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Revising the Organizational Sentencing Guidelines to Eliminate the Focus on Compliance Programs and Cooperation in Determining Corporate Sentence Mitigation

Lindsay K. Eastman

Note

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On January 14, 2010, Attorney General Eric Holder made a promise to the American people: "When we find businesses or individuals whose disregard for the law has hurt the pocketbooks of average Americans, we will use every available measure to hold them accountable."[1] After explaining to the Financial Crisis Inquiry Commission[2] that fraud in the banking and securities industries are at their highest recorded levels, Holder vowed drastic action, "not just to hold accountable those whose conduct may have contributed to the last meltdown, but to deter such future conduct as well."[3] As these strong statements indicate, it is the established goal of the Department of Justice (DOJ) to vigilantly monitor and harshly punish corporate crime.

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1. Eric H. Holder, Jr., U.S. Attorney Gen., Statement of Attorney General Eric H. Holder, Jr. Appearing Before the Financial Crisis Inquiry Commission (Jan. 14, 2010) [hereinafter Statement of Eric H. Holder], *available at* http://www.fcic.gov/hearings/pdfs/2010-0114-Holder.pdf.

2. The Financial Crisis Inquiry Commission is charged with examining the causes of the recent economic collapse. Financial Crisis Inquiry Commission, http://www.fcic.gov (last visited Apr. 12, 2010). Congress created the bipartisan Commission when it enacted the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31.

3. Statement of Eric H. Holder, *supra* note 1, at 2.

The Organizational Sentencing Guidelines (Guidelines or OSG), promulgated by the United States Sentencing Commission (USSC), are focused on preventing and punishing organizational crime.[4] A court must calculate the appropriate sentence range using the OSG,[5] which allows subtraction of points from an organization's Guidelines sentence based on two factors: the existence of an effective compliance program at the time of the misconduct and cooperation in the government investigation, which includes waiver of applicable privileges, acceptance of responsibility, and self-reporting of the misconduct.[6] As such, organizations seeking to mitigate criminal punishment can do so by adopting a facially effective compliance and ethics program, and/or reporting illegal activity to prosecutors and cooperating in the investigation.

This Note argues that the OSG should be revised to eliminate sentence mitigation based on compliance programs and cooperation in order to better advance the DOJ's objectives of detecting and deterring corporate crime. Part I discusses organizational sentencing, including the development of the OSG and corresponding DOJ policy statements, and the operation of the Guidelines in practice. Part II analyzes why reducing criminal punishment based on an organization's adoption of a compliance program and cooperation with the authorities is ineffective at preventing and identifying corporate crime. To further the DOJ's goal of getting tough on organizational crime, Part

4. *See* U.S. SENTENCING GUIDELINES MANUAL § 8 (2009) [hereinafter GUIDELINES MANUAL] (explaining that the Guidelines are designed to "provide just punishment, adequate deterrence, and incentives" for organizations to police themselves). The Guidelines define an "organization" as any "person other than an individual," including "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments . . . and non-profit organizations." *Id.* § 8A1.1 cmt. n.1 (internal quotation marks omitted). This Note focuses on corporations, and uses the terms "corporations" and "organizations" interchangeably.

5. The Supreme Court has declared the mandatory application of the Guidelines unconstitutional as violating defendants' Sixth Amendment rights. United States v. Booker, 543 U.S. 220, 267 (2005). Still, the federal courts must calculate the Guidelines sentence and explain any departure from the suggested range. *See* Gall v. United States, 552 U.S. 38, 49–50 (2007) (holding that courts should begin sentencing proceedings by calculating the applicable Guidelines range; then, after making an "individualized assessment based on the facts presented," courts should ensure that any variance from the Guidelines sentence is justified).

6. *See* GUIDELINES MANUAL, *supra* note 4, § 8C2.5(f)–(g), cmt. n.12 (describing the effect of compliance programs and cooperation on the OSG score, and defining cooperation to include "the disclosure of all pertinent information known by the organization").

III proposes that the USSC eliminate the sentence mitigation provisions of the OSG, instead relying upon the general sentencing policies incorporated in the Guidelines[7] and allowing judges to consider multiple criteria and exercise discretion to fashion an appropriate punishment in the case at hand.

I. ORGANIZATIONAL SENTENCING

All three federal government branches influence sentencing[8]: Congress defines criminal conduct and sets statutory maximum and minimum sentences;[9] the executive, primarily through the DOJ, exercises prosecutorial discretion to choose whom to charge and when to plea bargain;[10] and the judiciary promulgates the Guidelines through the USSC and, of course, actually imposes sentences after conviction.[11] To fully understand the revisions to the OSG, this Note proposes that it is important to identify the roles of each branch in the sentencing process. This Part first describes the development of the OSG, including the Sentencing Reform Act and the deliberation that led to the implementation of the Guidelines. Second, this Part discusses DOJ charging and sentencing policy. Finally, it explains the operation of the Guidelines in practice, detailing the process courts use in determining an organization's sentence.

