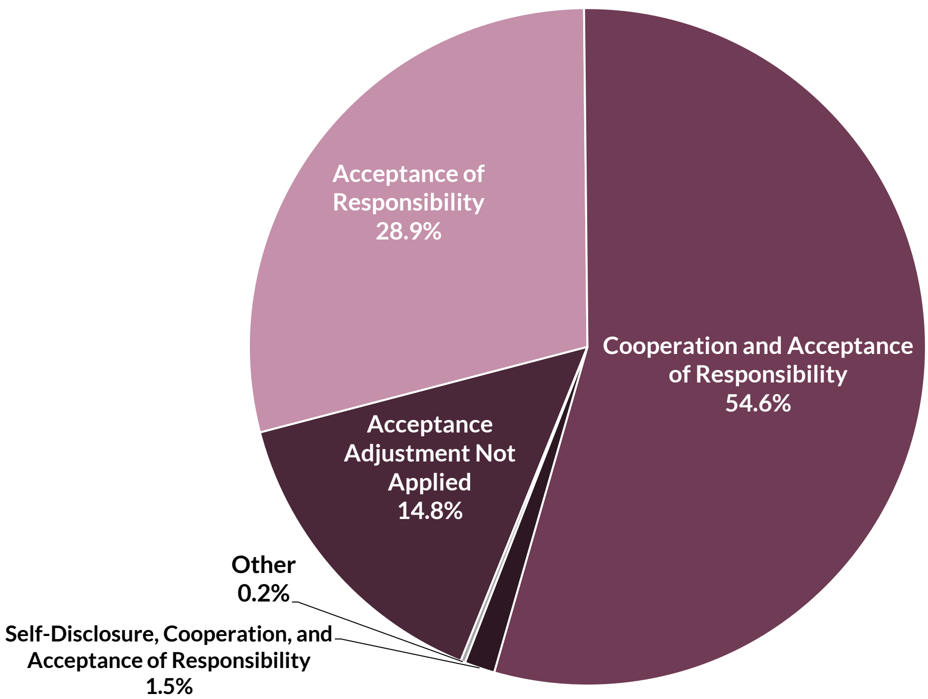
Most of the organizational offenders that received the compliance and ethics program reduction were domestic (6)[153] and private organizations (10). The majority had less than 50 employees (6) and most remained financially solvent at the time of sentencing (10).

Among the other culpability score adjustments given, seven organizational offenders received increases for involvement in or tolerance of criminal activity; all received a culpability score decrease for acceptance of responsibility with nine of the 11 organizational offenders receiving the two-point reduction for fully cooperating in the investigation and demonstrating acceptance of responsibility for their criminal conduct. None of these organizations self-reported the offense to authorities.

Acceptance of Responsibility

Most organizational offenders (85.2%) to which the guideline fine provisions apply received a culpability score decrease for acceptance of responsibility.[154] This is not surprising since most organizational offenders plead guilty (92.8%), rather than proceeding to trial. Most commonly the organizational offenders (54.6%) received the two-point reduction for fully cooperating in the investigation and demonstrating acceptance of responsibility for their criminal conduct (Figure 20).[155] Few organizational offenders (1.5%) received the five-point reduction for disclosing the offense to appropriate authorities prior to a government investigation in addition to their full cooperation and acceptance of responsibility.[156]

Figure 20. Culpability Score Decrease for Self-Reporting, Cooperation, and Acceptance of Responsiblity (§8C2.5(g))
Fiscal Years 1992–2021



SENTENCING OUTCOMES

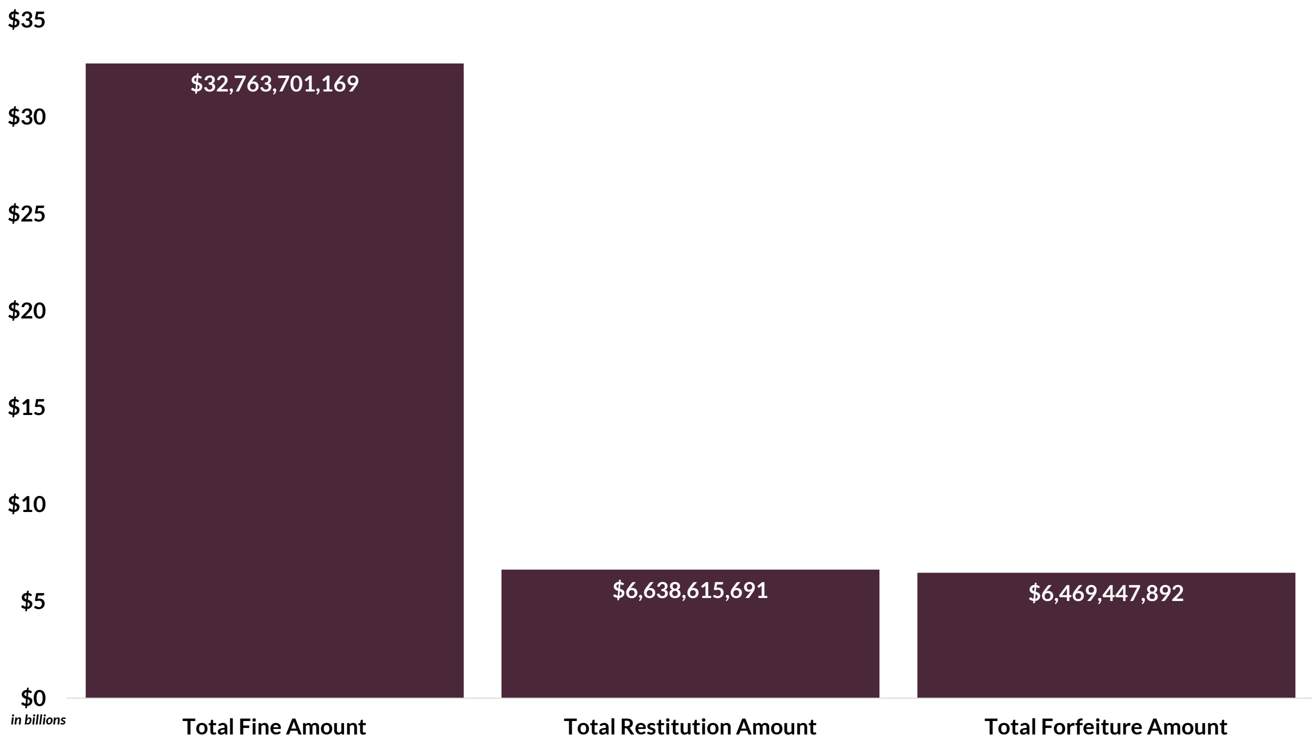
The sentences imposed on organizational offenders typically consisted of monetary judgments (fine, restitution, or forfeiture order), and a term of probation. The conditions of probation may include a requirement that the organization implement an effective compliance and ethics program. This section provides information on the frequency in which organizational sentences include each of these different sanctions.

Monetary Judgments

Since fiscal year 1992, the courts have imposed nearly $33 billion in fines on organizational offenders. Additionally, courts ordered organizational offenders to pay restitution and forfeiture amounts of approximately $6.6 and $6.5 billion, respectively (Figure 21).

Since fiscal year 1992, courts determined that approximately two-thirds (65.6%) of organizational offenders were able to pay a fine (Figure 22). The ability

Figure 21. Total Fine, Restitution, and Forfeiture Amounts Fiscal Years 1992–2021



to pay is an initial step in the application of the Chapter Eight fine guidelines. Likewise, when a court determines that an organizational offender cannot pay a fine, the court need not compute the guideline fine range.[157]

Courts imposed a fine on 3,625 organizational offenders (73.3%) (Figure 23). In nearly every fiscal year, courts imposed fines on more than two-thirds of the organizational offenders.[158] Since fiscal year 1992, the overall average fine amount imposed was over $9 million and

Figure 22. Organizational Offenders With Ability to Pay Fine Fiscal Years 1992–2021

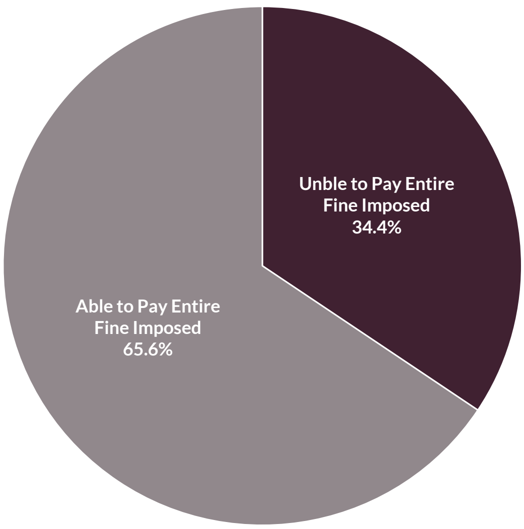
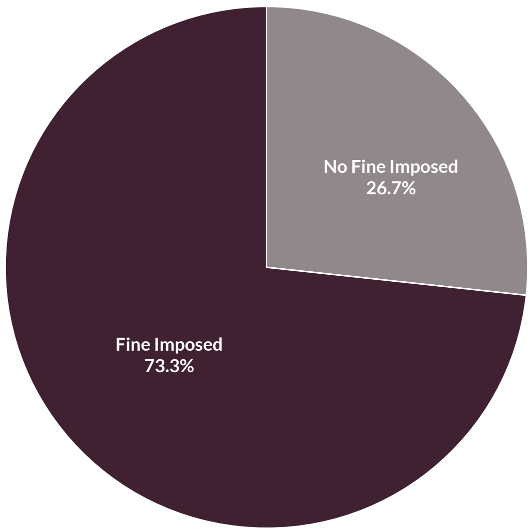
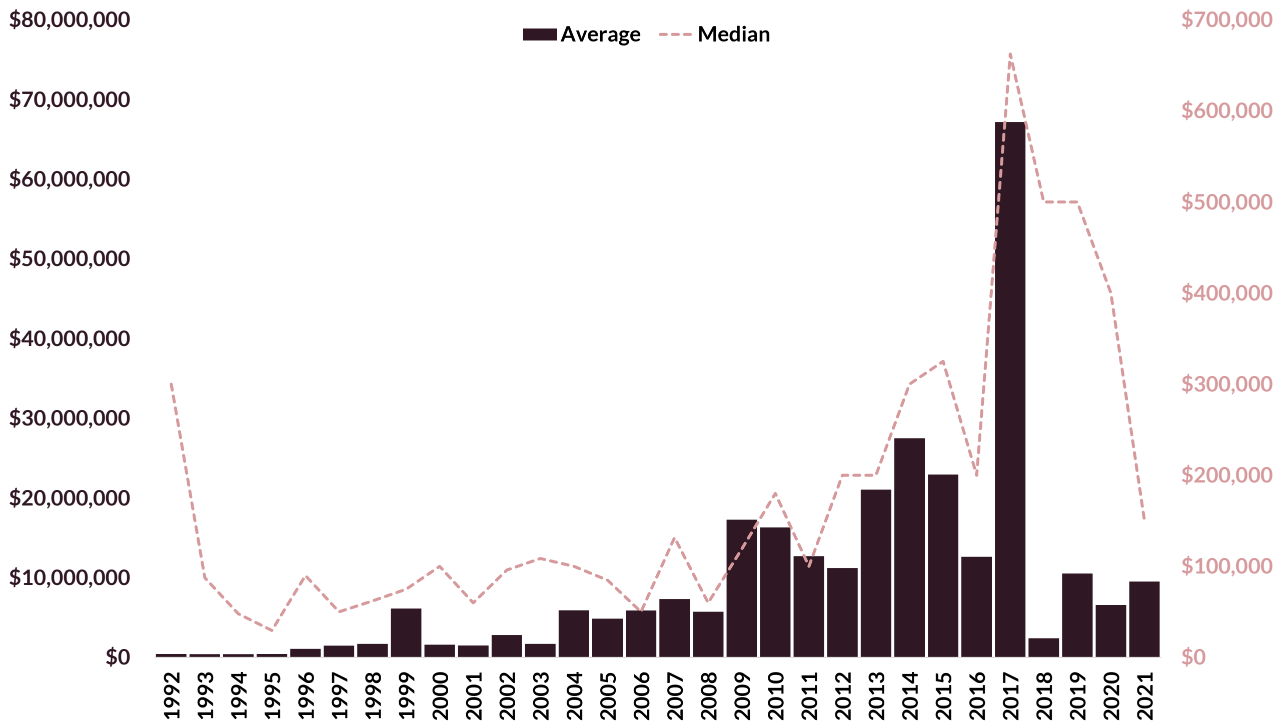


Figure 23. Imposition of Fine Ordered on Organizational Offenders Fiscal Years 1992–2021



the median amount was $100,000. As reflected in Figure 24, the average and median fine amounts differed by fiscal year.[159] In the aggregate, the fine amounts varied over time. In the early 1990s, the average fine amount was less than $500,000, it generally increased over time, and peaked in fiscal year 2017 at $67 million. There was less variation when measuring the median fine amount, which ranged from approximately $29,550 to $662,500 over the study period.

Figure 24. Fine Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021



Courts ordered restitution as part of a sentence less frequently than fines (30.9% and 73.3%, respectively) (Figure 25). For the organizational offenders ordered to pay restitution, the average restitution amount imposed was $4.4 million and the median restitution amount imposed was $180,486.

The average and median restitution amounts also varied from fiscal year 1993 to fiscal year 2021 (Figure 26).[160] In the 1990s, the average restitution amount was less than $1 million each fiscal year. Since the turn of the century, the average restitution amount has varied from a low of $447,440 in fiscal year 2012, to a high of over $17 million in fiscal year 2010.

Figure 25. Imposition of Restitution Ordered on Organizational Offenders Fiscal Years 1992–2021

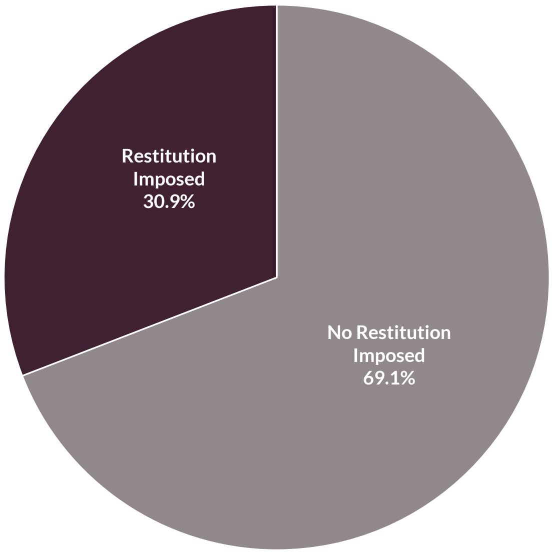
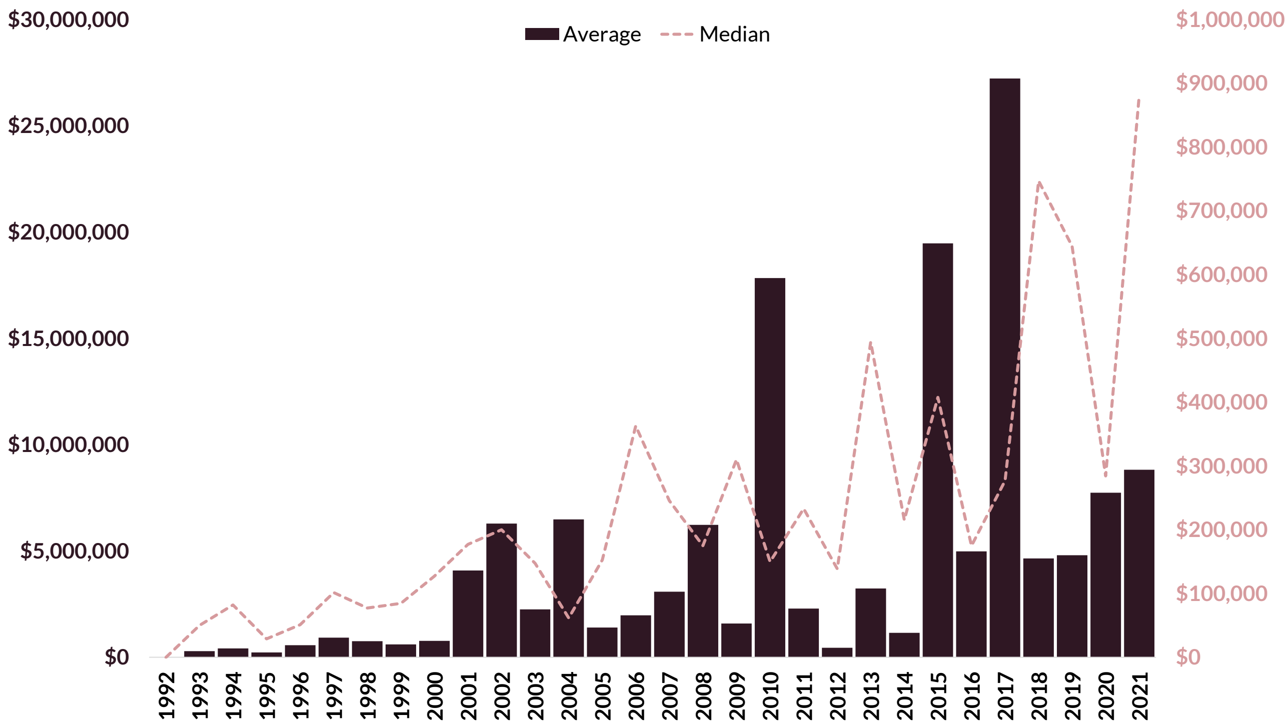
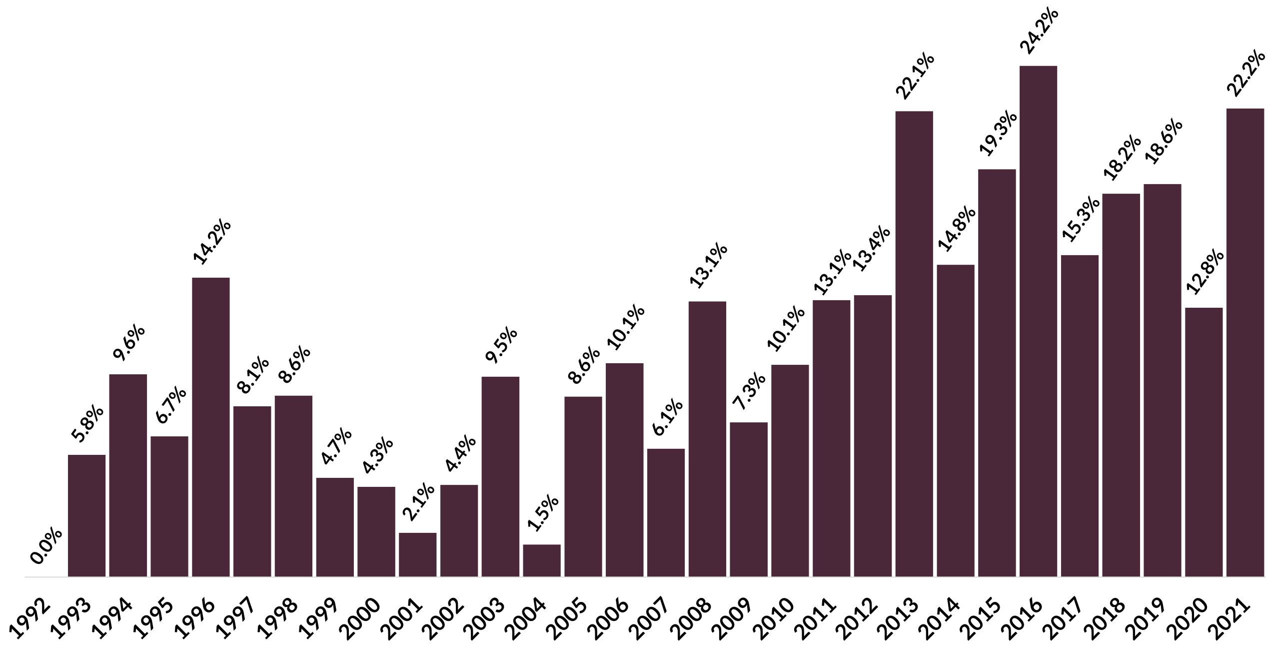


Figure 26. Restitution Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021



Courts entered comparatively fewer forfeiture orders against organizational offenders (10.4%). The percentage of forfeiture orders entered each fiscal year ranged from none in fiscal year 1992 to 24.2 percent in fiscal year 2016 (Figure 27). Notably, entry of forfeiture orders against organizational offenders has increased from fiscal year 1992 to fiscal year 2021.

Figure 27. Imposition of Forfeiture Order on Organizational Offenders Fiscal Years 1992–2021

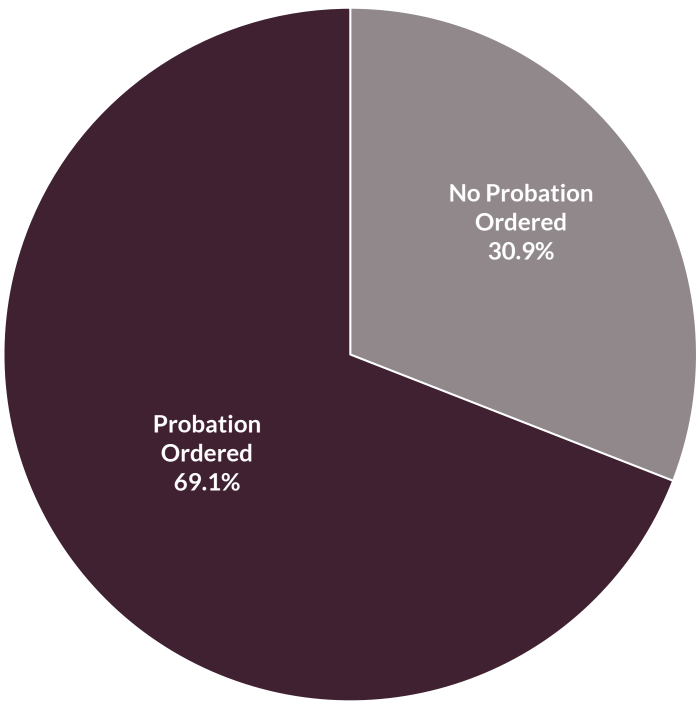


Probation

"Section 8D1.1 sets forth the circumstances under which a sentence to a term of probation is required."[161] Courts sentenced over two-thirds of organizational offenders (69.1%) to a term of probation (Figure 28). The rates of imposition of probation are not unexpected given the broad circumstances under which the guidelines require imposition of a term of probation. Courts shall order a term of probation under specified circumstances, including if such a sentence is necessary to "secure payment of restitution," "enforce a remedial order," or "ensure completion of community service,"[162] if the organization is sentenced to pay a monetary penalty that is not paid in full at the time of sentencing,[163] or if the organization has 50 or more employees or is otherwise required by law to have an effective compliance and ethics program and does not have such a program.[164]

The maximum term of probation that courts may impose is five years.[165] The average length of the terms of probation imposed on organizational offenders was 39 months and the median length was 36 months.

Figure 28. Organizational Offenders Sentenced to Probation Fiscal Years 1992–2021



Implementation of an Effective Compliance and Ethics Program

As a condition of probation, the court can order that the organizational offender take additional actions it deems appropriate,[166] including the implementation of an effective compliance and ethics program.[167] Since fiscal year 2000, courts ordered approximately 20 percent (19.5%) of organizational offenders to implement an effective compliance and ethics program (Figure 29).[168] The percentage of organizations ordered to implement an effective compliance and ethics program each fiscal year was rarely more than one-third of the organizational offenders and ranged from 5.1 percent in fiscal year 2009 to 35.5 percent in fiscal year 2012 (Figure 30).

Figure 29. Organizational Offenders Ordered to Implement Compliance Program Fiscal Years 2000–2021

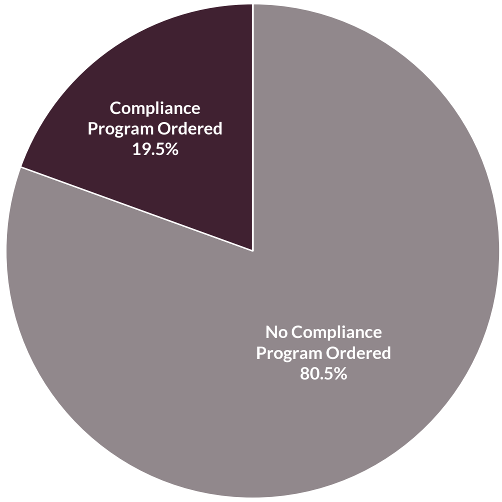
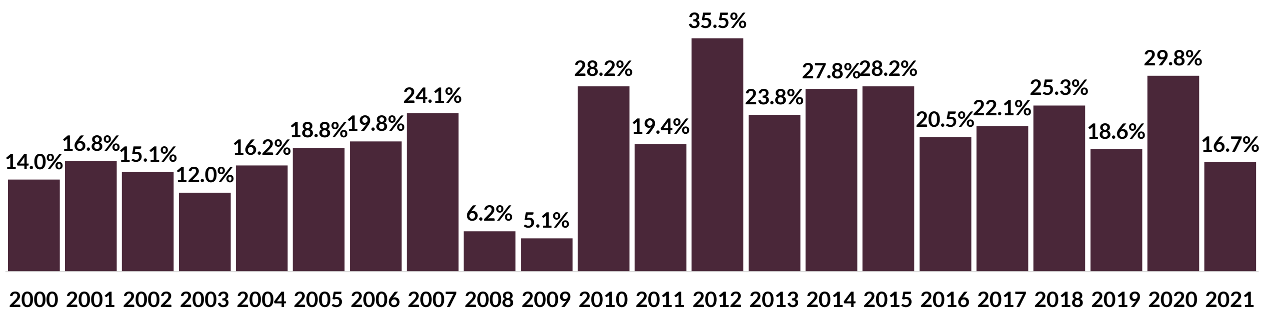


Figure 30. Organizational Offenders Ordered to Implement Compliance Program Fiscal Years 2000–2021



CHAPTER THREE

Influence of the Organizational Sentencing Guidelines

As mentioned above, the impact of the organizational guidelines is not limited to their application in criminal sentencings. Incentivizing organizations to develop and maintain internal programs to prevent, detect, and report criminal conduct is one of the major innovations of the Chapter Eight organizational guidelines,[169] so their influence has been evidenced in other areas.

Not only did the organizational guidelines influence the prosecutorial policy of the DOJ, they also influenced the policies of other regulatory agencies.[170] Additionally, the organizational guidelines were "credited with helping to create an entirely new job description: the Ethics and Compliance Officer."[171]

Public Sector Response to the Guidelines

The organizational guidelines influence the decisions of federal agencies in bringing enforcement actions against organizations. The guideline criteria for an effective compliance and ethics program also serve as a model for compliance and ethics program guidelines created by other federal agencies.

U.S. Department of Justice

In 1999, the DOJ announced that the existence and adequacy of an organization's compliance program and efforts to implement or improve an existing compliance program were among the factors that prosecutors would weigh when determining whether to prosecute an organization. The DOJ made the announcement through a memorandum issued by then-Deputy Attorney General, Eric H. Holder, regarding bringing criminal charges against corporations.[172] The DOJ later codified these factors in the *Justice Manual*.[173] When evaluating the effectiveness of corporate compliance programs, the DOJ expressly relies upon the criteria set forth in §8B2.1.[174] While the existence of a compliance program will not absolve the organization of its criminal liability, it may result in the DOJ choosing to defer prosecution or use other means to elicit the organization's cooperation to change its business practices.[175]

Within the last decade, the DOJ has issued written guidance meant to assist prosecutors in making informed decisions about the effectiveness of a compliance program.[176] In November 2012, the DOJ

Incentivizing organizations to develop and maintain internal programs to prevent, detect, and report criminal conduct is one of the major innovations of the Chapter Eight organizational guidelines, so their influence has been evidenced in other areas.

and the SEC jointly issued a resource guide aimed, in part, at providing businesses and individuals with information to help them implement effective compliance programs.[177] The resource guide incorporates the elements of an effective compliance program, as set forth in §8B2.1, to provide insight into the aspects of compliance programs that the DOJ and SEC assess.[178]

The DOJ has since provided updated guidance on the *Evaluation of Corporate Compliance Programs*, which provides greater clarity on some key issues prosecutors consider when assessing the adequacy of corporate compliance programs during charging and settlement decisions.[179] The guidance, which was first developed in 2017 under the leadership of the DOJ's first "corporate compliance expert"[180] and was updated in 2019 and 2020, lays out the "fundamental questions" that prosecutors should ask about compliance programs:

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
- Does the corporation's compliance program work in practice?[181]

The guidance then describes in detail the topics that prosecutors should consider when answering those questions.[182] The elements of an effective compliance and ethics program, set forth in §8B2.1, underlie these topics.[183]

Under the current administration, the DOJ has "prioritized building a wealth of compliance expertise among [its] prosecutors and dedicating resources to strengthen [its] abilities to assess the effectiveness of compliance programs."[184] The DOJ's Assistant Attorney General in charge of the Criminal Division is a former chief compliance officer for a Fortune 500 company.[185] The DOJ's Fraud Section now has a specialized unit, Corporate Enforcement, Compliance, and Policy Unit, staffed with prosecutors and former compliance and defense attorneys "with deep experience in compliance, monitorships, and corporate enforcement matters."[186] With the "invigoration" of its effort to combat corporate crime, the DOJ continues to emphasize the importance of an active review of compliance programs to "ensure they adequately monitor for and remediate misconduct"[187] and provide "true independence, authority, and stature within the company" for the chief compliance officers and their functions.[188]

U.S. Securities and Exchange Commission

Similar to the DOJ, the SEC also considers an organization's compliance program when determining whether to take enforcement action.[189] Its four-part framework includes examining the organization's efforts to self-police through an effective compliance program, self-report misconduct, remediate wrongdoing, and cooperate with law enforcement authorities, all of which mirror the organizational guidelines' requirements for an effective compliance and ethics program.[190] The SEC first articulated its four-part framework in the 2001 Seaboard report that identified §8C2.5 as a source of guidance for organizations to consider to promote self-policing, self-reporting, and remediation.[191] Organizations regulated by the SEC may mitigate the impact of possible prosecution by having an effective compliance and ethics program.[192]

U.S. Department of Health and Human Services

Using the criteria for an effective compliance and ethics program found in §8B2.1 as a model for the development of their own program guidelines, the Office of Inspector General ("OIG") of the U.S. Department of Health and Human Services undertook the development of a series of compliance programs directed at various segments of the health care industry.[193] When it initiated this project in 1998, the OIG announced its intent to incorporate elements of Chapter Eight into its compliance program proposals.[194] The OIG's compliance programs now apply to a major portion of the health care services industry of the United States and continue to rely upon the guideline criteria.[195]

U.S. Environmental Protection Agency

In 1995, the EPA issued a "final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements."[196] Much like the guidelines' carrot and stick approach, the EPA's policy encourages self-policing by foregoing criminal prosecution referrals and by waiving or reducing civil penalties for violations that are promptly disclosed and corrected and imposing "stiff sanctions for noncompliance."[197] The policy also encourages the development of compliance management programs, with enunciated criteria "which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines."[198] The EPA revised the policy in 2000, but continued its reliance on criteria adapted from the organizational guidelines when evaluating the due diligence exercised by its regulated organizations to prevent, detect, and correct violations.[199]

Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission ("FERC") "encourages companies subject to [its] regulatory requirements to develop rigorous compliance programs."[200] In March 2010, the FERC issued a policy statement on penalty guidelines "for the purpose of adding greater fairness, consistency and transparency to [its] civil penalty determinations"[201] that it patterned after the sentencing guidelines.[202] In response to public comment on the policy statement, the FERC issued a revised policy statement that continued to be modeled after the organizational guidelines, with some modifications. The FERC explained "that the [s]entencing [g]uidelines provide the best model to adapt to the [FERC] purposes because they focus on factors—such as the seriousness and remediation of a violation—that reflect the requirements of [the Energy Policy Act of 2005] and that [the FERC] believe[s] are the centerpiece of our penalty regime."[203] Like the organizational guidelines, the FERC penalty scheme requires disgorgement of pecuniary gain[204] and uses a base penalty table[205] and minimum and maximum multiplier[206] derived from a culpability score calculation in order to set penalty ranges.[207] The FERC's compliance program requirements are almost identical to those set forth in §8B2.1.[208]

Federal Acquisition Regulations

Similarly, the Federal Acquisition Regulations ("FAR") also incorporated requirements for compliance programs by organizations doing business with the federal government.[209] While the FAR has always provided for some limited compliance program requirements, the promulgation of the new compliance and ethics program requirements at §8B2.1 in 2004 prompted a re-examination of the FAR's requirements.[210] In 2007, several federal agencies proposed changes to the FAR, resulting in a new rule requiring contractors to develop codes of ethics and business conduct.[211]

Private Sector Response to the Guidelines

Changes in Corporate Structure

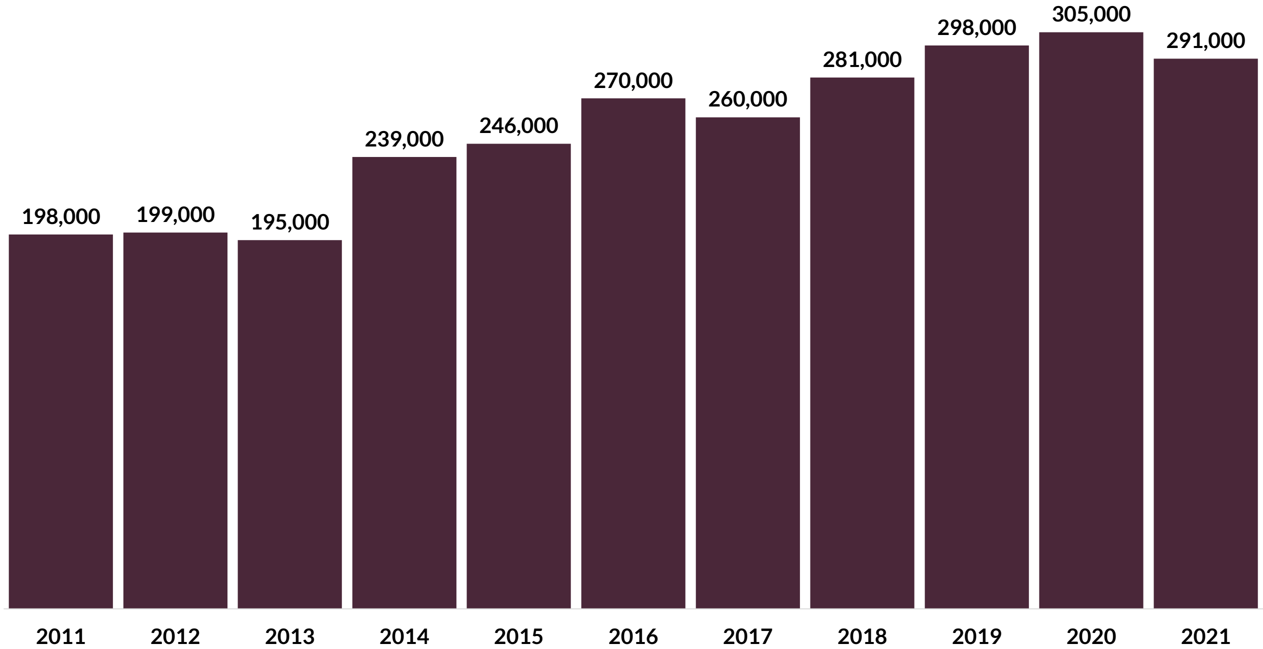
The organizational guidelines' influence is not limited to the public sector. Although initially resistant to the idea of the organizational guidelines,[212] corporate America heeded the guidelines' call for self-policing. Immediately after promulgation of Chapter Eight in 1991, the number of organizations with compliance and ethics departments increased dramatically.[213] Essentially, the guidelines transformed compliance "from an industry-specific effort to a mainstream

Although initially resistant to the idea of the organizational guidelines, corporate America heeded the guidelines' call for self-policing.

corporate concern"[214] and "spurred a massive increase in corporate compliance efforts."[215] Businesses recognized that it was in their best interest to maintain a proper compliance program[216] and "began creating multi-faceted programs to include the seven elements [for a compliance program] specified by the guidelines."[217] Moreover, the business demands associated with developing and implementing compliance programs led to the birth of a "new job (later to be treated as a profession)—the chief compliance officer."[218]

In the past three decades, the compliance and ethics profession has grown exponentially. "Today, estimates of the aggregate direct costs to support compliance programs are routinely in the hundreds of billions of dollars."[219] Increasing numbers of staff contribute, in part, to these costs (Figure 31).[220] "[T]he corporate compliance department 'has emerged, in many firms, as the co-equal of the legal department.'"[221] In addition, these departments now "function with greater authority, organizational support, and funding than in the past."[222]

Figure 31. Number of Employed Compliance Officers Annual Years 2011–2021



The U.S. Bureau of Labor Statistics defines a "compliance officer" as someone who "examine[s], evaluate[s], and investigate[s] eligibility for or conformity with laws and regulations governing contract compliance of licenses and permits, and perform[s] other compliance and enforcement inspection and analysis activities not classified elsewhere."

SOURCE: U.S. Bureau of Labor Statistics. Labor Force Statistics from the Current Population Survey 2011-2021 on BLS Data Finder 1.1 Online Database, in May 2022.

Professional Organizations and Resources

In addition to growing intra-company expenditures, the growth of the compliance and ethics profession led to the demand for professional resources and the creation of professional organizations designed to provide forums for sharing best practices in the field. Today, there is a "robust and fully functioning cottage industry dealing with ethics and compliance issues,"[223] providing a broad range of services.

Many national and international law firms offer client services designed to assist in developing and improving compliance and ethics programs. Additionally, "[c]ompanies emerged to provide consulting, software, and training materials to support the creation of compliance departments."[224] The growth also spurred the development of specialized compliance organizations, such as the Ethics and Compliance Initiative, the Health Care Compliance Association ("HCCA"), and the SCCE, to provide a forum for further development of the field.

Higher Education Degrees and Professional Certifications

In recent years, many universities and colleges around the world have become interested in the study of organizational compliance and ethics, along with the related subjects of corporate governance and risk. Thus, institutions of higher learning have developed specialized curriculum and offer specialized degrees and professional certificate programs in organizational compliance, ethics, governance, and risk, both to train professionals and to promote continuing academic research in these subjects.