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7. Congress requires courts to consider certain factors and to craft sentences that reflect congressional judgment about the purposes of sentencing, including punishment, deterrence, and incapacitation. *See* 18 U.S.C. § 3553(a) (2006). Organizational sentences are no exception. *See id.* § 3551(c). In establishing the USSC, Congress specifically instructed it to design sentencing guidelines to effect those purposes. *See* 28 U.S.C. § 994(g) (2006).

8. *See* Mistretta v. United States, 488 U.S. 361, 364 (1989) (explaining that federal sentencing "never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government").

9. *See Ex parte* United States, 242 U.S. 27, 41–42 (1916) (holding that the judicial power to sentence defendants is subject to the constraints imposed by Congress); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (acknowledging the power of Congress to "ordain . . . punishment" for federal crimes).

10. *See* Wayte v. United States, 470 U.S. 598, 607–08 (1985) (noting that the government has significant, though not unlimited, discretion with respect to the decision to prosecute).

11. *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2009), http://www.ussc.gov/general/USSC_Overview_200906.pdf (describing the USSC as "an independent agency in the judicial branch" and acknowledging the role of federal judges in imposing sentences).

A. DEVELOPMENT OF THE ORGANIZATIONAL GUIDELINES

Corporations at common law could not be convicted of crimes.[12] At the beginning of the twentieth century, the Supreme Court first affirmed Congress's extension of criminal liability to corporations, holding that they may be held criminally responsible for the acts of their employees.[13] In spite of this, corporations did not commonly face criminal prosecution until 1984, when Congress passed the Sentencing Reform Act that provides the basis for contemporary sentencing practices.[14] Although the Reform Act focused on individual sentencing, it also implemented an enhanced structure for corporate fines. Before this Act, the law provided the same fines for individuals and corporations, typically totaling only a few thousand dollars.[15] Such low fines effectively allowed large corporations to ignore criminal laws.[16] In response, Congress more than doubled the mean fines for corporations,[17] raising felony fines for corporations up to $500,000 per count.[18] The purposes for raising these fines relate to the expanded goals of sentencing under the Reform Act: the Act shifted the focus of sentencing from rehabilitation to also include considerations of just punishment, deterrence, and incapacitation.[19]

Perhaps most importantly, the Sentencing Reform Act created the USSC to promulgate sentencing guidelines.[20] The legislative history of the Act contains few explicit references to

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12. 1 WILLIAM BLACKSTONE, COMMENTARIES *464.

13. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 496–97 (1909). Since this decision, the scope of corporate criminal liability has expanded to the actions of all agents committed within the scope of the employment and with the intent to benefit the organization. *See* United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406–08 (4th Cir. 1985).

14. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–3673 and 28 U.S.C. §§ 991–998 (2006)).

15. *See* S. REP. NO. 98-225, at 103–05 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3286–88 (explaining that the typical felony conviction for a corporation could only be punishable by a fine of $5000 to $10,000).

16. *See id.* at 106 (reasoning that corporations could shrug off low fines as a "cost of doing business," one which "may in fact be more than offset by the gain from the illegal method of doing business").

17. *See* Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. REV. 247, 257 tbl.3 (1991) (explaining that mean fines for corporations rose from $45,790 before 1984 to $102,469 after 1984).

18. 18 U.S.C. § 3571(c) (2006).

19. *See* S. REP. NO. 98-225, at 38, 50 (describing the rehabilitative sentencing model as "outmoded" and laying out new goals for federal sentencing).

20. 28 U.S.C. § 991 (2006).

organizational sentencing, but Congress made it clear that corporations were not to be exempted from sentencing reform.[21] In addition to the data suggesting that the fines imposed on organizations were doing little to deter misconduct, the Commission based its decision to proceed with the OSG on research suggesting unwarranted sentence disparity among organizations convicted of similar offenses.[22] This disparity complicated the USSC's mission, however, because it could not base the new guidelines on past sentences.[23] Still, the Commission gathered data on organizational sentencing between 1984 and 1990, which revealed the kinds of organizations sentenced, their offenses, the penalties imposed, and the factors that influenced these sentences.[24] This data provided a starting point for the draft guidelines.[25]

To complete the OSG, the USSC went through a long process, including publishing four sets of draft guidelines for comment and reviewing the approximately four hundred public comments submitted, holding five public hearings, and convening expert advisory groups.[26] The Commission-appointed Corporate Defense Attorney Working Group developed principles especially important to the USSC, urging the creation of a sentencing system that provides incentives to reduce the occurrence of crime and bases punishment on the degree of culpabili-

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21. *See* S. REP. NO. 98-225, at 166 ("Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses."). Thus, Congress did not require the USSC to promulgate organizational guidelines, but rather left the matter to the Commission's discretion. *See id.*

22. *See* Mark A. Cohen et al., *Report on Sentencing of Organizations in the Federal Courts, 1984–1987, in* U.S. SENTENCING COMM'N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, pt. III, at 10–11 (1988) (discussing this sentencing disparity).