The ABA, the major law school accreditation body in the United States,[225] lists at least 22 ABA-approved law schools offering post-*juris doctorate* (J.D.) or non-J.D. degrees in compliance, ethics, governance, and risk that target various industries, such as the healthcare and financial industries.[226] Universities and other post-secondary schools also offer programs on these subjects. *Compliance Week Magazine* publishes a directory listing educational programs from an additional 14 universities and colleges, both domestic and international, offering degrees and professional or post-graduate certificates in corporate compliance, ethics, and risk.[227] Various universities offer programs that are Compliance Certification Board("CCB")—accredited by SCCE and HCCA.[228]

In addition to conferring degrees, law schools and universities have established organizational compliance, ethics, governance, or risk research centers; entities dedicated to the practical and academic research of these subjects to promote understanding and best practices for scholars and practitioners alike. For example, New York University School of Law has established the Program on Corporate Compliance and Enforcement that is dedicated to the study of effective corporate compliance, causes of corporate misconduct, and enforcement.[229] Harvard Law School has created its Program on Corporate Governance to "foster research and scholarship about corporate governance" and frequently publishes governance-related articles.[230] Other universities have developed similar programs.[231]

INFLUENCE ON CORPORATE LAW

In 1996, the reach of the organizational guidelines extended into corporate law following a decision by the influential Delaware Court of Chancery. In the process of evaluating a proposed settlement of a derivative suit seeking to impose personal liability on members of the board of directors, the court considered whether director liability could stem from unconsidered action by the board.[232] After observing that "[t]he Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts,"[233] the court concluded that "[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the organizational guidelines]."[234] Thus, the court held that a director has a good faith duty to see that the organization establishes adequate information and reporting systems.[235] The decision was widely interpreted to expand potential liability for board members.[236] In fact, following the *Caremark* decision, federal and state courts recognized the importance of compliance programs in the context of shareholder derivative suits.[237]

International Influence of the Guidelines

By setting a "global benchmark" for compliance programs,[238] the organizational guidelines have also been influential with international governing and standards bodies that fashion their own compliance and ethics programs.[239] For example, the United Nations includes among its many initiatives, the development of compliance and ethics programs targeting anti-corruption and bribery. The United Nations

Office on Drugs and Crime recognizes the Commission's use of incentives as a criterion for an effective compliance and ethics program and reports how this innovation has been adopted by other national standards organizations.[240] The United Nation's Global Compact initiative cites the sentencing guidelines as one of the six most commonly used frameworks by anti-corruption risk assessment practitioners to catalog and classify controls and other risk mitigating efforts.[241]

The Organisation for Economic Co-operation and Development ("OECD") is a multinational organization that develops public policy recommendations.[242] Like the United Nations, the OECD develops guidance on how businesses can develop anti-corruption compliance and ethics programs.[243] As part of this initiative, the OECD developed the 2009 Anti-Bribery Convention.[244] To provide guidance to businesses on how to promote the goals of the 2009 Convention, the OECD published the *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.[245] The OECD's guidance urged businesses to adopt programs to monitor, detect, and report wrongdoing that closely followed the Chapter Eight guidelines.[246] In 2021, the OECD updated the Anti-Bribery Convention, which still retains the same emphasis on the development of internal compliance and ethics programs in the earlier convention.[247]

Many of the guidelines' provisions have been emulated internationally in the fight against anti-corruption and anti-competition. Examples relating to anti-corruption include the "UK Bribery Act, Italian Legislative Decree 231/2001, and amendments to [c]riminal codes in countries around the world."[248] "New Brazilian, French and South Korean anti-bribery laws provide for some sort of compliance defense or have a compliance requirement."[249] "Other nations (including Russia, Ukraine and Spain) have mandated compliance programs."[250] Compliance programs with requirements analogous to the guideline criteria also feature prominently in anti-competition guidance issued by the Canadian Competition Bureau[251] and in New Zealand and Australia.[252]

CONCLUSION

What began as an "experiment" to encourage legal compliance and foster more ethical business practices is now widely accepted as a success.[253] Described as the "gold standard" for the evaluation of an organization's compliance and ethics program,[254] the organizational guidelines appear to have achieved their stated goal of "reduc[ing] . . . criminal conduct by providing a structural foundation from which an organization may self-police its own conduct."[255] Evidence suggests that compliance and ethics programs implemented using the guideline criteria produce positive effects on an organization's behavior.[256] Moreover, the organizational guidelines have had a significant impact on public and private sector actors. Their criteria help inform prosecutorial charging decisions and have led to significant changes in corporate America that continue to evolve with the development of best practices in the compliance and ethics profession. Indeed, their influence is now spreading around the globe, suggesting that the hallmarks of an effective compliance and ethics program have universal appeal.

While the data reported in this publication cannot provide a complete picture of the prevalence of corporate crime in the United States, it can provide some empirical support about the importance of developing an effective compliance and ethics program. It may also help identify areas where existing programs can be improved. At a minimum, the Commission intends for this publication to foster continued dialogue about the benefits of good corporate behavior.

APPENDIX A

ORGANIZATIONAL OFFENDER CHARACTERISTICS

Figure A-1. Number of Individual Offenders
Fiscal Years 1992–2021

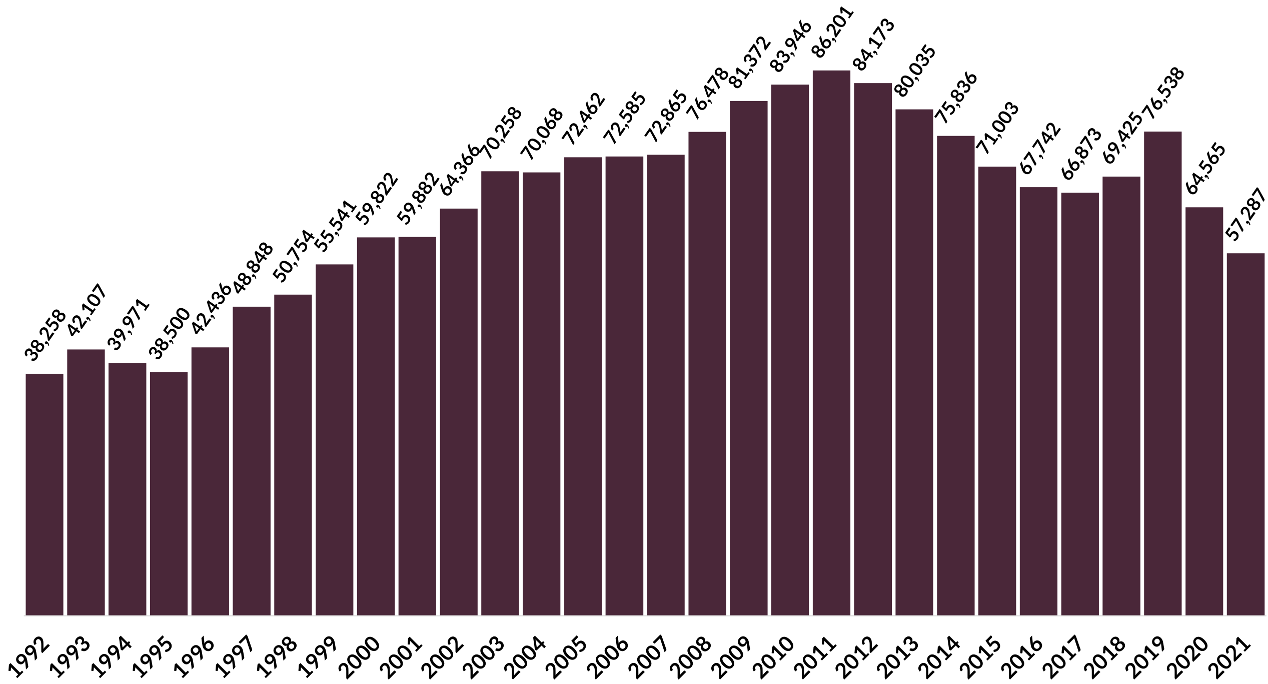
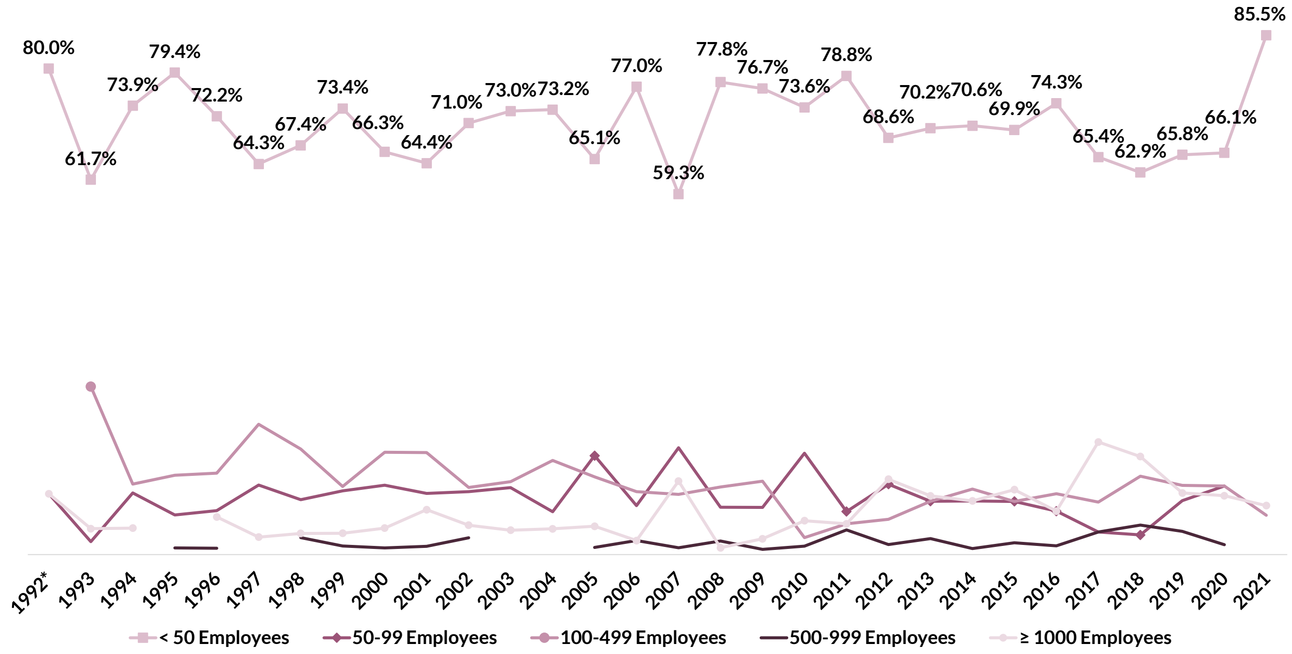
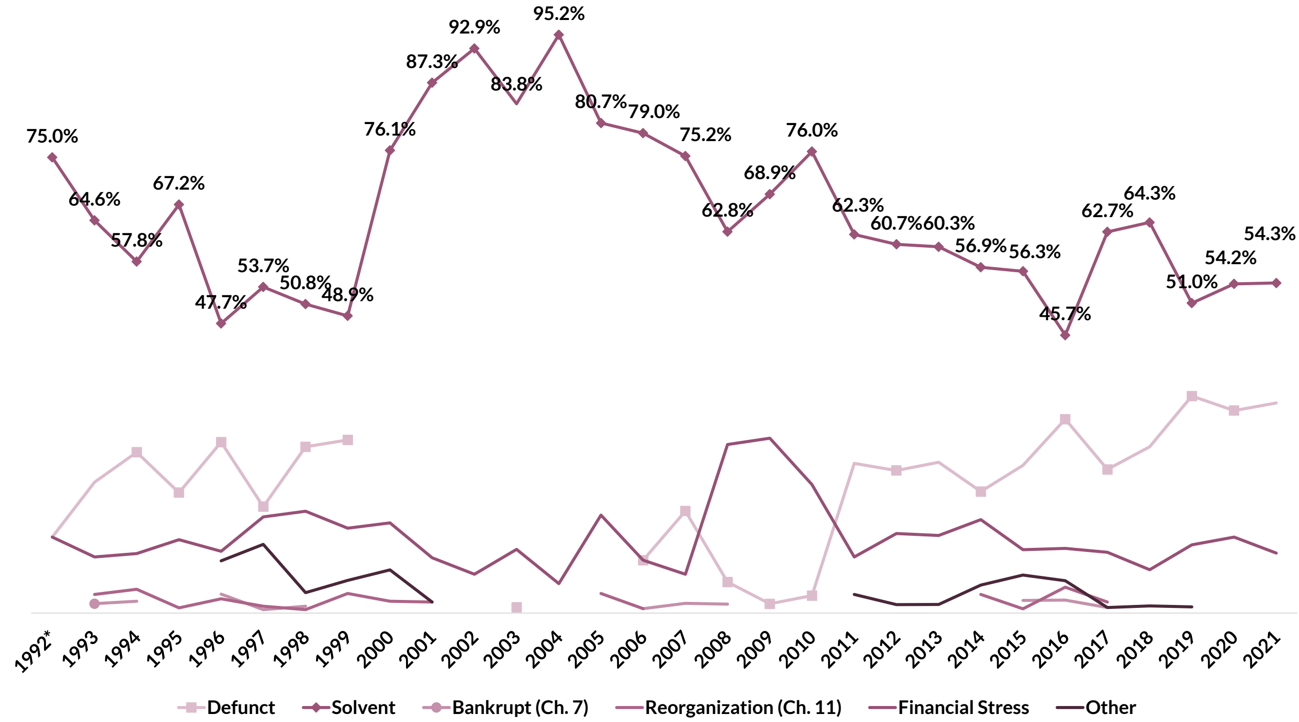


Figure A-2. Size of Organizational Offenders
Fiscal Years 1992–2021



NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

Figure A-3. Financial Status of Organizational Offenders
Fiscal Years 1992–2021



NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

Figure A-4. Organizational Offenders With History of Misconduct
Fiscal Years 1992–2021

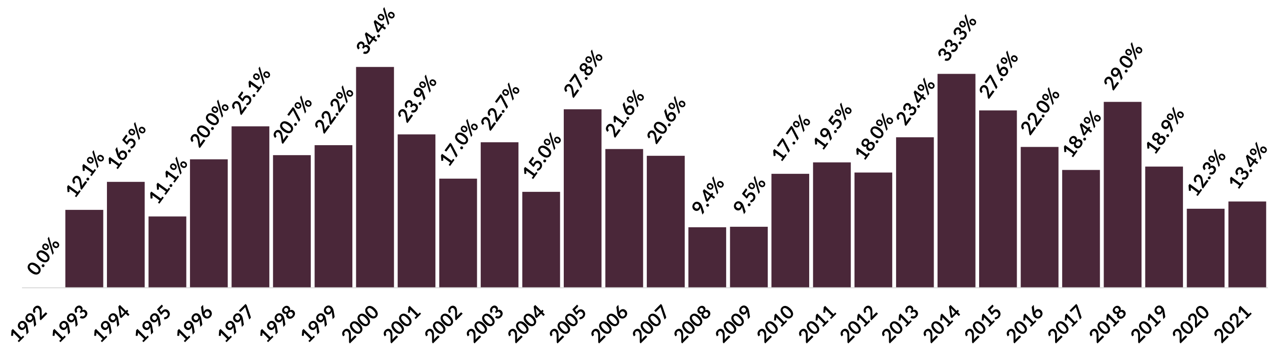
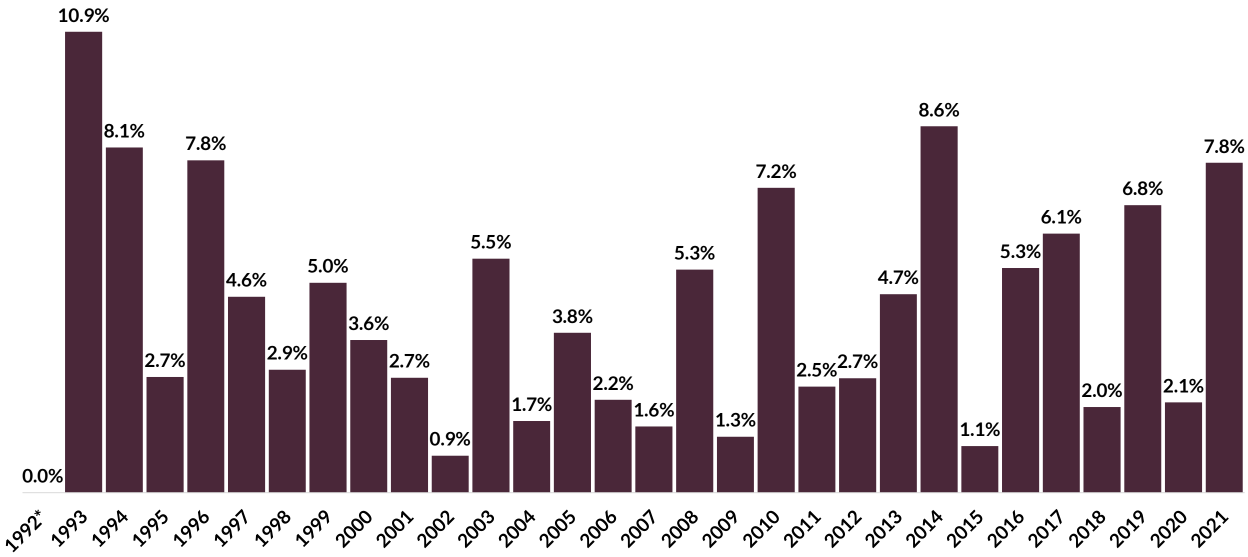


Figure A-5. Criminal Purpose Organizations
Fiscal Years 1992–2021



NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

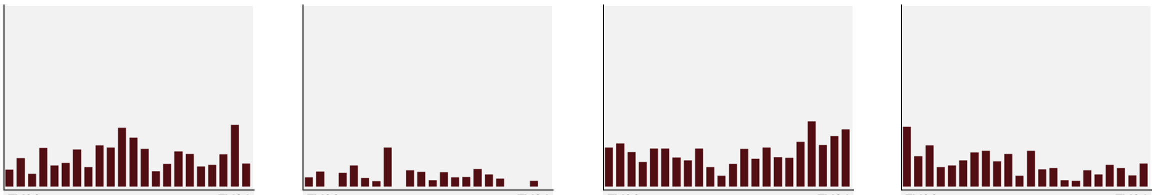
APPENDIX B

ORGANIZATIONAL OFFENSE AND INDUSTRY TYPES

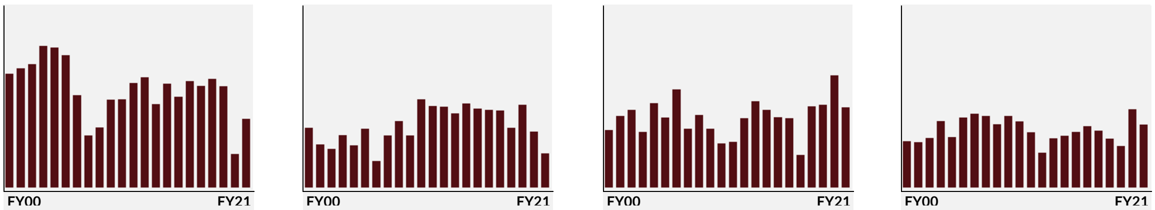
Table B-1. Offense Type of Organizational Offenders Fiscal Years 1992–2021

Offense Type	N	%
Fraud	1,481	30.1
Environmental	1,183	24.0
Antitrust	412	8.4
Food/Drugs/Agricultural/Consumer Products	323	6.6
Money Laundering	300	6.1
Import and Export	255	5.2
Tax	167	3.4
Public Corruption: Bribery/Gratuity/Extortion	137	2.8
Drugs	128	2.6
Immigration	113	2.3
Administration of Justice Offenses	75	1.5
Larceny/Theft/ Embezzlement	73	1.5
Copyright/Trademark	59	1.2
Firearms	44	0.9
Racketeering/Extortion	37	0.8
Gambling	27	0.6
Contraband	16	0.3
Obscenity	16	0.3
Civil Rights	7	0.1
Food Stamps	5	0.1
Motor Vehicle	5	0.1
Archeological Damage	4	0.1
Forgery	2	0.0
Other	51	1.0

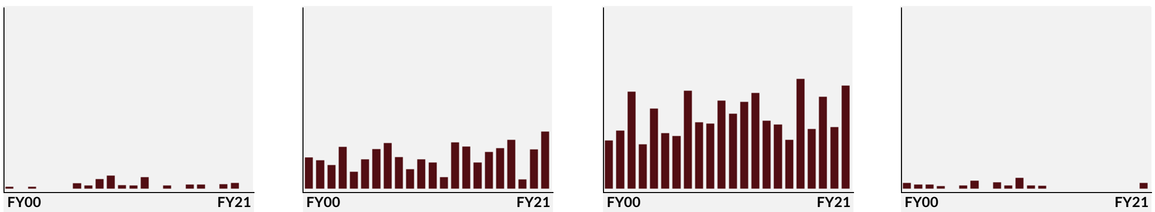
Figure B-1. Type of Industry of Organizational Offenders
Fiscal Years 2000–2021