23. Congress instructed the USSC to ascertain the "average sentences imposed" for offenses in the past, but cautioned that because of their widespread failure to "accurately reflect the seriousness" of offenses, such sentences would not be binding upon the Commission. 28 U.S.C. § 994(m) (2006).

24. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 2 (1991), *available at* http://www.ussc.gov/corp/OrgGL83091.pdf.

25. *See id.* at 10 (describing analysis of past practices as "useful" in determining base fine levels, multipliers, and other aspects of the Guidelines).

26. 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.Q. 205, 226–27 (1993). Interestingly, in the public comments on the draft guidelines, the corporate community argued in favor of substantial sentence mitigation based on the implementation of compliance programs. *See id.* at 236.

ty of the organization.[27] One key principle stipulated that the OSG should tailor fines to "recognize an organization's relative degree of culpability"[28] and to "encourage desirable behavior."[29] Lastly, public perception played a major role in the USSC's formulation of the OSG because Congress required the Commission to consider the "community view of the gravity of the offense" and the "public concern generated by the offense."[30] After engaging in this process, the USSC promulgated its first iteration of the OSG in 1991, incorporating the principles promulgated by Congress and its advisory groups. When the OSG went into effect, the focus of organizational sentencing shifted to emphasize corporate self-governance through effective compliance and ethics programs, as well as acceptance of responsibility and cooperation in investigations.[31]

In 2004, the Sentencing Commission amended the Guidelines to impose stricter criteria for effective compliance programs, establishing a separate section to more fully address the key elements that programs should incorporate.[32] To be considered effective under the revised OSG, organizational compliance programs must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[33] As part of its compliance program, an organization must "exercise due diligence to prevent and detect criminal conduct" and "establish standards and procedures to prevent and detect criminal conduct."[34] Further, to receive sentence mitigation, a corporation must engage in self-assessment and regularly evaluate the risk of criminal conduct.[35] The Guidelines thus establish a "carrot and stick" approach to compliance programs: organizations found to have effective programs can reduce their potential federal criminal fines up to ninety-five

27. *Id.* at 227.

28. *Id.* at 228 (internal quotation marks omitted).

29. GUIDELINES MANUAL, *supra* note 4, ch. 8, introductory cmt. (explaining that the purposes underlying the OSG are to provide "just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct").

30. 28 U.S.C. § 994(c)(4)–(5) (2006).

31. *See* Nagel & Swenson, *supra* note 26, at 210 (describing dramatic sentence reductions available under the OSG to organizations that "demonstrate in specified ways [their] antipathy toward lawbreaking").

32. GUIDELINES MANUAL, *supra* note 4, § 8B2.1.

33. *Id.* § 8B2.1(a)(2).

34. *Id.* § 8B2.1(a)(1), (b)(1).

35. *Id.* § 8B2.1(c).

percent.[36] Thus, as the Sentencing Commission explained in the introduction to the Guidelines, the OSG are based on the premise that compliance and ethics programs can effectively prevent and detect organizational crime.[37]

The revisions to the 2004 Guidelines, along with the passage of the Sarbanes-Oxley Act,[38] increased the emphasis on full cooperation in government investigations.[39] This cooperation must occur before any "imminent threat" of disclosure or investigation, and within a "reasonably prompt" time after discovering the misconduct.[40] In commentary since deleted from the Guidelines, the Commission explained that such full cooperation may require the corporation to waive the attorney-client privilege and work-product protections when "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[41] Organizations that cooperate in investigations may even be given a sentence below the congressionally established statutory minimum to reflect the organization's "substantial assistance" in the corporate investigation, or in the prosecution of another person.[42] In contrast, a corporation deemed uncooperative in an investigation can be found complicit in the illegal activity and have its fines multiplied by a factor of four.[43] Indeed, the current version of the OSG places more emphasis on the development of

36. Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 J. CORP. L. 467, 467 (2007).

37. *See* GUIDELINES MANUAL, *supra* note 4, ch. 8, introductory cmt. ("These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.").

38. Pub. L. No. 107-204, § 805(a)(5), 116 Stat. 745, 802 (2002) (directing the USSC to revise the Guidelines to ensure that they "are sufficient to deter and punish organizational criminal misconduct").