Fiscal Years	AGRICULTURE	MINING	CONSTRUCTION	ENVIRONMENTAL MANAGEMENT
2000	3.3%	1.8%	7.6%	11.6%
2001	5.5%	2.9%	8.4%	5.9%
2002	2.5%		6.7%	8.0%
2003	7.5%	2.7%	4.8%	3.8%
2004	4.1%	4.1%	7.4%	4.1%
2005	4.6%	1.7%	7.4%	5.1%
2006	7.2%	1.0%	5.6%	6.7%
2007	3.8%	7.6%	5.1%	7.0%
2008	8.0%		7.4%	4.9%
2009	7.6%	3.2%	3.8%	6.3%
2010	11.4%	2.9%	2.1%	2.1%
2011	9.5%	1.3%	4.4%	7.0%
2012	7.3%	2.8%	7.3%	3.4%
2013	3.0%	1.8%	5.4%	3.6%
2014	4.4%	1.9%	7.6%	1.3%
2015	6.8%	3.4%	5.7%	1.1%
2016	6.4%	2.4%	5.6%	3.2%
2017	3.9%	1.6%	8.7%	2.4%
2018	4.2%		12.6%	4.2%
2019	6.3%		8.0%	3.6%
2020	12.0%	1.1%	9.8%	2.2%
2021	4.4%		11.1%	4.4%



Fiscal Years	MANUFACTURING	TRANSPORTATION	RETAIL TRADE	SERVICES
2000	22.0%	11.6%	11.2%	9.0%
2001	23.1%	8.4%	13.9%	8.8%
2002	23.9%	7.5%	15.1%	9.6%
2003	27.4%	10.2%	10.8%	12.9%
2004	27.1%	8.2%	16.4%	9.8%
2005	25.6%	11.4%	13.6%	13.6%
2006	18.0%	5.1%	19.0%	14.4%
2007	10.1%	10.1%	11.4%	13.9%
2008	11.7%	12.9%	14.1%	12.3%
2009	17.1%	10.1%	11.4%	13.9%
2010	17.1%	17.1%	8.6%	12.9%
2011	20.3%	15.8%	8.9%	10.8%
2012	21.4%	15.7%	13.5%	6.7%
2013	16.2%	14.4%	16.8%	9.6%
2014	20.1%	16.4%	15.1%	10.1%
2015	17.6%	15.3%	13.6%	10.8%
2016	20.6%	15.1%	13.5%	11.9%
2017	19.7%	15.0%	6.3%	11.0%
2018	21.1%	11.6%	15.8%	9.5%
2019	19.6%	16.1%	16.1%	8.0%
2020	6.5%	10.9%	21.7%	15.2%
2021	13.3%	6.7%	15.6%	12.2%



Fiscal Years	ORGS, ASS'NS, CHARITIES	FINANCE	HEALTH CARE SERVICES	PUBLIC ADMIN
2000	0.4%	6.1%	9.4%	1.1%
2001		5.5%	11.3%	0.8%
2002	0.4%	4.6%	18.8%	0.8%
2003		8.1%	8.6%	0.5%
2004		3.3%	15.6%	
2005		5.7%	10.8%	0.6%
2006	1.0%	7.7%	10.3%	1.5%
2007	0.6%	8.9%	19.0%	
2008	1.8%	6.1%	12.9%	1.2%
2009	2.5%	3.8%	12.7%	0.6%
2010	0.7%	5.7%	17.1%	2.1%
2011	0.6%	5.1%	14.6%	0.6%
2012	2.3%	2.3%	16.9%	0.6%
2013		9.0%	18.6%	
2014	0.6%	8.2%	13.2%	
2015		5.1%	12.5%	
2016	0.8%	7.1%	9.5%	
2017	0.8%	7.9%	21.3%	
2018		9.5%	11.6%	
2019	0.9%	1.8%	17.9%	
2020	1.1%	7.6%	12.0%	
2021		11.1%	20.0%	1.1%

Figure B-2. Offense Type of Organizational Offenders by Industry Type Fiscal Years 2000–2021

	Admin of Justice	Antitrust	Arch. Damage	Public Corruption	Civil Rights	Contraband	Copyright / Trademark	Drugs
	%	%	%	%	%	%	%	%
Manufacturing (n=694)	1.5%	18.1%		2.6%		0.3%	1.6%	1.6%
Health Care Services (n=493)	2.8%	0.8%		3.3%				6.3%
Retail Trade (n=478)	0.8%	3.6%	0.4%	1.3%		2.1%	4.2%	7.3%
Transportation (n=419)	3.6%	15.3%		3.1%			0.5%	0.2%
Services (n=391)	1.8%	4.1%	0.3%	4.9%		0.3%	0.8%	1.5%
Construction (n=237)	1.3%	4.2%		9.7%				0.4%
Finance (n=219)	1.4%	4.1%		3.7%				2.3%
Agriculture (n=207)	1.0%	0.5%		1.0%				1.5%
Enviro Management (n=179)	0.6%	2.2%		1.1%				
Mining (n=73)		1.4%		8.2%				
Orgs, Ass'ns, Charities (n=23)	4.4%							
Public Admin (n=21)		4.8%						
Other (n=98)	1.0%	4.1%		3.1%		1.0%	1.0%	3.1%

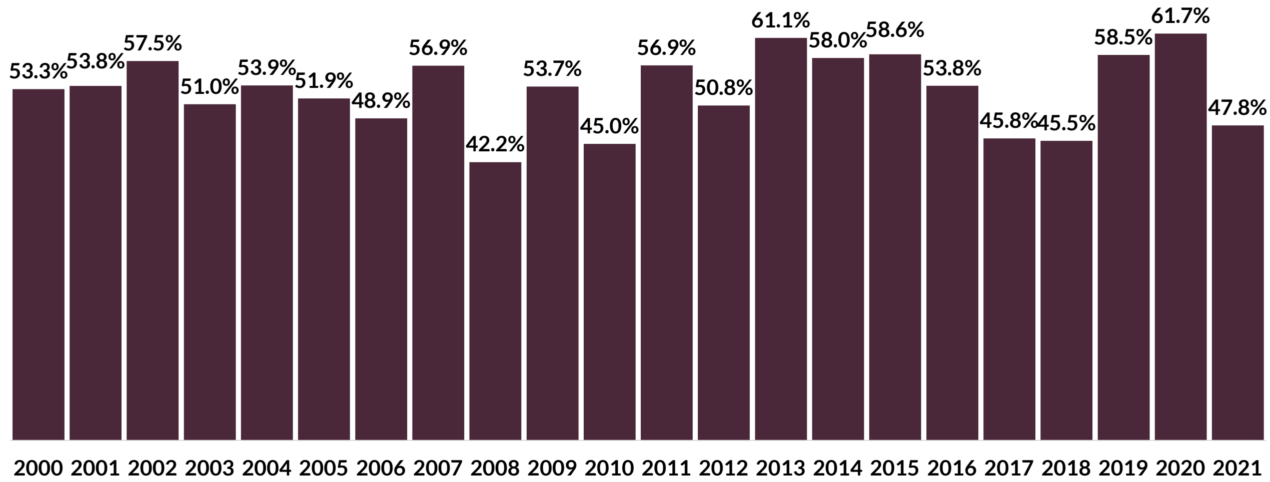
	Environment	Import and Export	Firearms	FDA	Food Stamps	Forgery	Fraud	Gambling
	%	%	%	%	%	%	%	%
Manufacturing (n=694)	24.9%	9.3%	0.7%	9.8%			22.0%	
Health Care Services (n=493)	0.8%	1.8%		25.2%			54.0%	
Retail Trade (n=478)	9.0%	13.6%	4.8%	9.0%	0.8%	0.2%	17.0%	1.3%
Transportation (n=419)	47.7%	5.5%					20.1%	
Services (n=391)	16.1%	4.1%	0.5%	1.3%	0.3%		32.7%	3.3%
Construction (n=237)	26.6%	0.4%	0.4%				39.2%	
Finance (n=219)	11.0%	1.4%	0.5%				47.0%	
Agriculture (n=207)	54.1%	5.8%		11.1%			14.0%	
Enviro Management (n=179)	66.5%	0.6%		0.6%			21.8%	
Mining (n=73)	46.6%	4.1%					21.9%	
Orgs, Ass'ns, Charities (n=23)	8.7%	8.7%					17.4%	13.0%
Public Admin (n=21)	57.1%	9.5%					23.8%	
Other (n=98)	19.4%	10.2%	4.1%	2.0%			26.5%	1.0%

	Immigration	Larceny	Motor Vehicle	Money Laundering	Obscenity	Racketeering	Tax	Other
	%	%	%	%	%	%	%	%
Manufacturing (n=694)	1.0%	2.2%		2.5%	0.1%	0.1%	1.9%	0.1%
Health Care Services (n=493)	0.2%	0.6%		3.3%		0.2%	0.6%	0.2%
Retail Trade (n=478)	4.2%	1.1%	0.2%	15.1%	0.4%	0.6%	1.9%	1.3%
Transportation (n=419)	0.2%	1.0%		0.7%			1.0%	1.2%
Services (n=391)	8.2%	3.1%		8.7%	2.6%	2.1%	2.6%	1.0%
Construction (n=237)	6.8%	1.7%		5.1%			4.2%	
Finance (n=219)	0.9%	1.4%		18.7%		2.3%	3.7%	1.8%
Agriculture (n=207)	5.8%	1.9%		1.5%			0.5%	1.5%
Enviro Management (n=179)	1.7%			1.1%		2.2%	0.6%	1.1%
Mining (n=73)	1.4%			1.4%				15.1%
Orgs, Ass'ns, Charities (n=23)	4.4%			21.7%		4.4%	13.0%	4.4%
Public Admin (n=21)						4.8%		
Other (n=98)	4.1%	1.0%		14.3%		2.0%	1.0%	1.0%

APPENDIX C

ORGANIZATIONAL OFFENDERS AND CO-DEFENDANTS

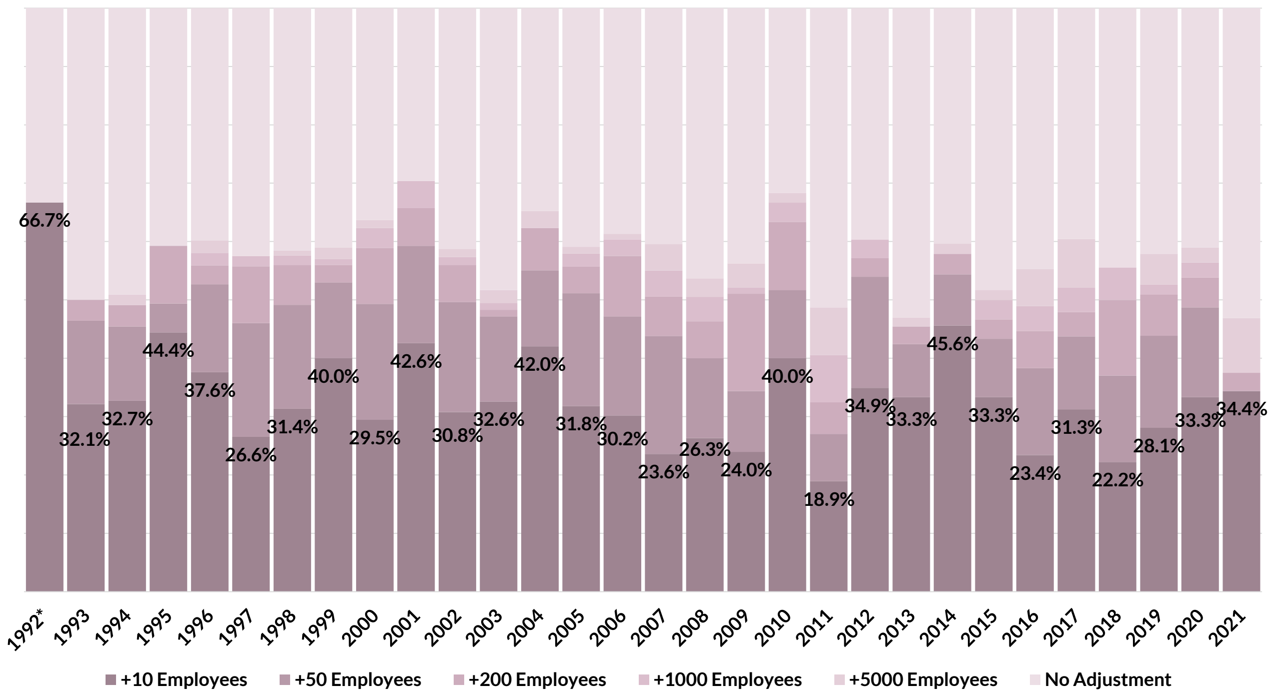
Figure C-1. Organizational Offenders Charged With at Least One Individual Co-Defendant Fiscal Years 2000–2021



APPENDIX D

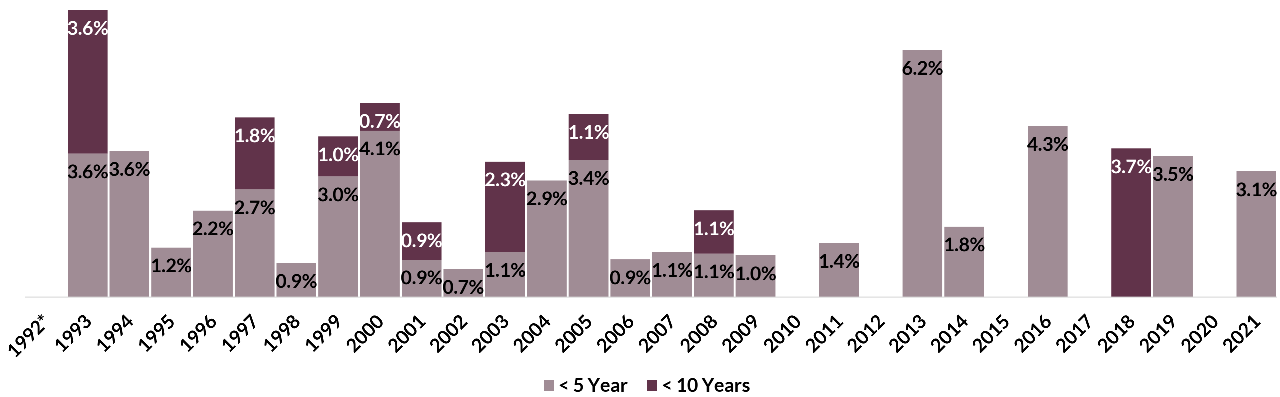
CHAPTER EIGHT APPLICATIONS

Figure D-1. Culpability Score Increase for Involvement in or Tolerance of Criminal Activity (§8C2.5(b)) by Number of Employees
Fiscal Years 1992–2021



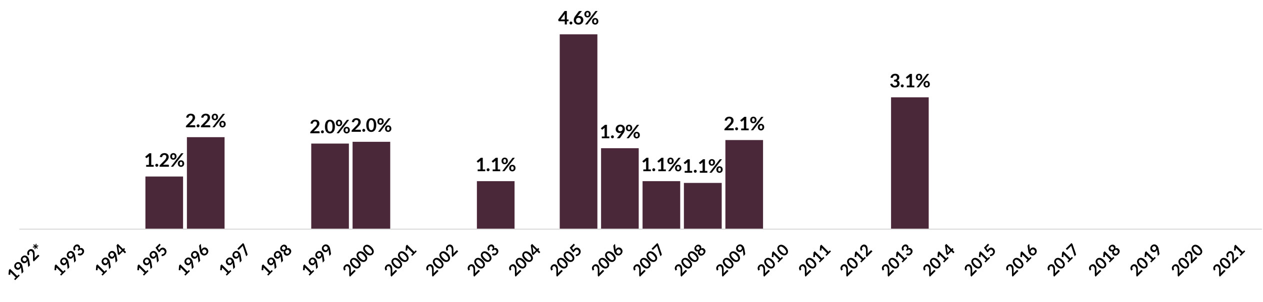
NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

Figure D-2. Culpability Score Increase for Prior History (§8C2.5(c))
Fiscal Years 1992–2021



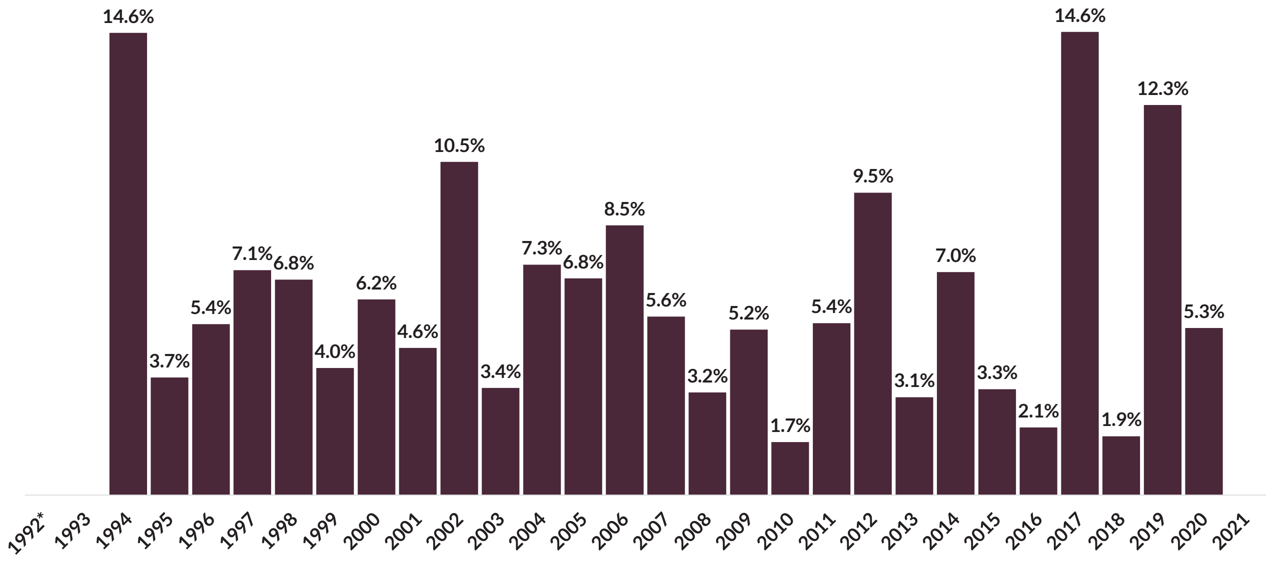
NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

Figure D-3. Culpability Score Increase for Violation of an Order (§8C2.5(d))
Fiscal Years 1992–2021



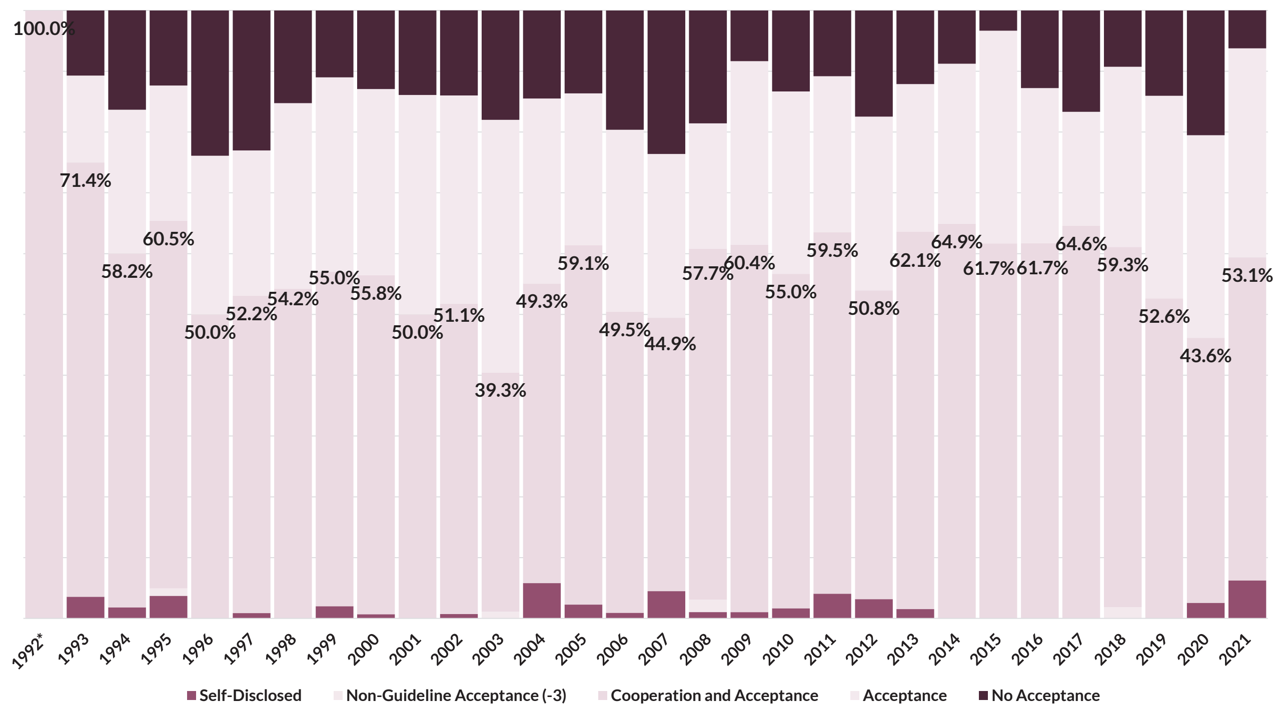
NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

Figure D-4. Culpability Score Increase for Obstruction of Justice (§8C2.5(e))
Fiscal Years 1992–2021



NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders. Sentencing documents in three cases indicate that courts applied either a one- or two- level adjustment for obstruction of justice, instead of the three-point adjustment required by the guidelines.