39. *See* GUIDELINES MANUAL, *supra* note 4, § 8C2.5 (providing a much lower "culpability score" for corporations that fully cooperate in investigations than for those deemed uncooperative).

40. *Id.* § 8C2.5(g)(1). The Guidelines offer a smaller two-point reduction "[i]f the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct." *Id.* § 8C2.5(g)(2).

41. *Id.* § 8C2.5 cmt. n.12.

42. 18 U.S.C. § 3553(e) (2006).

43. Fiorelli & Tracey, *supra* note 36, at 467–68.

compliance programs and cooperation with prosecutors than ever before.

B. JUSTICE DEPARTMENT SENTENCING POLICY

After the promulgation of the OSG, the DOJ issued policy statements addressing how it planned to effectuate the Guidelines. The DOJ's first statement on the sentencing of corporations came in the 1999 Holder Memo, which provided eight factors for prosecutors to consider when deciding whether to charge organizations, including any voluntary waiver of the attorney-client and work-product protections and the existence of an effective compliance program at the time of the misconduct.[44] Increased public awareness of corporate fraud prompted the DOJ to issue the Thompson Memo in 2003, with the goal of creating an "increased emphasis on and scrutiny of . . . a corporation's cooperation" with federal investigators in both charging and sentencing.[45] The Thompson Memo preserved the eight Holder factors, including the waiver language, and emphasized the need to ensure that corporate compliance measures were not just "paper programs."[46] Thus, in interpreting the OSG, the DOJ has chosen to focus on pursuing waiver of the attorney-client and work-product privileges as an important element in cooperation.

Following the issuance of the Thompson Memo, the Sentencing Commission in 2004 amended the OSG to emphasize the importance of full cooperation in government investigations.[47] Responding to criticism over the waiver policy established in the 2004 amendments, the DOJ in 2006 issued the McNulty Memo[48] instructing prosecutors to request attorney work product and privileged materials only "when there is a

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44. Memorandum from Eric H. Holder, Deputy Attorney Gen., to All Component Heads & U.S. Attorneys 3–4 (June 16, 1999), *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf.

45. Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys, cover letter (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

46. *Id.* at 3–4, 9–10.

47. *See* GUIDELINES MANUAL, *supra* note 4, § 8C2.5 (providing a much lower culpability score for corporations that fully cooperate in investigations than for those that do not).

48. Deputy Attorney General Paul McNulty replaced the Thompson Memo on December 12, 2006. Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, cover letter, at 2 (Dec. 12, 2006) [hereinafter McNulty Memo], *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

legitimate need for the privileged information to fulfill their law enforcement obligations,"[49] and to ask only for the "least intrusive waiver necessary to conduct a complete and thorough investigation."[50] Currently, prosecutors are only permitted to request certain privileged materials if the initial facts disclosed "provide[] an incomplete basis to conduct a thorough investigation."[51] Even though the McNulty Memo facially reduced prosecutors' discretion in requesting privilege waivers, many believe it does not go far enough to protect individual and corporate rights. As such, corporations are still encouraged to waive privileges or face being regarded as uncooperative in the investigation and incurring greatly increased fines under the OSG.

C. THE GUIDELINES IN OPERATION

Judges calculating a fine under the OSG proceed in five general steps.[52] First, the court must identify the offense level of the crime. The Guidelines assign offense levels to each crime based on seriousness, with level one being the least severe and level forty-three the most.[53] Second, the judge looks to the fine table that correlates offense level with the proper fine.[54] Third, the court calculates the culpability score of the organization based on its prior history, cooperation in the investigation, acceptance of responsibility, and whether it had adopted a compliance program at the time of the misconduct.[55] Each organization begins with a culpability score of five, which is adjusted downward or upward based on the presence of mitigating or aggravating factors. The OSG mandate a five-point reduction in the sentence calculation if the organization fully cooperates in the government investigation and accepts responsibility for the criminal conduct.[56] The Guidelines require an additional three-point sentence reduction if the crime occurred in spite of the

49. *Id.* at 8.

50. *Id.* at 9.

51. *Id.* at 10.

52. For a more thorough explanation of the Guidelines sentencing process, see Paul E. McGreal, *An Overview of Corporate Compliance and Ethics Programs, in* ADVANCED CORPORATE COMPLIANCE AND ETHICS WORKSHOP 2009, at 139, 142–44 (PLI Corporate Law & Practice, Course Handbook Series No. B-1776, 2009).

53. Specific offense levels are established in Chapter Two of the Guidelines. *See* GUIDELINES MANUAL, *supra* note 4, ch. 2. The OSG expressly incorporate those offense levels. *See id.* § 8C2.3.

54. *See id.* § 8C2.4.

55. *See id.* § 8C2.5.

56. *Id.* § 8C2.5(g)(1).

existence of an effective compliance and ethics program at the time of the misconduct.[57] Fourth, the court identifies any fine multipliers that correspond to the organization's culpability score; the top multiplier range is 2.00 to 4.00 for an organization with a high culpability score, and the lowest range is 0.05 to 0.20 if the culpability score is low.[58] Fifth, and last, the judge must set the actual fine within the established range, considering factors such as the seriousness of the offense, the organization's role in the offense, any nonpecuniary loss caused to others, and the gain to the organization from the offense.[59]

Additionally, federal sentencing law indicates that judges should consider general sentencing policy and goals along with the Guidelines range.[60] The pertinent sentencing policy is outlined in 18 U.S.C. § 3553(a), in which Congress establishes several factors (the § 3553(a) factors) for courts to consider in sentencing.[61] The § 3553(a) factors include the nature and circumstances of the offense; history and characteristics of the defendant; seriousness of the offense; and the need to promote respect for the law, provide just punishment, and afford adequate deterrence to future criminal conduct.[62] Historically, the § 3553(a) factors were used sparingly in sentencing. After the Supreme Court made the guidelines nonmandatory in 2005,[63] however, courts began to look to the § 3553(a) factors when sentencing organizations, especially when deciding what sentence to impose within the calculated Guidelines range.[64]

The rest of this Note demonstrates that the OSG sentence-mitigation factors are ineffective at deterring and detecting corporate crime, and suggests a proposal for reform. The next Part discusses the evidence showing that the focus on com-

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57. *Id.* § 8C2.5(f)(1) ("If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in § 8B2.1 (Effective Compliance and Ethics Program), subtract 3 points."). The Manual withholds mitigation in situations when "after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities." *Id.* § 8C2.5(f)(2).

58. *See id.* § 8C2.6.

59. *See id.* § 8C2.8.

60. *See* United States v. Booker, 543 U.S. 220, 224 (2005) (explaining that federal sentencing law "requires judges to take account of the Guidelines together with other sentencing goals").

61. 18 U.S.C. § 3553(a)(1)–(7) (2006).

62. *Id.* § 3553(a)(1)–(2).

63. *Booker*, 543 U.S. at 267.

64. *See* Timothy A. Johnson, Note, *Sentencing Organizations After* Booker, 116 YALE L.J. 632, 642 (2006).

pliance and cooperation is misplaced. Part III then details revisions to the OSG, including eliminating sentence mitigation based on compliance and cooperation.

II. THE MISPLACED FOCUS ON COMPLIANCE AND COOPERATION

The mandatory sentence reduction based on compliance programs and cooperation with the prosecution is unwarranted because the available evidence shows that these efforts do not actually increase deterrence or detection of corporate crime. Indeed, incorporating these mitigating factors into the OSG actually undermines the rights of organizations and their employees.

A. COMPLIANCE AND ETHICS PROGRAMS

Although many organizations have adopted compliance programs in hopes of receiving sentence mitigation under the OSG,[65] evidence suggesting that these programs are actually successful at preventing and detecting crime within corporations is scarce.[66] Several possible reasons exist for this ineffectiveness.

Organizations have incentives to adopt "window-dressing" compliance programs that facially meet the OSG requirements but are substantively ineffective.[67] Supporting a compliance program that meets all the various requirements of the OSG is very costly, and can place a large financial burden on a corporation.[68] The programs are very expensive both to create and maintain, and companies seeking sentencing mitigation are

65. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1383–84 (1999).

66. *See* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 591–97 (2004); *cf.* Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 361–63 (2002) (noting that there is no proof that corporate criminal liability serves a deterrent effect); Marc S. Raspanti & Gregg W. Mackuse, *What's Really So Important About an Effective Compliance Program?*, CHAMPION, May 2007, at 22, 23 (indicating that many sentenced organizations had in place robust compliance programs).

67. For examples of "window-dressing" compliance programs, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003).

68. Frank O. Bowman, III, *Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing*, 39 WAKE FOREST L. REV. 671, 680 (2004).

also required to comply with onerous evidentiary documentation requirements to prove the effectiveness of their programs.[69] The technology required to compile the necessary data for reporting to government agencies alone can be very expensive, as can the maintenance of a compliance officer at the management level.[70] Due to the large number of resources that must be dedicated to compliance program development in order for it to be successful, coerced implementation of compliance programs can be especially difficult for small corporations.[71] The immense financial and other demands of compliance programs offer further disincentives for corporations to develop these programs.