Figure D-5. Culpability Score Decrease for Self-Reporting, Cooperation, Acceptance of Responsibility (§8C2.5(g))
Fiscal Years 1992–2021



NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

APPENDIX E

ORGANIZATIONAL OFFENDERS WITH COMPLIANCE AND ETHICS PROGRAM ADJUSTMENT

Table E-1. Organizational Offenders With a Culpability Score Decrease for a Compliance Program Fiscal Years 1992–2021

Location	N	%
Inside U.S.	6	75.0
Outside U.S.	2	25.0

Ownership Structure	N	%
Private Organization	10	90.9
Openly-Traded Organization	1	9.1
Non-Profit Organization	0	0.0
Government Organization	0	0.0
Other	0	0.0

Size of Organization	N	%
Less than 50 Employees	6	60.0
50-to-99 Employees	1	10.0
100-to-499 Employees	0	0.0
500-to-999 Employees	1	10.0
More than or 1000 Employees	2	20.0

Financial Status at Sentencing	N	%
Defunct	0	0.0
Solvent	10	90.9
Bankrupt (Ch. 7)	0	0.0
Reorganization (Ch. 11)	0	0.0
Financial Stress	0	0.0
Other	1	9.1

NOTE: The location of organizational offenders was not collected prior to FY2000. Only offenders with complete information were included in the analyses.

Table E-2. Organizational Offenders With a Culpability Score Decrease for a Compliance Program and Offense and Industry Types Fiscal Years 1992–2021

Offense Type	N	%
Admin. of Justice	1	9.1
Drugs	1	9.1
Environmental	2	18.2
FDA	1	9.1
Fraud	2	18.2
Gambling	1	9.1
Immigration	2	18.2
Tax	1	9.1

Industry Type	N	%
Services	3	37.5
Transportation	2	25.0
Manufacturing	1	12.5
Environmental	1	12.5
Other	1	12.5

NOTE: The type of industry of organizational offenders was not collected prior to FY2000. Percentages may not equal to 100.0 percent due to rounding.

Table E-3. Organizational Offenders With a Culpability Score Decrease for a Compliance Program and Other Culpability Score Increases and Decreases Fiscal Years 1992–2021

Tolerance (§8C2.5(b))	N	%
No Adjustment	4	36.4
+10 Employees	5	45.5
+50 Employees	1	9.1
+200 Employees	0	0.0
+1,000 Employees	0	0.0
+5,000 Employees	1	9.1

Prior History (§8C2.5(c))	N	%
No Adjustment	11	100.0
< 5 Years after Prior Offense	0	0.0
< 10 Years after Prior Offense	0	0.0

Violation of an Order (§8C2.5(d))	N	%
No Adjustment	11	100.0
Condition of Probation	0	0.0
Judicial Order or Similar Misconduct	0	0.0

Obstruction of Justice (§8C2.5(e))	N	%
No Adjustment	11	100.0
Obstruction	0	0.0

Acceptance (§8C2.5(g))	N	%
No Adjustment	0	0.0
Acceptance	2	18.2
Acceptance and Cooperation	9	81.8
Self Disclosed	0	0.0

NOTE: Percentages may not equal to 100.0 percent due to rounding.

Table E-4. Organizational Offenders With a Culpability Score Reduction for a Compliance Program: Sentencing Outcomes Fiscal Years 1992–2021

Ability to Pay Fine	N	%
Unable to Pay Fine	0	0.0
Able to Pay Fine	10	100.0

Imposition of Fine/Restitution	N	%
Did Not Impose Fine/Restitution	1	9.1
Imposed Fine/Restitution	10	90.9

Of those with Fine/Restitution	
Average Amount	$ 2,649,280
Median Amount	$ 162,500

Probation Ordered	N	%
No Probation Ordered	2	18.2
Probation Ordered	9	81.8

Of those with Probation Ordered	
Average Months	37
Median Months	36

NOTE: Only offenders with complete information were included in the analyses.

APPENDIX F

SENTENCING OUTCOMES

Figure F-1. Organizational Offenders With Ability to Pay Fine
Fiscal Years 1992–2021

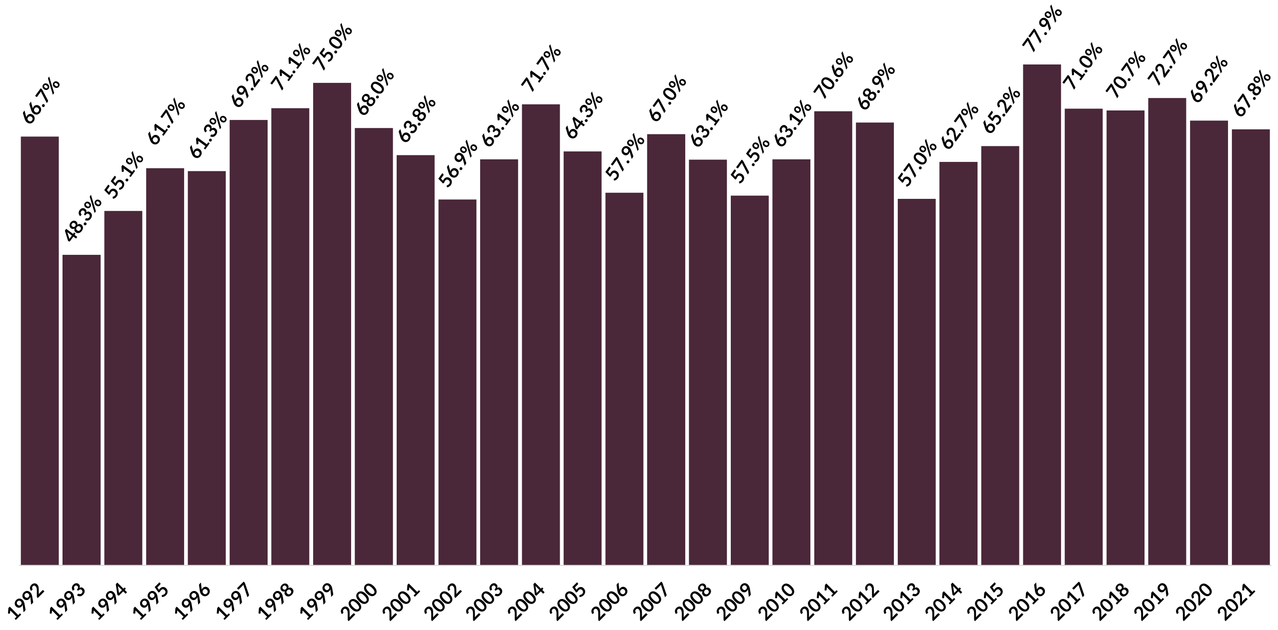


Figure F-2. Imposition of Fine Ordered on Organizational Offenders
Fiscal Years 1992–2021

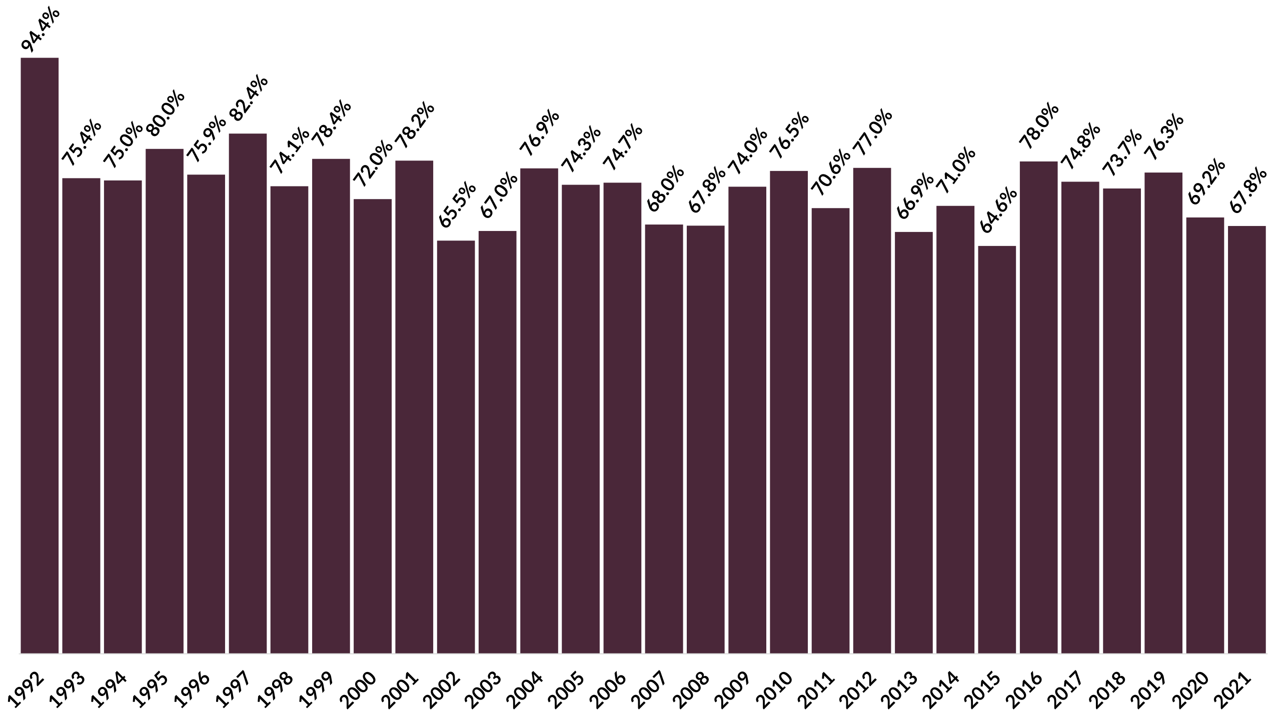


Figure F-3. Average Fine Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021

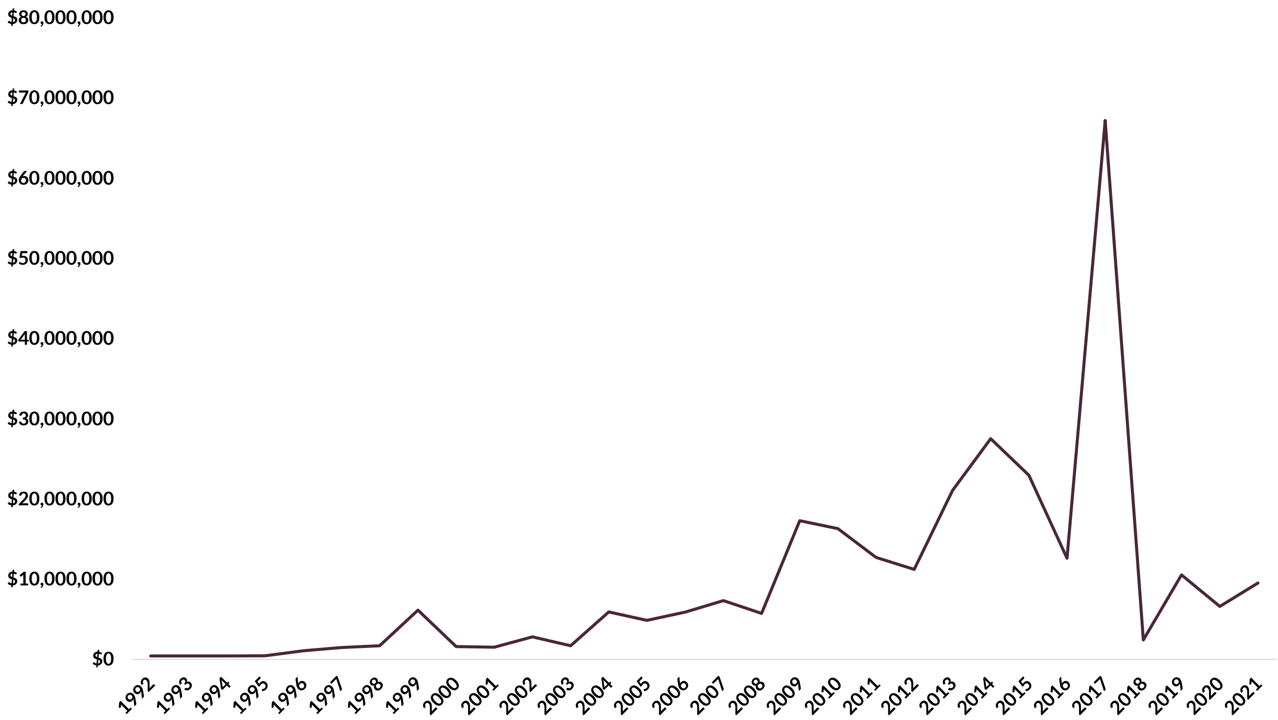


Figure F-4. Median Fine Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021

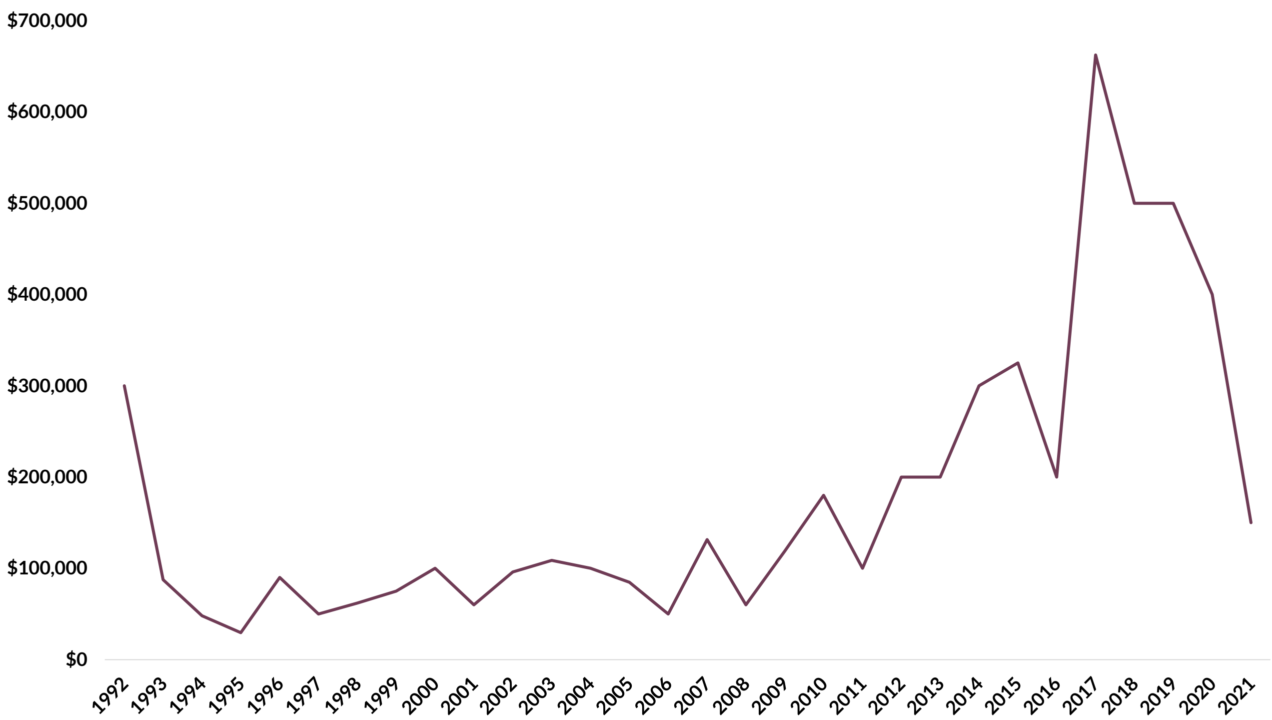


Figure F-5. Imposition of Restitution Ordered on Organizational Offenders Fiscal Years 1992–2021

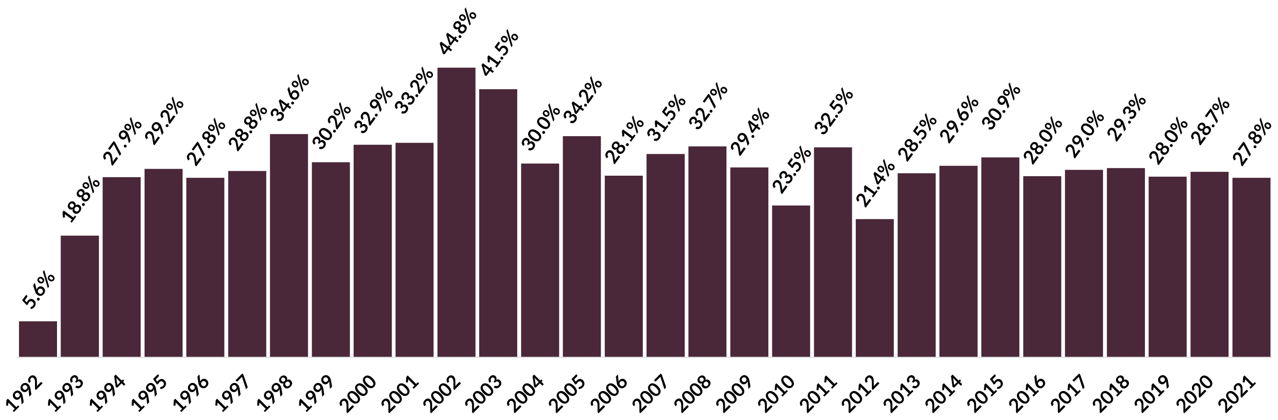


Figure F-6. Average Restitution Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021

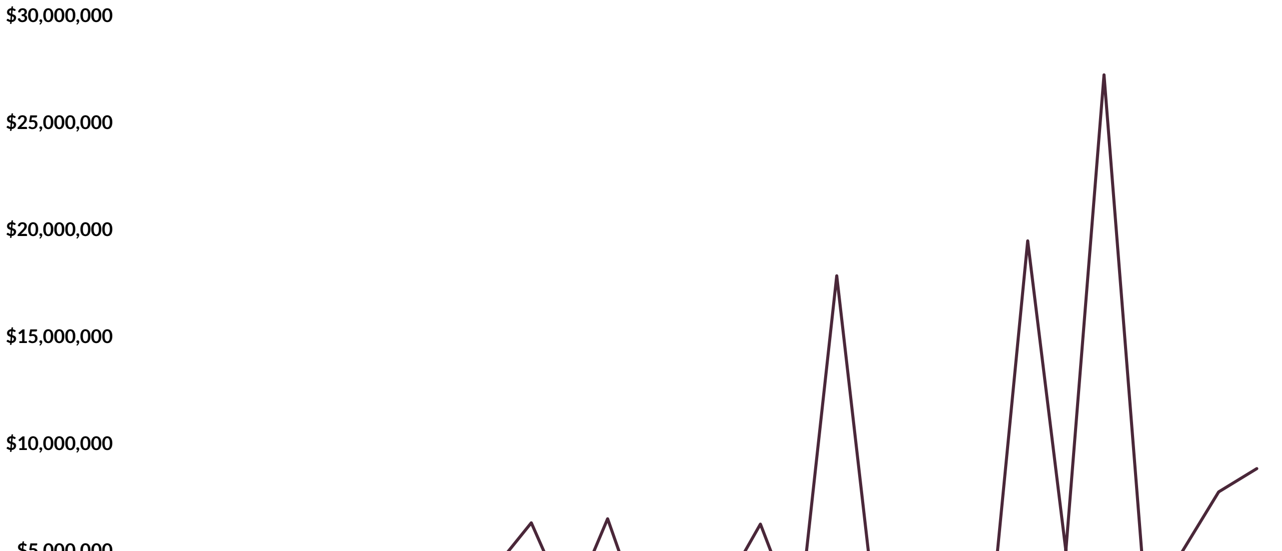


Figure F-7. Median Restitution Amount Ordered to be Paid by Organizational Offenders Fiscal Years 1992–2021

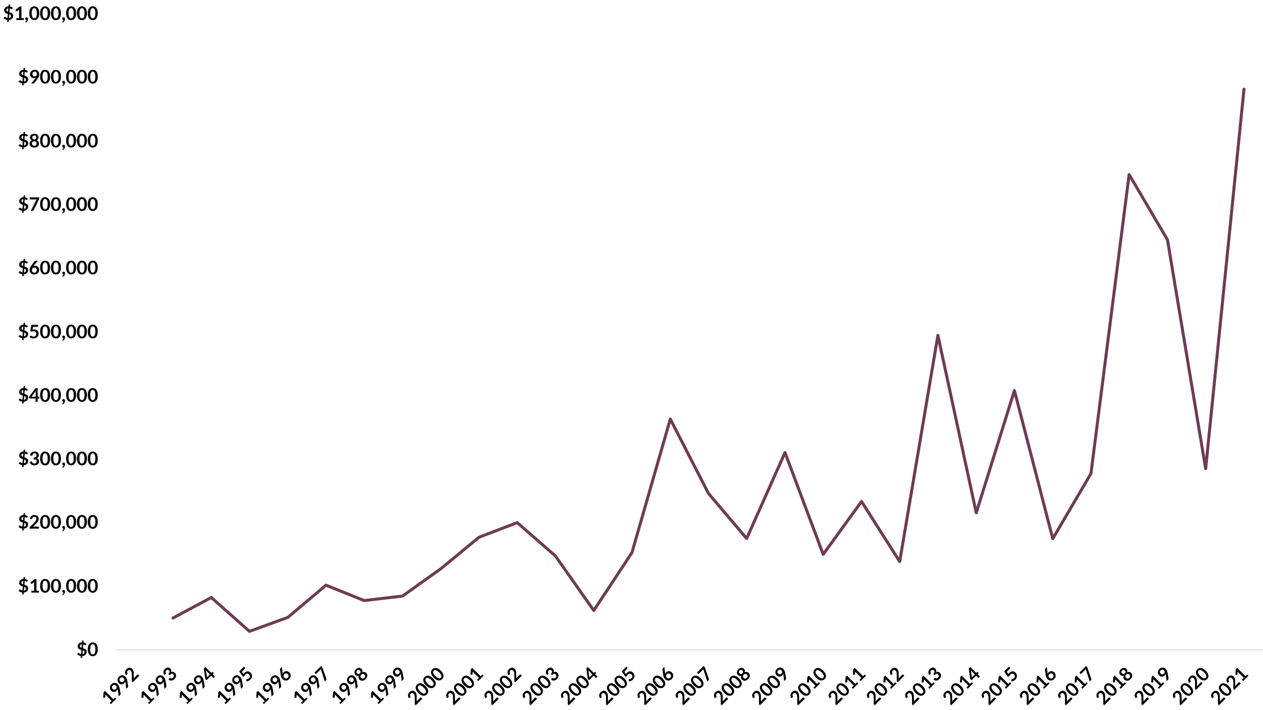


Figure F-8. Organizational Offenders Sentenced to Probation Fiscal Years 1992–2021

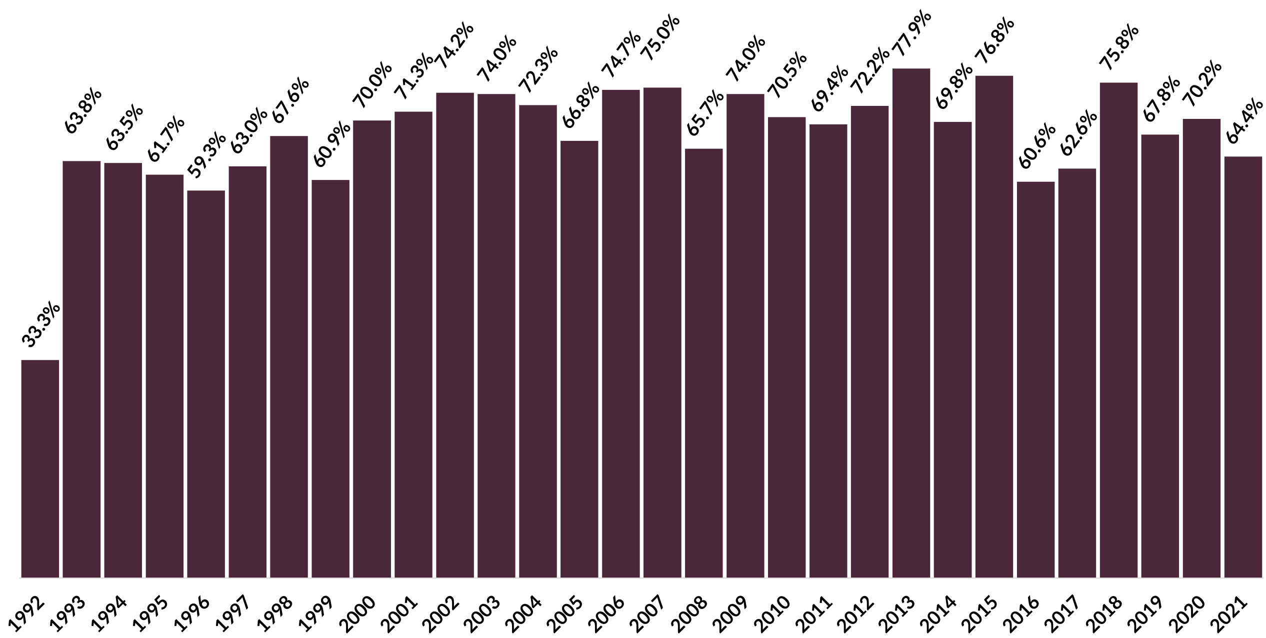


Table F-1. Length of Probation of Organizational Offenders Fiscal Years 1992–2021

Fiscal Year	Median (in months)	Average (in months)
1992*	51	43
1993	36	40
1994	36	37
1995	36	38
1996	36	42
1997	36	39
1998	36	39
1999	36	40
2000	36	41
2001	36	38
2002	36	42
2003	36	41
2004	36	33
2005	36	39
2006	36	40
2007	36	40
2008	36	38
2009	36	37
2010	36	37
2011	36	39
2012	36	34
2013	36	38
2014	36	41
2015	36	38
2016	36	38
2017	36	39
2018	36	41
2019	36	41
2020	36	37
2021	36	34

NOTE: Asterisk indicates the number of organizational offenders is ten or less offenders.

ENDNOTES

1 *See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions*: *Hearing Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 101st Cong. 189 (1990) (testimony of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission). The guidelines offer fine reductions to organizations with effective compliance and ethics programs or other mitigating factors (the carrot) and fine increases to organizations with certain aggravating factors (the stick).

2 Ethics Res. Ctr., The Federal Sentencing Guidelines for Organizations at Twenty Years: A Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs 28 (2012).

3 *See* Paul E. McGreal, *The Amended Organizational Sentencing Guidelines: Top Ten Things Attorneys Should Know*, 42 Hous. Law. 10, 11 (2005) ("These criteria immediately became the gold standard for designing and implementing an effective compliance program."); Barry Boss, *U.S. Sentencing Commission Amends Corporate Guidelines-What Do The Changes Mean For You?*, Metro. Corp. Couns. (2004) ("These guidelines not only serve as the basis for determining punishment for corporations convicted of crimes but also provide the "gold standard" for evaluating internal corporate compliance programs."); Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 J. Corp. L. 467 (2007) ("These guidelines . . . are considered the 'gold standard' for evaluating internal corporate compliance programs.").

4 *See* S. Rep. No. 97-307 (1981); H.R. Rep. No. 98-1017 (1984); *see also* 28 U.S.C. §§ 991(b)(1)(B), 994(f).

5 S. Rep. No. 98-225, at 66–67 (1983).

6 *Id.* at 76.

7 The purposes of sentencing were set forth in the SRA. Congress expressly determined that federal sentencing should be tailored: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See* Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 212(a), 98 Stat. 1837, 1989 (codified as amended in 18 U.S.C. § 3553(a)(2)).

8 *See* 28 U.S.C. §§ 991, 994, 995(a)(1).

9 For purposes of title 18 of the United States Code, the term "organization" means "a person other than an individual." *See* 18 U.S.C. § 18.

10 Prior to the SRA, courts did not have the legal authority to place an organization on probation.

11 18 U.S.C. § 3551(c).

12 S. Rep. No. 98-225, at 68 (1983).

13 *Id.*; *see also* 18 U.S.C. §§ 3554–56.

14 For a more comprehensive discussion of the history of the organizational guidelines, see Ketanji Brown Jackson & Kathleen Cooper Grilli, *The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs*, *in* The Complete Compliance and Ethics Manual (2022).

15 *See* Notice of Hearing, 51 FR 19918 (June 3, 1986); *see also* Transcript of Public Hearing before the U.S. Sent'g Comm'n, Washington, D.C. (June 10, 1986). For a complete list of the witnesses, see U.S. Sent'g Comm'n, Supplementary Report on Sentencing Guidelines for Organizations, at B-1 (1991) [hereinafter 1991 Supplementary Report]. Commission materials cited herein are available on the Commission's website at www.ussc.gov.

16 *See* Preliminary Draft of Sentencing Guidelines for United States Courts, 51 FR 35080, 35083 (Oct. 1, 1986).

17 *Id.* at 35080. The draft presented "an approach currently being considered by the U.S. Sentencing Commission in developing guidelines and policy statements for use by the federal courts in determining the sentences to be imposed in criminal cases." *Id. See also id.* at 35081 (making clear that "[t]he preliminary draft published for public comment seeks to accomplish several goals. The first is to focus public attention on a proposed format, a possible structure and suggested sentencing ranges. The format, structure, and suggested terms of imprisonment will all be reconsidered by the Commission before the final draft is written in light of further deliberation, continued empirical research, and the receipt of written and oral comment").

18 *Id.* at 35129. Culpability would be measured by factors, such as "whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees or whether the organization took steps to discipline responsible employees prior to indictment." *Id.*

19 *Id.*

20 The Commission grappled with the "differing perceptions of the purposes of criminal punishment" as it drafted both the individual and organizational guidelines. *See* U.S. Sent'g Comm'n, *Guidelines Manual*, Ch.1, Pt.A, intro. comment. (Nov. 2021) [hereinafter USSG]. The Commission ultimately resolved the philosophical dilemma by "dr[awing] especially strong guidance" from the statutory purposes of sentencing set out in 18 U.S.C. § 3553. 1991 Supplementary Report, *supra* note 15, at 5.

21 Preliminary Draft of Sentencing Guidelines for United States Courts, 51 FR at 35128.

22 The mandatory conditions of probation that courts must impose on an organizational offender are: (1) the organization must not commit another federal, state, or local crime while on probation; and (2) the organization must either pay a fine, make restitution, or perform community service. *See* 18 U.S.C. § 3563(a). The only mandatory condition imposed upon probationers convicted of a misdemeanor or an infraction is the requirement that they commit no further crimes while on probation. Discretionary conditions of probation are listed in 18 U.S.C. § 3563(b).

23 Preliminary Draft of Sentencing Guidelines for United States Courts, 51 FR at 35128–29. The early list of possible conditions of probation included "the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization's misdeeds and subsequent corrective action." *Id.*

24 The Commission was required to deliver the first set of guidelines for individual defendants to Congress by April 1987. *See* Sentencing Reform Act of 1984, Pub L. No. 98–473, § 235, 98 Stat. 1837 (Oct. 12, 1984), as amended by Pub. L. No. 99–217, 99 Stat. 1728 (Dec. 26, 1985) ("[T]he United States Sentencing Commission . . . [shall submit] the initial set of sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within 30 months of the [date of enactment of this Act].").

25 1991 Supplementary Report, *supra* note 15, at 1. The one exception was offenses involving antitrust violations. Section 2R1.1 of the initial guidelines included a special instruction for computing fines for organizations. *See* U.S. Sent'g Comm'n, *Guidelines Manual*, §2R1.1(c) (Nov. 1987) ("The fine range for an

organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000.").

26 *See* Sentencing Guidelines for United States Courts, 52 FR 18046 (May 13, 1987).

27 *See* Letter from William W. Wilkins, Jr. (July 1988), *in* U.S. Sent'g Comm'n, Discussion Materials on Organizational Sanctions (1988). These materials included a draft of sentencing guidelines for organizations, a draft proposal on standards for organizational probation, and a report on past sentencing practices of organizations by the federal courts from 1984 through 1987. *See* Public Hearings on Organizational Sanctions, 53 FR 32815, 32816 (Aug. 26, 1988). Working groups of scholars and experts from various government agencies helped shape these materials. *See* 1991 Supplementary Report, *supra* note 15, at 2.

28 *See* Jeffrey S. Parker, *Staff Working Paper on Criminal Sentencing Policy for Organizations*, *in* Discussion Materials on Organizational Sanctions, *supra* note 27, at pt. IV, at 9.

29 The first was held on October 11, 1988, in New York City, and the second in Pasadena, California on December 2, 1988. *See* Public Hearing on Organizational Sanctions, 53 FR 35407 (Sept. 13, 1988); Public Hearing on Organizational Sanctions, 53 FR 41644 (Oct. 24, 1988), respectively.

30 For a complete list of the witnesses, see 1991 Supplementary Report, *supra* note 15, at B-1–B-3.

31 *See generally* Transcript of Public Hearing before the U.S. Sent'g Comm'n, New York, N.Y. (Oct. 11, 1988); *see also supra* note 30.

32 *See* Transcript of Public Hearing before the U.S. Sent'g Comm'n, Pasadena, CA 71 (Dec. 2, 1988) (R. Monks).

33 *See* Transcript of Public Hearing 73 (Dec. 2, 1988) (W. Wilkins, Jr.) ("The points you make are very interesting."); *Id.* at 83 (S. Breyer) ("[I]t's a very interesting proposal, and I think perhaps practical."); *Id.* (H. Corrothers) ("I think the idea is a marvelous one, and I would like to encourage you and to do anything I can to help promote it, too.").

34 *See* 1991 Supplementary Report, *supra* note 15, at 2.

35 *See* Letter from Joseph E. diGenova, Chair, Att'y Working Grp., to Hon. William W. Wilkins, Jr., Chairman, U.S. Sent'g Comm'n 2 (May 19, 1989).

36 *See id.* at 1. The Attorney Working Group consisted of recognized experts in the areas of white collar, tax, antitrust law, and economic regulation, including Chair diGenova, Esq., Victoria Toensing, Esq., Ernest Gellhorn, Esq., Bert W. Rein, Esq., Winthrop Swenson, Justin Thornton, Esq., Samuel J. Buffone, Esq., Earl Silbert, Esq., Carl Rauh, and Robert Jordan, III Esq. *Id.* at 7. Notably, the group recommended that the Commission limit itself to the promulgation of "flexible policy statements rather than rigid and binding guidelines." *Id.* at 4. Other reductions suggested by the Working Group included steps taken by the organization "to discipline the responsible individuals" and to "make it easier for the criminal justice system to identify and punish responsible individuals," or "if an organization takes appropriate steps to prevent a recurrence of similar offenses." *Id.* at 3.

37 *See* Sentencing Guidelines for United States Courts, 54 FR 47056 (Nov. 8, 1989).

38 On February 14, 1990, the Commission conducted a public hearing on "the proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations." *See* Sentencing Guidelines for United States Courts; Public Hearing, 55 FR 4045 (Feb. 6, 1990); Transcript of Public Hearing before the U.S. Sent'g Comm'n, Washington, D.C. (Feb. 14, 1990). Seventeen witnesses, with a diversity of backgrounds and interests, testified before the Commission about organizational sentencing policy. For a complete list of the witnesses, see 1991 Supplementary Report, *supra* note 15, at B-3.

39 For a complete list of the witnesses, see 1991 Supplementary Report, *supra* note 15, at B-3.

40 *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Feb. 15, 1990).

41 At the time, the Commission had only four voting members. One of them, Judge George E. MacKinnon, announced that he would "not vote to adopt any proposal for corporate sentences during this current amendment period," expressing his concerns about a four-member Commission adopting such important guidelines. *See* U.S. Sent'g Comm'n, Public Meeting Minutes 7 (Apr. 10–11, 1990). The Commission is required to deliver guideline amendments to Congress no later than May 1 in order for such guideline amendments to take effect by November 1, and their promulgation requires an "affirmative vote of at least four members" of the Commission. *See* 28 U.S.C. § 994(a), (p).

42 *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990).

43 *See* 1991 Supplementary Report, *supra* note 15, at A-3.

44 *See* Sentencing Guidelines for United States Courts, 55 FR 46600, 46601 (Nov. 5, 1990). The Commission also solicited public comment on proposed organizational guidelines prepared by the DOJ. The DOJ's proposal included both aggravating and mitigating factors that would increase or decrease the offense level used for determining the fine level. Notably, the DOJ's proposal did not identify the existence of an effective program to prevent and detect violations of law as a mitigating factor but allowed for a one-level reduction in the offense level if "the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense" or "[i]f the organization substantially cooperated in the investigation, or if the organization has taken substantial steps to prevent a recurrence of similar offenses, such as implementing appropriate monitoring procedures." *Id.* at 46612. The DOJ's proposed commentary did not contain language explaining any of the terms used, such as "bona fide policies and programs" or "substantial steps to prevent recurrence."

45 *Id.* at 46605.

46 *See* Transcript of Public Hearing before the U.S. Sent'g Comm'n, Washington, D.C. (Dec. 13, 1990). Among the witnesses were Robert S. Mueller, III, Esq., Assistant Attorney General, Criminal Division, U.S. Department of Justice, James F. Rill, Esq., Assistant Attorney General, Antitrust Division, U.S. Department of Justice, United States Attorney Joe B. Brown, Esq., in his capacity as Chairman, Attorney General's Advisory Commission on Sentencing Guidelines, Richard R. Rogers, Esq., Associate Counsel of Ford Motor Company representing the National Association of Manufacturers, and Jonathan C. Waller, Esq., Assistant General Counsel, Sun Company, representing the American Corporate Counsel Association. For a complete list of the witnesses, see 1991 Supplementary Report, *supra* note 15, at B–5.

47 *See* Transcript of Public Hearing 17 (Dec. 13, 1990).