Furthermore, as the specific elements of compliance programs are prescribed by the government, there is a likelihood that the program will not be adequately tailored to the needs of the organization.[72] When an organization designs its programs to fit legal requirements rather its unique needs, the organization suffers from inefficient allocation of resources and is put at a competitive disadvantage.[73] By establishing minimum re-

69. These onerous burdens manifest in a number of areas of regulation and other contexts. *See, e.g.*, Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 942 (2006) (discussing burdens associated with corporate attorney-client privilege and work-product doctrine); Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care as Responsibility for Systems,"* 31 J. CORP. L. 949, 959 (2006) (noting the general costs associated with documenting compliance).

70. *See* Paul E. Fiorelli, *Fine Reductions Through Effective Ethics Programs*, 56 ALB. L. REV. 403, 410 (1992).

71. *See* Paul E. McGreal, *Legal Risk Assessment After the Amended Sentencing Guidelines: The Challenge for Small Organizations*, 23 CORP. COUNS. REV. 153, 196–98 (2004) (discussing the unique challenges faced by small organizations when designing compliance programs).

72. *See* Jean K. FitzSimon & Paul McGreal, *Corporate Compliance Survey*, 60 BUS. LAW. 1759, 1761 (2005); Richard S. Gruner, *A Compendium of Compliance Program Standards: Statutory, Regulatory, Judicial, and Private Sources*, *in* 1 CORPORATE COMPLIANCE INSTITUTE 2004, at 641, 683 (PLI Corporate Law & Practice, Course Handbook Series No. B-1417, 2004); *cf.* Krawiec, *supra* note 67, at 518 (highlighting inadequate tailoring as applied to employment discrimination policies). *But see* Fiorelli, *supra* note 70, at 409 (noting that the "Guidelines' fine scheme takes into account a company's size" in an attempt to better account for higher caliber managers in large organizations).

73. *Cf.* Langevoort, *supra* note 69, at 960–64 (noting that high-quality compliance programs are costly, and thus provide less benefit to the shareholder than pure market-based mechanisms for curtailing fraud). *But see* Charles J. Walsh & Alissa Byrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 674–75 (1995).

quirements for compliance programs, the Guidelines encourage corporations to establish compliance programs that meet these obligations, but nothing more.[74] The requirements of the law can become counterproductive if companies get so caught up in complying with the letter of the law that they forget to consider the spirit of the law, which is designed to encourage corporations to develop programs that not only conform to legal requirements, but also foster a spirit of true compliance and ethics within the organization.[75] The bottom line is that the checklist approach used in the OSG is unlikely to encourage the development of effective compliance programs.[76]

Further, the specific elements of effective compliance and ethics programs outlined in the OSG may not result in the development of the best compliance programs in all circumstances.[77] For example, the Guidelines ignore the concepts of shared corporate values and an organizational tone of compliance,[78] which have been found to be integral in the effectiveness of compliance programs.[79] Empirical data suggest that values-based compliance programs are more effective in deterring criminal conduct than the currently emphasized compliance-based programs.[80] Furthermore, the OSG elements are

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74. *Cf.* Jeffrey L. Seglin, *Will More Rules Yield Better Corporate Behavior?*, N.Y. TIMES, Nov. 17, 2002, § 3 (Sunday Edition), at 4 (noting that with new regulations imposed on businesses, they will likely adhere to the letter of the law, but then try to find ways to get around it).

75. *See* Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?*, 39 WAKE FOREST L. REV. 565, 573 (2004); Seglin, *supra* note 74.

76. *See* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 114.

77. *See* Linda Klebc Trevino et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 138–39 (1999).

78. *Cf.* Krawiec, *supra* note 66, at 599 (noting that the current legal system ignores these kinds of qualities in general).

79. *See* Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 367, 372 (2002); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 966 (2003); Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 111; Trevino et al., *supra* note 77, at 143.

80. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 716 (2002); Trevino et al., *supra* note 77, at 135 (explaining that a compliance-based approach focuses on "preventing, detecting, and punishing violations of the law," whereas the more effective values-based approach counsels organizations to "define organizational values and encourage employee commitment to ethical aspirations").

vague as to the exact requirements for effective compliance programs, creating possible room for exploitation by opportunistic organizations.[81]

It is also difficult for organizations to implement compliance programs that will satisfy all the federal laws requiring such programs.[82] The Guidelines represent only the judicial branch's policy on compliance programs, and do not guarantee compliance with specific laws in other areas.[83] Because organizations are being pulled in many different directions when it comes to compliance, they are likely to get bogged down in the various government guidance and lose focus on implementing a program that will truly help the organization comply with the law and detect any misconduct.