48 *Id.* at 78–79 (S. Cowen); *Id.* at 130 (R. Langsdorf); *Id.* at 99 (R. Rogers).

49 *See* U.S. Sent'g Comm'n, Public Meeting Minutes 6 (Apr. 26, 1991). Although the motion passed unanimously, two commissioners made statements following the vote indicating disagreement with certain policy decisions reflected in Chapter Eight. Nevertheless, "the corporate sanctions draft was the workproduct of all Commissioners." *See id.* (reflecting comments by Commissioners MacKinnon, Nagel and Mazzone).

50 *See* USSG App. C, amend. 422 (effective Nov. 1, 1991).

51 John R. Steer, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit, Presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma 8 (Apr. 26, 2001).

52 *Id.*

53 USSG Ch.8, intro. comment.

54 *Id.* (emphasis omitted). Remedying the harm could include a restitution order, a remedial order, an order of probation requiring restitution or community service, or an order of notice to victim. *See* USSG §§8A1.2(a), 8B1.1, 8B1.2, 8B1.3, 8B1.4.

55 USSG Ch.8, intro. comment.

56 *Id.* (emphasis omitted).

57 *Id.* Calculating the offense level for the fine table requires using the applicable Chapter Two guidelines to determine the base offense level and application of any appropriate adjustments contained in that guideline, followed by application of Chapter Three, Part D, if there is more than one such count. *See* USSG §§8C2.1, 8C2.3, 8C2.4.

58 USSG Ch.8, intro. comment.

59 *Id.*

60 *Id.*

61 *Id.*

62 Commentators included the Health Care Compliance Association, the Practising Law Institute, and the Alliance for Health Care Integrity, among others. Comments were made in writing and orally to the Commission. For a more detailed discussion of these suggestions, see Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 716–18 (2002).

63 During the intervening ten years after promulgation of the organizational guidelines, the Commission continuously studied Chapter Eight's operation. For example, the Commission continued to consider the issue of a guideline fine provision for organizations with respect to food and drug and environmental offenses, which were not included in the guideline fine provisions in Chapter Eight. *See, e.g.*, U.S. Sent'g Comm'n, Food and Drug Working Group Final Report (1995); U.S. Sent'g Comm'n, Report from Advisory Group on Environmental Sanctions (1993). The Commission also held a symposium on corporate crime. *See* U.S. Sent'g Comm'n, Corporate Crime in America: Strengthening the "Good Citizen" Corporation (1995). At the symposium, the keynote speaker, Sen. Edward M. Kennedy, noted the significance of the organizational guidelines, agreeing that "commendable efforts are underway to help ensure that companies doing business in this country are, in fact, good corporate citizens." *Id.* at 119–20.

64 Murphy, *supra* note 62, at 698; *see also In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996) (noting that "[t]he Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take voluntary remedial efforts").

65 Murphy, *supra* note 62, at 714. Chair Murphy cited authorities that defined a good compliance program as one that "emphasize[s] values and moral responsibility" while a good ethics program "must help employees to know and obey the law." *Id.* at 715 (citations omitted). *See also* Janet C. Cook, Assistant Gen. Couns., U.S. Air Force, Remarks by Janet C. Cook, *in* Corporate Crime in America: Strengthening the "Good Citizen" Corporation, *supra* note 63, at 380 ("A compliance program sets basic rules and procedures and can be summed up in a checklist. An ethics program addresses values and decisions in the grey areas.").

66 *See* Sentencing Guidelines for United States Courts, 66 FR 48306 (Sept. 19, 2001).

67 *See* Press Release, U.S. Sent'g Comm'n, Sentencing Commission Convenes Organizational Guidelines Ad Hoc Advisory Group (Feb. 21, 2002).

68 *Id.* The chair of the advisory group was B. Todd Jones, Esq., who served as the United States Attorney

for the District of Minnesota before and after his time on the advisory group, before becoming Director of the Bureau of Alcohol, Tobacco and Firearms. Other members of the advisory group included former Attorney General, Eric Holder, Esq., and the current Inspector General for the DOJ, Michael Horowitz, Esq. For a complete list of Advisory Group members and their relevant backgrounds, see U.S. Sent'g Comm'n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at app. A (2003) [hereinafter Ad Hoc Advisory Group Report].

69 Pub. L. No. 107–204, 116 Stat. 745.

70 Sarbanes-Oxley Act § 805.

71 *See* U.S. Sent'g Comm'n, *Advisory Group on Organizational Guidelines to the United States Sentencing Commission* (Mar. 19, 2002).

72 *Id.*

73 *See* U.S. Sent'g Comm'n, *Public Comment Received by Advisory Group on Organizational Guidelines in Response to Request for Public Comment* (Mar. 19, 2002); U.S. Sent'g Comm'n, *Public Comment Received in Response to Additional Public Comment Requested* (Oct. 15, 2002).

74 *See* Ad Hoc Advisory Group Report, *supra* note 68, at 1. Witnesses included former Director of the Federal Bureau of Investigation, James Comey, Esq., Joshua Hochberg, Esq., Chief, Fraud Section, Criminal Division, U.S. Department of Justice, Michael Goldsmith (former USSC Commissioner), J. Reuben Clark Law School, Brigham Young University, Donald C. Klaiter, Esq., Morgan, Lewis & Bocklius, representing the ABA: Antitrust Section, Stuart C. Gilman, Ph.D., President, Ethics Resource Center, James W. Conrad, Jr., Sidley Austin Brown & Wood LLP, representing the American Chemistry Council. For a complete list of the witnesses and their testimony, see U.S. Sent'g Comm'n, *Public Hearing of the Ad Hoc Advisory Group on Organizational Guidelines* (Nov. 14, 2002).

75 Ad Hoc Advisory Group Report, *supra* note 68, at 2.

76 *Id.* at 3.

77 *Id.* at 3–5.

78 In response to the group's recommendation, on December 30, 2003, the Commission published for public comment a proposed amendment that would move the minimum requirements of an effective compliance program from the commentary into a new guideline to emphasize the importance of such programs. *See* Sentencing Guidelines for United States Courts; Notice, 68 FR 75340, 75354 (Dec. 30, 2003). Following publication of the proposed amendment, the Commission followed its usual process for promulgating amendments, which included studying relevant data and information that the Commission staff compiled and reviewing the formal public comment. *See* 28 U.S.C. § 994(o), (p), (x); U.S. Sent'g Comm'n, Rules of Practice and Procedure pt. IV, at 5 (2016).

79 The Commission held a public hearing in March, 2004, at which two panels of subject matter experts testified about the proposed amendment to Chapter Eight. *See* Transcript of Public Hearing before the U.S. Sent'g Comm'n, Washington, D.C. (Mar. 17, 2004).

80 *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 8, 2004); USSG App. C, amend. 673 (effective Nov. 1, 2004); *see also* USSG §8B2.1.

81 *See* USSG App. C, amend. 673 (effective Nov. 1, 2004); *see also* USSG §8B2.1.

82 *See* USSG App. C, amend. 673 (effective Nov. 1, 2004); USSG §8B2.1; *see also* U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 8, 2004).

83 USSG App. C, amend. 673 (effective Nov. 1, 2004); *see also* USSG §8B2.1(a)(2).

84 The guidelines defined "small organization" as an organization having fewer than 200 employees. *See* USSG §8C2.5, comment. (n.1).

85 *See* USSG App. C, amend. 673 (effective Nov. 1, 2004).

86 *Id.*

87 *Id.*; *see also* USSG §8C2.5(f)(3)(B). A motion to allow the rebuttable presumption to extend to all organizations, both large and small, failed by vote of two to four. *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 8, 2004).

88 Letter from Daniel R. Roach, Co-Chair, Soc'y of Corp. Compliance and Ethics, to U.S. Sent'g Comm'n 1 (Mar. 19, 2010).

89 *See* Sentencing Guidelines for United States Courts, 75 FR 3525, 3534 (Jan. 21, 2010).

90 *See generally* U.S. Sent'g Comm'n, *Public Comment from March 17, 2010* (Mar. 17, 2010) (providing public comment letters received by the Commission in response to 75 FR 3525).

91 *Id.* The Environmental Protection Agency and National Oceanic and Atmospheric Administration also submitted comment. *Id.*

92 *Id.* At the time, those standing advisory groups were the Probation Officers Advisory Group, the Practitioners Advisory Group, and the Victims Advisory Group. In 2016, the Commission created a fourth standing advisory group, the Tribal Issues Advisory Group.

93 *See supra* note 90. The Defense Industry Initiative on Business Ethics and Conduct, the Association of Corporate Counsel, and the Open Compliance and Ethics Group were also among the commentators. In addition, a former Vice Chair of the Commission, John Steer, and a member of the ad hoc advisory group, Winthrop M. Swenson, also submitted public comment. *See id.* Both were Commission staff members when the organizational guidelines were promulgated in 1991.

94 *See id.* The RAND Center for Corporate Ethics and Governance also commented on the proposed amendment. *See id.*

95 *See supra* notes 90–94.

96 *See* Transcript of Public Hearing before the U.S. Sent'g Comm'n, Washington, D.C. (Mar. 17, 2010). Witnesses on these two panels included David Debold, Esq., Chair, Practitioners Advisory Group, Susan Hackett, Esq., Senior Vice President and General Counsel, Association of Corporate Counsel, Karen Harned, Esq., Executive Director of the Small Business Legal Center, National Federation of Independent Business, Tim C. Mazur, M.B.A., Chief Operating Officer, Ethics and Compliance Officer Association, Patricia J. Harned, Ph.D., President, Ethics Resource Center, and Joseph E. Murphy, Esq., Director of Public Policy Society of Corporate Compliance and Ethics. *See id.* at 4–5.

97 *See* USSG App. C, amend. 744 (effective Nov. 1, 2010).

98 *Id.*

99 *Id.* The Commission has made no other substantive changes to the criteria for an effective compliance and ethics program since that date. The Commission did, however, adjust the Chapter Eight fine table for inflation in 2015. *See* USSG App. C, amend. 791 (effective Nov. 1, 2015).

100 The *Justice Manual* (previously known as the *U.S. Attorney's Manual*) expressly provides that "[i]n certain

instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation." U.S. Dep't of Just., Just. Manual § 9-28.200 (2018). It further provides that "[l]ikewise, civil and regulatory alternatives may be appropriate in certain cases." *Id.*

101 While the Commission does not collect information about the DOJ's organizational charging decisions, some third parties publish information based on publicly available materials. *See, e.g.*, Gibson Dunn, 2021 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (2022).

102 The Commission receives and collects data from sentencing documents sent directly from the federal courts. Within 30 days of the entry of judgment in a criminal case for either an individual or organizational offender, the chief judge of each sentencing court is required to submit the following to the Commission: (1) the Judgment and Commitment Order; (2) the Statement of Reasons form; (3) any plea agreement; (4) the indictment or other charging document; (5) the Presentence Report; and (6) any other information the Commission finds appropriate. *See* 28 U.S.C. § 994(w)(1).

103 U.S. Sent'g Comm'n, 1993–2021 Corporate Datafiles. Fiscal year 1992 was extrapolated based on sentencing date from the 1993 datafile.

104 U.S. Sent'g Comm'n, 1993–2021 Individual Offender Datafiles.

105 As reflected in Figure A-1, the number of individual offenders sentenced increased since fiscal year 1992 to a high in fiscal year 2011 before steadily decreasing into fiscal year 2021.

106 In fiscal year 2000, the Commission expanded the ownership structure to three additional categories: partnership, sole proprietorship, and association. In fiscal year 2012, the Commission expanded the ownership structure once again to include the Limited Liability Company or LLC.

107 An organization whose ownership is not open to the general public; these closely-held organizations include organizations whose stock is held by a single shareholder or a group of closely-associated shareholders. *See* U.S. Sent'g Comm'n, Variable Codebook: Organizational Defendant Database Documentation for Dataset "ICPSRO99" 14 (2015) (on file with the Commission).

108 An organization whose stock ownership is widely dispersed, *i.e.*, the stock is traded on a public stock exchange and the sale of stock is subject to regulation by state and federal agencies. *See id.*

109 An organization formed for some charitable or benevolent purpose that does not realize a profit. *See id.*

110 An organization created and funded by a federal, state, or local government. *See id.*

111 An organization that cannot be categorized by any of the previous four categories. *See id.*

112 *See* U.S. Sent'g Comm'n, *Guidelines Manual*, §2R1.1(c) (Nov. 1987) ("The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000."); *see also supra* note 25.

113 The 13 industries are: manufacturing, health care services, retail trade, transportation, services, construction, finance, agriculture, environmental management, mining, "organizations, associations, charities," public administration, and other.

114 This is consistent with the prevalence of these two offense types overall. See Figure B-2 for more information on offense types by industry. Money laundering is the most common offense type for the organizations, associations, and charities industry, but this industry is less than one percent (0.7%) of all organizational industries.

115 USSG §8B2.1(c).

116 An individual who is an owner, officer or board member (*e.g.*, president, secretary, treasurer), or manager or supervisor (*e.g.*, sales manager, district manager).

117 An individual who is an employee, consultant, counsel, or not employed by the organization.

118 Those exceptions are fiscal years 2010 (60.1%) and 2018 (57.0%).

119 Inclusion of this information helps inform the court's decision whether to impose a term of probation because courts have authority to order organizations to develop an effective compliance and ethics program as a condition of probation. *See* USSG §8D1.4(b)(1).

120 This data highlights the importance of developing an effective compliance and ethics program. Among the factors that prosecutors consider when deciding whether to charge an organization with a criminal offense are the adequacy and effectiveness of a compliance and ethics program at the time of the offense and at the time of a charging decision, and the organization's efforts to implement an adequate and effective compliance and ethics program or to improve an existing one. *See* U.S. Dep't of Just., Just. Manual § 9-28.300 (2018).

121 *See* USSG §8C1.1.

122 *Id.*

123 The organizational fine guidelines at §§8C2.2 through 8C2.9 are applicable only to counts where the guideline offense level is determined under the Chapter Two guidelines listed at §8C2.1. *See* USSG §8C2.1.

124 Of the top six offense types, only the fraud, antitrust, and money laundering offenses are subject to the guideline fine provisions of Chapter Eight. *See* USSG §8C2.1.

125 However, when the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) of §8C2.1, but the applicable guideline results in the determination of the offense level by use of a listed guideline, the provisions of §§8C2.2 through 8C2.9 are to be applied to that count. *See* USSG §8C2.1, comment. (n.2). For example, if the conduct set forth in the count of conviction ordinarily referenced to §2N2.1, an offense guideline not listed in §8C2.1(a), establishes §2B1.1 as the applicable offense guideline, which is listed in §8C2.1(a), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under §2B1.1. *Id.*

126 USSG §8C2.2.

127 Between fiscal years 1992 to 2021, courts determined that 756 organizational offenders were unable to pay the entire or partial amount of the fine, but still determined the guideline fine range for those offenders.

128 *See* USSG Ch.8, intro. comment. The fine range is also based on the seriousness of the offense which "generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table." *Id.*

129 *Id.*

130 *Id.*

131 USSG §8B2.1(a)(2).

132 USSG §8C2.5. The guidelines define high-level personnel of the organization as "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization." USSG §8A1.2, comment. (n.3(B)).

133 The guidelines define "unit" as "any reasonably distinct operational component of the organization."

USSG §8C2.5, comment. (n.2). The guidelines define high-level personnel of a unit of the organization as "agents within the unit who set the policy for or control that unit." USSG §8C2.5, comment. (n.3).

134 USSG §8C2.5. "'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." USSG §8A1.2, comment. (n.3(C)).

135 USSG §8C2.5(b)(1)–(5).

136 *Id.*

137 *See infra* Figure D-1.

138 USSG §8C2.5(c). "'Similar misconduct' means prior conduct that is similar in nature to the conduct underlying the instant offense, without regard to whether or not such conduct violated the same statutory provision. For example, prior Medicare fraud would be misconduct similar to an instant offense involving another type of fraud." USSG §8A1.2, comment. (n.3(F)).

139 USSG §8C2.5(c).

140 *Id.*

141 *Id.*

142 *See infra* Figure D-2.

143 USSG §8C2.5(d).

144 USSG §8C2.5(d)(1).

145 USSG §8C2.5(d)(2).

146 *See infra* Figure D-3. Two organizational offenders received the one-point adjustment for violating a condition of probation.

147 USSG §8C2.5(e).

148 USSG §8C2.5, comment. (n.9).

149 *Id.*; *see also* USSG §3C1.1, comment. (n.3, 4).

150 USSG §8C2.5(f).

151 A fair inference that can be drawn from this low application rate is that authorities pursue alternative remedies against organizations with an effective compliance and ethics program. *See infra* note 175 and accompanying text.

152 USSG §8B2.1.

153 The Commission did not collect this information until fiscal year 2000. *See* discussion *supra* p. 14.

154 USSG §8C2.5(g)(1)–(3).

155 USSG §8C2.5(g)(2); *see also infra* Figure D-5.

156 USSG §8C2.5(g)(1). The Commission identified five organizational offenders that received a three-

point reduction for acceptance of responsibility rather than the one-, two-, or five-point reductions provided for in §8C2.5. In these instances, it appears as though the court may have mistakenly applied the Chapter Three adjustment for acceptance of responsibility at §3E1.1, rather than the provisions of Chapter Eight. *See* USSG §3E1.1.

157 USSG §8C2.2.

158 *See infra* Figure F-2. Only fiscal years 2002 and 2015 had less than two-thirds of organizational offenders receive a fine.

159 Additional trends can be seen in Figures F-2 through F-4.

160 Additional trends can be seen in Figures F-5 through F-7.

161 USSG Ch.8, Pt.D, intro. comment.

162 USSG §8D1.1(a)(1).

163 USSG §8D1.1(a)(2).

164 USSG §8D1.1(a)(3).

165 USSG §8D1.2; *see also* 18 U.S.C. § 3561(c).

166 *See* USSG §§8D1.3, 8D1.4.

167 USSG §8D1.4(b)(1).

168 Although the implementation of an effective compliance and ethics program is noted under the recommended conditions of probation, 23 organizational offenders were not placed on probation but were nevertheless required to implement an effective compliance and ethics program as part of their sentence.

169 USSG Ch.8, intro. comment.; *see also* Samuel R. Miller & Daniel E. Kritz, *New Developments in Corporate Criminal Liability: The Benefits and Risks of Compliance Programs*, C800 ALI-ABA 267, 277 (1992) ("[T]he new Federal Sentencing Guidelines for Organizations attempt to encourage corporate compliance programs by offering substantial fine reductions on the upside and threatening mandatory probation on the downside."); Robert Roberts, *The Rise of Compliance-Based Ethics Management*, 11 Pub. Integrity 261, 262 (2009).

170 *See* Murphy, *supra* note 62, at 712–13.

171 *Id.* at 710.

172 *See* Memorandum from Eric H. Holder, Deputy Att'y Gen., U.S. Dep't of Just. to All Component Heads and United States Attorneys, U.S. Dep't of Just. 3 (June 16, 1999). Several of Mr. Holder's successors issued modified versions of this memorandum. For example, Deputy Attorney General Larry Thompson modified the memo in 2003 and Deputy Attorney General Paul J. McNulty modified the Thompson memo in 2006. Compliance and ethics programs remained part of the calculus in both modified versions. *See* Fiorelli & Tracey, *supra* note 3, at 478–81.

173 *See generally* U.S. Dep't of Just., Just. Manual § 9-28.000 (2018).

174 *See id.* § 9-28.800 n.1.

175 Civil or other regulatory enforcement actions are one alternative to criminal prosecution. *See id.* at 9-28.1200. Other possible resolutions include either "a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent

recidivism." *Id.* § 9-28.1100. While the Commission does not collect information on the DOJ's organizational charging decisions, some third parties publish information based on publicly available materials. *See, e.g.*, Dunn, *supra* note 101.