The fact that any fraud discovered by a compliance program may be used against the organization in criminal and civil proceedings is another disincentive for corporations to vigorously investigate and report violations.[84] Indeed, the Advisory Group on the OSG cited this problem as one of the primary disincentives for corporations to institute effective compliance programs.[85] This fact highlights another practical problem of the Guidelines: an organization found to have an ineffective compliance program can be subject to greater liability than one with no program at all.[86] The organization's increased risk of liability as a result of its own compliance program logically leads a corporation to either choose not to implement a program at all, or to only establish a compliance program to the extent that it meets the minimum legal requirements.[87]

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81. *Cf.* Krawiec, *supra* note 66, at 592–93.

82. For a list of all federal corporate compliance requirements, see Fitz-Simon & McGreal, *supra* note 72, at 1767–71; Gruner, *supra* note 72, at 644–82.

83. *See* Gruner, *supra* note 72, at 643–44.

84. *See* Fiorelli, *supra* note 70, at 419; Krawiec, *supra* note 66, at 576. *But see* Amitai Aviram, *In Defense of Imperfect Compliance Programs*, 32 FLA. ST. U. L. REV. 763, 769–72 (2005) (noting that an effective compliance program, combined with nonlegal sanctions, provides an incentive for corporations to investigate and report malfeasance).

85. U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 108 (2003), http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf.

86. *Cf. id.* (stating that a corporation's compliance program generates evidence against the corporation for use by future adversaries).

87. *See* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 14–15 (2008).

Furthermore, organizations are not guaranteed sentencing mitigation for implementing a compliance program.[88] The Sentencing Commission reported that from 1993–2005, of the nineteen organizations sentenced with compliance programs, only three received sentence mitigation.[89] Because compliance programs do not guarantee sentence mitigation,[90] corporations are further discouraged from implementing truly effective programs.[91]

Doubt also exists as to whether prosecutors and courts are well equipped to decide whether or not a compliance program is legally effective.[92] The ultimate sentencing decision is made by a federal judge, who must consider the factors enumerated in the Guidelines to decide what mitigating factors, if any, to apply to the defendant's sentence.[93] Federal judges usually are not in a position to effectively evaluate the success of compliance programs.[94] Additionally, organizations that reach the sentencing phase of a criminal proceeding have a difficult time answering the key question: if the corporation had an effective compliance program, why did the program fail to prevent the crime for which the corporation was just convicted?[95] This is

88. Phillip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, U.S. ATT'YS BULL., Mar. 2002, at 19, 24.

89. Kristen K. McGuffey & Thomas C. Soldan, *Right-Sizing: Customizing Compliance to the Small Corporation*, *in* CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2008, at 97, 102–03 (PLI Corporate Law & Practice, Course Handbook Series No. B-1661, 2008).

90. *See* Cindy R. Alexander et al., *The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations*, 12 FED. SENT'G REP. 20, 21–23 (1999) (indicating that Guidelines-constrained corporations, on average, experienced higher total sanctions than before the Guidelines were implemented).

91. *Cf.* V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1270 (2000) (noting that organizations do not necessarily have incentives to adopt "optimal reporting measures").

92. *Id.* at 1271–72 (arguing that the accurate determination of an "effective" compliance program is too specialized for federal judges and prosecutors to accomplish consistently).

93. *See id.*

94. *See id.*; Krawiec, *supra* note 66, at 593–95 (explaining that determining the effectiveness of a compliance program is difficult because "the indicators of an effective internal compliance structure are easily mimicked, and the true level of effectiveness is difficult for any decisionmaker lacking perfect information to determine"). For an example of how to remedy this deficiency, see V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1479 (1996) (describing how to avoid costs of suboptimal corporate criminal prosecution by having the same judge hear both the case against the accused individual and the case against the corporation).

95. *See* Urofsky, *supra* note 88, at 24.

the inherent problem with all corporate self-regulation: by the time the government gets involved with the internal compliance structure, the program has already failed to prevent misconduct.[96] These problems make it likely that any sentence mitigation will be applied inconsistently, and perhaps not applied at all to organizations with truly effective compliance programs.[97] Furthermore, it may not be long before public outrage builds over the sentence reductions given to companies that attempt self-regulation but obviously fail, or else they would not be facing criminal liability.[98] This lack of oversight on the part of the government will only cause problems for organizations and the government, which is already seen by the public as being too lax on corporate crime.[99]

Although the focus on compliance programs has increased due to societal pressure on the government and companies to crack down on corporate crime, the current scheme of self-regulation is unlikely to earn many points in the public's opinion. Recent corporate scandal has increased the public's wariness of organizational misconduct,[100] and the continued emphasis on self-implemented compliance programs is not going to fix this problem. The public sees efforts of corporate self-regulation as ineffective and disingenuous, and questions why the government is allowing federal money to be spent based on the certifications of corporations.[101] Because much of an organization's success depends on its public image, and self-regulation has been shown to increase the public mistrust in an industry, the current emphasis on compliance programs may be bad for business.[102]

Studies show that the public mistrust of corporate self-policing is prudent; evidence demonstrates that compliance programs do little to prevent organizational crime. The author of one study of compliance-program effectiveness opined that companies' efforts to develop these programs are frustrated by

96. *Id.*

97. *See* Krawiec, *supra* note 66, at 582.