176 *See* Crim. Div., U.S. Dep't of Just., Evaluation of Corporate Compliance Programs (2020).

177 U.S. Dep't of Just. & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 58–62 (2012). The DOJ and the SEC updated this resource guide and published the second edition in July 2020.

178 *Id.*

179 *See* Evaluation of Corporate Compliance Programs, *supra* note 176.

180 Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & Bus. 965 (2018).

181 *See* Evaluation of Corporate Compliance Programs, *supra* note 176, at 1–2.

182 *See* Evaluation of Corporate Compliance Programs, *supra* note 176. This guidance may have been developed, in part, in response to the compliance and ethics community's constant call for more information on how the DOJ evaluates compliance and ethics programs. It has been described as the second most important document for compliance, with the organizational guidelines being the first. *See* Roy Snell, *The Compliance Train has Left the Station and is Gaining Speed*, 19 J. Health Care Compliance 29, 30 (2017). Mr. Snell was a co-founder of the Society of Corporate Compliance and Ethics and Health Care Compliance Association and previously served as its chief executive officer and first president. *Id.* at 29 n.1.

183 *See* Evaluation of Corporate Compliance Programs, *supra* note 176.

184 Kenneth A. Polite, Jr., Assistant Att'y Gen., Remarks at NYU Law's Program on Corporate Compliance and Enforcement, New York, N.Y. (Mar. 25, 2022).

185 *Id.*

186 *Id.*

187 Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime, Washington, D.C. (Oct. 28, 2021).

188 *See supra* note 184.

189 *See* U.S. Div. of Enf't, U.S. Sec. & Exch. Comm'n, Enforcement Manual 98 (2017); *see also supra* note 177 and accompanying text.

190 *See* Enforcement Manual, *supra* note 189, at 98.

191 In the Matter of Gisela de Leon-Meredith, Exchange Act Release No. 44970, at n.2 (Oct. 23, 2001).

192 In 2021, the SEC announced it would focus on anti-money laundering programs and investment advisers and investment companies' compliance programs. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Division of Examinations Announces 2021 Examination Priorities (Mar. 3, 2021).

193 *See* Off. of Inspector Gen., Dep't of Health & Hum. Servs., *Compliance Guidance*, https://oig.hhs.gov/compliance/compliance-guidance/ (last visited May 25, 2022).

194 *See* Publication of the OIG Compliance Program Guidance for Hospitals, 63 FR 8987 (Feb. 23, 1998) ("Future compliance program guidances to be developed will be similarly structured and based on substantive policy recommendations, the elements of the Federal Sentencing Guidelines, and applicable statutes, regulations and Federal health care program requirements."); *see also* Publication of the OIG Model Compliance Plan for Clinical Laboratories, 62 FR 9435 (Mar, 3, 1997) ("The [clinical laboratory model compliance program] considers elements of the Federal Sentencing Guidelines.").

195 *See Compliance Guidance*, *supra* note 193.

196 Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 FR 66706 (Dec. 22, 1995).

197 *Id.* at 66706–07.

198 *Id.* at 66708.

199 *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 FR 19618, 19621 (Apr. 11, 2000).

200 *See Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058, at 1 (Oct. 16, 2008) (Policy Statement on Compliance); *see also Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (Oct. 20, 2005) (Policy Statement on Enforcement). The FERC began publicly explaining the factors it considers when deciding on remedies, including penalties, for violations shortly after Congress passed the Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594, which granted the FERC enhanced authority to assess civil penalties. *See id.*

201 *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at 1 (Mar. 18, 2010) (Policy Statement on Penalty Guidelines).

202 *Id.*

203 *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61216, at 7 (Sept. 17, 2010) (Revised Policy Statement on Penalty Guidelines).

204 *Id.* at 92 (citing §1B1.1). This provision is similar to §8C2.9. *See* USSG §8C2.9.

205 *Id.* at 97 (citing §1C2.2); *cf.* USSG §8C2.4.

206 *Id.* at 103 (citing §§1C2.4, 1C2.5); *cf.* USSG §§8C2.6, 8C2.7.

207 *Id.* at 98 (citing §1C2.3); *cf.* USSG §8C2.5.

208 *Id.* at 92 (citing §1B2.1); *cf.* USSG §8B2.1.

209 48 C.F.R. § 52.203-13. For fiscal year 2020, the U.S. Government Accountability Office reported that the federal government spent more than $665 billion on contracts, many of which were issued under the FAR. *See* U.S. Gov't Accountability Off., *A Snapshot of Government-Wide Contracting for FY 2020 (infographic)* (June 22, 2021), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic.

210 *See* Christopher R. Yukins, *Enhancing Integrity--Aligning Proposed Contractor Compliance Requirements with Broader Advances in Corporate Compliance*, 49 Gov't Contractor 166, 166–67 (2007) ("Those limited FAR provisions became even more obviously inadequate when, in November 2004, the Sentencing Commission revised its guidelines for corporate, or 'organizational,' compliance systems . . . . It was especially ironic that the federal regulations governing contractor compliance lagged behind the rest of corporate America, because the defense industry had earlier led the way in corporate compliance, as the industry responded to the 'Ill Wind' contracting scandals of the mid-1980s.").

211 *See* Federal Acquisition Regulation; FAR Case 2006–007, Contractor Code of Ethics and Business Conduct, 72 FR 7588 (Feb. 16, 2007). The Department of Defense, General Services Administration, and National Aeronautics and Space Administration put forth this proposal. *Id.* At the time, public comment suggested that the guidelines' compliance and ethics program's provisions should be adopted; however, a revised set of requirements were ultimately adopted. *See* Federal Acquisition Regulation; FAR Case 2006–007, Contractor Code of Business Ethics and Conduct, 72 FR 65873, 65875 (Nov. 23, 2007).

212 Representatives of the Business Round Table publicly urged the Commission to "take more time to consider the draft guidelines because of the potential impact on the corporate sector" and to adopt policy statements instead of binding guidelines. U.S. Sent'g Comm'n, Public Meeting Minutes (Feb. 27, 1990). The Commission received much public comment urging it to refrain from promulgating guidelines for organizations and suggesting that the Commission had no statutory authority to do so. For further discussion of this issue, see Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future*, 71 Wash. U. L. Rev. 205, 212–14 (1993). In addition to these public statements to the Commission, members of the Business Round Table were allegedly exerting pressure behind the scenes to delay implementation of the organizational guidelines. *See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions*: *Hearing Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 101st Cong. 173 (1990) (statement of Hon. John Conyers, Jr.). Judge MacKinnon voiced the belief that the Commission's consideration of corporate guidelines had been "vigorously, if not viscously (sic), opposed by the corporations at practically every meeting we had." *Id.* at 198; *see also* Jeffrey W. Nunes, *Organizational Sentencing Guidelines: The Conundrum of Compliance Programs and Self Reporting*, 27 Ariz. St. L. J. 1039, 1043–44 (1995) ("Initially, the Organizational Guidelines met with heavy opposition.").

213 *See* Tina Kelley, *Earning It; Charting a Course to Ethical Profits*, N.Y. Times, Feb. 8, 1998 (§3), at 1 ("Today [Feb. 1998], more than 500 companies have created [ethics officers]—up from 200 just six years ago [1992] . . . one of the main factors behind the sudden popularity of ethics officers was the creation in 1991 of sentencing guidelines that reduced fines for white-collar crimes committed by corporations with comprehensive ethics programs.").

214 Todd Haugh, *The Criminalization of Compliance*, 92 Notre Dame L. Rev. 1215, 1227 (2017); *see also*, Robert S. Patterson Sr., *Organizational Sentencing Guidelines*, 29 Tenn. B.J. 28, 31 (1993) ("[T]he U.S. Sentencing Guidelines for Organizations is the first comprehensive effort to encourage all corporations to enact [corporate compliance codes].").

215 Haugh, *supra* note 214, at 1228.

216 *See* Nancy A. Nord, *Sentencing Guidelines Up the Ante for Corporate Compliance Programs*, 9 ACCA Docket 48, 49 (1991) ("[T]he Guidelines provide strong incentive to re-examine and, if necessary, re-double corporate compliance efforts. . . .[C]orporate managers would be ill-advised not to implement new programs and undertake a thorough review of existing compliance efforts to assure conformity with the [g]uidelines."); Thomas M. Schehr, *An Analysis of a Corporate Director's Duty to Ferret out Wrongdoing: Have the Federal Sentencing Guidelines Effectively Overruled Graham v. Allis-Chalmers?* 42 Wayne L. Rev. 1617, 1641 (1996) ("[W]ith the enactment of the Guidelines, it is in a corporation's best interests to maintain proper compliance programs to minimize potential risk of loss."). Indeed, some even went so far as to suggest that it would be professional malpractice for a general counsel to ignore implementation of a compliance program. *See* Ad Hoc Advisory Group Report, *supra* note 68, at 29.

217 Michael Josephson, *History of the Integrity, Ethics and Compliance Movement: A Cautionary Tale for CEOs and Corporate Directors*, Ethikos 13, 14 (2014).

218 *Id.* at 15; *see also* Amy Zipkin, *Management: Getting Religion on Corporate Ethics; A Scourge of Scandals Leaves its Mark*, N.Y. Times, Oct. 18, 2000, at C1 ("The corporate title of ethics officer, for example, almost unknown a decade ago, has become almost as familiar as chief information officer."); Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 Notre Dame J.L. Ethics & Pub. Pol'y 169, 172 (2015) ("Corporate compliance and ethics programs and the position of CCO were first created in a noticeable

way in 1991 in response to the enactment of the Federal Sentencing Guidelines.").

219 Soltes, *supra* note 180, at 969.

220 *Id.* at 969 n.11 ("Citigroup alone reported in 2015 that it had 26,000 compliance staff who were paid an average of $60,000 a year."). *The Criminalization of Compliance* also reported that JP Morgan had hired 8,000 compliance personnel since the financial crisis and HSBC added 1,600. *See* Haugh, *supra* note 214, at 1244.

221 *See also* Haugh, *supra* note 214, at 1244.

222 *Id.*

223 Paul Fiorelli, *The Metrics of Ethics*, 39 Banking & Fin. Servs. Pol'y Rep. 13, 15 (2020); *see also* Ryan D. McConnell, Jay Martin & Charlotte Simon, *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 Hous. J. Int'l L. 509, 531 (2011) (stating "the Organizational Guidelines . . . spawned an industry of compliance and ethics professionals").

224 Soltes, *supra* note 180, at 968.

225 Am. Bar Assoc., *Law School Accreditation*, https://www.americanbar.org/groups/legal_education/accreditation/ (last visited May 25, 2022).

226 Am. Bar Assoc., *LL.M. and Post-J.D. Programs by School*, https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school/ (last visited May 25, 2022). Among the law schools represented are Boston University (Certificate in Financial Services Compliance), Fordham University (Master's in Compliance), Loyola University Chicago School of Law (multiple graduate programs in compliance and risk management), Santa Clara University (Master of Legal Studies in Corporate Compliance), and the University of Southern California (Compliance Certificate). *Id.*

227 Compliance Wk., 2019 Directory of GRC Education Programs (2019). Among the universities represented are Georgetown University's McDonough School of Business (Certified Regulatory and Compliance Professional Program), Harvard Business School (Corporate Board Regulatory Compliance and Governance Seminar), New York University Stern Business School (Master of Science in Risk Management), Wharton School of the University of Pennsylvania (Advanced Risk Management Program), Xavier University (International Business Ethics and Compliance Certificate Program), and Yale School of Medicine (Compliance and Safety Certification Program).

228 Soc'y of Corp. Compliance & Ethics, *CCB-Accredited University Compliance and Ethics Programs*, https://www.corporatecompliance.org/university-program (last visited Apr. 21, 2022). HCCA established the CCB in 1999. Although its initial mission was to create an examination and certification program for health care compliance professionals, CCB now offers accreditation programs to other fields in addition to health care. Soc'y of Corp. Compliance & Ethics, *About CCB*, https://www.corporatecompliance.org/certification (last visited Apr. 21, 2022).

229 N.Y. Univ. Sch. of L., *Program on Corporate Compliance and Enforcement*, https://www.law.nyu.edu/centers/corporatecompliance (last visited Apr. 21, 2022).

230 Harvard L. Sch., *Program on Corporate Governance* (May 2022), https://pcg.law.harvard.edu/; Harvard L. Sch., *Harvard Law School Forum on Corporate Governance* (last visited May 26, 2022), https://corpgov.law.harvard.edu/.

231 Other compliance and ethics centers include the FINRA Institute at Georgetown University (financial industry compliance), Ohio University's Institute for Applied and Professional Ethics (academic, business, and public policy ethics), Santa Clara University's Markkula Center for Applied Ethics (business compliance and ethics), Temple Law Center for Compliance and Ethics (compliance across disciplines and industries), University of Virginia's Olsson Center for Applied Ethics (business ethics), and Xavier University's Cintas Institute for

Business Ethics (business ethics and corporate culture).

232 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

233 *Id.* at 969.

234 *Id.* at 970.

235 *Id.*

236 Murphy, *supra* note 62, at 714.

237 *See, e.g.*, Dellastatious v. Williams, 242 F3d 191, 196 (4th Cir. 2001) (directors can avoid liability in shareholder derivative suits by showing a good faith attempt to create "an adequate corporate information-gathering and reporting system"); McCall v. Scott, 239 F.3d 808, 819 (6th Cir. 2001) (directors can breach their fiduciary duty if they intentionally or recklessly disregard red flags that should alert them to fraudulent practices within the organization); *In re* Abbott Laboratories Derivative S'holder Litig., 325 F.3d 795, 808 (7th Cir. 2003) ("[D]irector liability may arise for the breach of the duty to exercise appropriate attention to potentially illegal corporate activities from 'an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss.'" (citation omitted)); *see also* Kravitz v. Tavlarios, No. 20-2579-CV, 2021 WL 5365582, at *2 (2d Cir. Nov. 18, 2021) ("[F]ailure [of a corporation's officers and directors] to oversee or monitor corporate operations is known by Delaware courts as a '*Caremark* claim,'" and is a "breach[of] the fiduciary duties that Delaware law impose[s] on them as officers and directors." (citation omitted)); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *33 (Del. Ch. Sept. 7, 2021) ("[U]nder *Caremark*[,] the Board has a rigorous oversight obligation where safety is mission critical, as the fallout from the Board's utter failure to try to satisfy this 'bottom-line requirement' can cause 'material suffering,' even short of death, 'among customers, or to the public at large,' and attendant reputational and financial harm to the company." (internal citations omitted)); Hughes v. Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *14 (Del. Ch. Apr. 27, 2020) ("For purposes of *Caremark*[,] 'a director may be held liable if she acts in bad faith in the sense that she made no good faith effort to ensure that the company had in place any "system of controls.'" (quoting Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019)); *Marchand*, 212 A.3d at 824 ("If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty."); City of Cambridge Ret. Sys. v. Ersek, 921 F.3d 912, 921 (10th Cir. 2019) ("To prevail . . . under Caremark[,]the Shareholders must plead with particularity that the Board was presented with 'red flags' alerting it to misconduct at the company and that it 'consciously disregarded' those red flags. Red flags serve as proxies for Board knowledge." (quoting Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 373 (Del. 2006) and City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 59 (Del. 2017), respectively)); Rich *ex rel.* Fuqi Int'l, Inc. v. Yu Kwai Chong, 66 A.3d 963, 980–82 (Del. Ch. 2013) ("The essence of a *Caremark* claim is a breach of the duty of loyalty arising from a director's bad-faith failure to exercise oversight over the company."); South v. Baker, 62 A.3d 1, 6 (Del. Ch. 2012) ("As developed in subsequent cases and endorsed by the Delaware Supreme Court . . . directors can be held liable under [*Caremark*] for knowingly causing or consciously permitting the corporation to violate positive law . . . ."); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 125 (Del. Ch. 2009) ("[Under *Caremark* a] plaintiff can show bad faith conduct by, for example, properly alleging particularized facts that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its risks or *consciously* disregarded the duty to monitor and oversee the business."); *Stone*, 911 A.2d at 370 ("*Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.").

238 Steven A. Lauer & Joseph E. Murphy, *Compliance and Ethics Programs: What Lawyers Need to Know to Understand the Development of This Field*, 75 Bus. Law. 2541, 2550 (2020).

239 Dove Izraeli & Mark S. Schwartz, *What Can We Learn from the U.S. Federal Sentencing Guidelines for Organizational Ethics?*, 17 J. Bus. Ethics 1045, 1046 (1998) ("It may be the case that the time has arrived for

countries other than the U.S. to consider the development of legislation similar to the Guidelines, using the Guidelines as a model or framework to follow.").

240 U.N. Off. on Drugs & Crime, An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide 74 n.63 (2013).

241 U.N. Global Compact: A Guide for Anti-Corruption Risk Assessment 36 (2013).

242 *See* Organisation for Econ. Co-operation & Dev., *Who We Are*, https://www.oecd.org/about/ (last visited May 26, 2022). The member states of the OECD include the United Sates, much of Europe, and several South American and Asian nations. *Id.*

243 Organisation for Econ. Co-operation & Dev., *Anti-Corruption & Integrity Hub* (May 2022), https://www.oecd.org/corruption-integrity/.

244 Organisation for Econ. Co-operation & Dev., *OECD Anti-Bribery Convention*, https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/ (last visited on May 26, 2022).

245 Organisation for Econ. Co-operation & Dev., Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010).

246 Joe Murphy & Donna Boehme, *Commentary on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance*, 9 Rutgers J.L. & Pub. Pol'y 581, 586–88 (2012). This development is not surprising as prominent compliance and ethics professionals from the United States worked with the OECD.

247 Organisation for Econ. Co-operation & Dev., *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, https://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited May 26, 2021). As of March 2022, 38 OECD and six non-OECD countries have adopted this Convention. *Id.*

248 Maria Hernandez, *Building a Global Compliance Department*, 31 ACC Docket 28, 30 (2013).

249 James Corsiglia & Cleary Gottlieb, *Justice Department Releases Standards for Evaluating Corporate Compliance Programs*, 31 Westlaw J. Gov't Cont. 1, *3 (May 22, 2017).

250 Lauer & Murphy, *supra* note 238, at 2554.

251 *See* Competition Bureau Can., Corporate Compliance Programs (2015). This publication replaced an earlier bulletin on corporate compliance program issued on September 27, 2010. *Id.*

252 *See* Lloyd Kavanaugh & Samantha Youjia Zhang, *Is the FMCA a Watershed for Offer Due Diligence?*, LAW Talk (Feb. 12, 2016), at 40–41 (discussing Standard NZS/AS 3806 Compliance Programs).

253 Ronald E. Berenbeim & Jeffrey M. Kaplan, *The Convergence of Principle and Rule-Based Ethics Programs - An Emerging Global Trend?*, 11 Wallstreetlawyer.com: Sec. Elec. Age 1 (2007) ("While initially viewed as an experiment (a term used even by the then chair of the Sentencing Commission), the model was soon considered a success[.]") (referencing the *Guidelines Manual* Chapter Eight, Preface to *Compliance Programs and the Corporate Sentencing Guidelines* (West 1993) (statement of the Hon. William Wilkins, Chair, U.S. Sentencing Commission).

254 *See supra* note 3 and accompanying text.

255 USSG Ch.8, intro. comment.

256 *See* Izraeli & Schwartz, *supra* note 239, at 1046 ("Empirical evidence is now suggesting that the implementation of these programs is raising the level of legal and ethical behavior in corporations."); Berenbeim

& Kaplan, *supra* note 253, at 1 ("Ultimately, effective compliance initiatives can help raise the profile of ethical thought in companies."). Additional benefits, such as the efficient development of such programs may also result. *See, e.g.*, Herbert L. Thornhill, Jr. & Jeffrey M. Kaplan, *Sentencing Guidelines Offer Pointers for Compliance*, 159 Am. Banker 16, 16 (1994) ("Banks should adopt the Federal Organizational Sentencing Guidelines in order to develop cost-effective regulatory compliance programs.").

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