98. Aviram, *supra* note 84, at 770.

99. *See id.* at 773 ("Evidentiary privileges do not assuage the public's suspicion of misconduct; they may agitate it.").

100. *See* Paul J. McNulty, Deputy Attorney Gen., Statement of Paul J. McNulty Appearing Before the Committee on the Judiciary Concerning "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations" (Sept. 12, 2006) [hereinafter Statement of Paul J. McNulty], *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=2054&wit_id=2742.

101. *See* Aviram, *supra* note 84, at 777.

102. *Id.* at 773, 777.

the lack of clarity in the OSG program criteria.[103] Two additional studies found positive correlations between organizational compliance programs and legal violations.[104] The authors attributed this correlation to the "possibility that internal compliance structures, such as those recommended by the [Guidelines], may serve primarily a window-dressing function designed only to reduce legal liability."[105] Additionally, the recent shift of the Guidelines to incorporate a focus on ethics is unlikely to improve the effectiveness of these programs because numerous studies show that ethics programs are similarly ineffective.[106] Other evidence demonstrates no significant relationship exists between ethics codes and the conduct of employees at any level of the organizations.[107]

Even the Sentencing Commission Advisory Group concedes that it knows of no empirical evidence showing that the Guidelines have caused organizations to implement *effective* compliance programs.[108] Additional anecdotal evidence from government officials and corporate investigators involved in prosecuting organizational fraud cases also supports a conclusion that compliance programs as established in the OSG do not actually reduce corporate misconduct.[109] Perhaps the most noto-

103. Lori S. Richardson Pelliccioni, *New Evidence in the World of Litigating Health Care Compliance Cases: The Compliance Effectiveness Study*, 3 SEDONA CONF. J. 175, 175 (2002).

104. M. Cash Mathews, *Codes of Ethics: Organizational Behavior and Misbehavior*, *in* 9 RESEARCH IN CORPORATE SOCIAL PERFORMANCE AND POLICY 107, 125–26 (William C. Frederick & Lee E. Preston eds., 1987); McKendall et al., *supra* note 79, at 380.

105. Krawiec, *supra* note 66, at 593.

106. *See* Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical Codes*, 15 BUS. & PROF. ETHICS J. 21, 22 (1996); Gary R. Weaver et al., *Corporate Ethics Practices in the Mid 1990's: An Empirical Study of the Fortune 1000*, 18 J. BUS. ETHICS 283, 293 (1999).

107. *See, e.g.*, Joseph L. Bardaracco & Allen P. Webb, *Business Ethics: A View from the Trenches*, 37 CAL. MGMT. REV. 8, 14–15 (1995); Margaret Anne Cleek & Sherry Lynn Leonard, *Can Corporate Codes of Ethics Influence Behavior?*, 17 J. BUS. ETHICS 619, 619, 627–28 (1998).

108. *See* U.S. SENTENCING COMM'N, *supra* note 85, at 35 (2003) ("It has been difficult to empirically test whether the organizational sentencing guidelines' success in raising corporate America's consciousness about compliance programs has translated into the *actual prevention* or *deterrence* of organizational crime, however, and the Advisory Group is not aware of any empirical evidence that the widespread movement to adopt compliance programs has resulted in the institution of *effective* compliance programs.").

109. *See* Stephen Andersen, *Hidden Troubles: Despite More Rigorous Compliance Programs, Corporate Fraud Still Thrives*, CORP. LEGAL TIMES, Apr. 2004, at 40, 40–42 (describing the insufficiencies of compliance programs as noted by corporate and government investigators).

rious example of a failed compliance program is the one in place at the time of the Enron collapse, which fully incorporated the Guidelines recommendations.[110] The Enron compliance program failed when the CEO ignored red flags regarding improper, related-party transactions.[111] The Enron scandal highlights the problems of allowing organizations to self-police and is an example of a corporation adopting a "window-dressing" program with no effectiveness in actually preventing misconduct.[112]

Because corporate compliance problems under the OSG are burdensome and ineffective, the emphasis placed on these programs does not serve the Guidelines' goals of preventing and detecting corporate crimes. The next section addresses another problem with the OSG approach, specifically showing that offering charge and sentence consideration in exchange for cooperation with government investigations has the potential to breach corporate and individual rights.

B. DISCLOSURE AND COOPERATION

The policy of offering sentence mitigation to encourage cooperation derogates the rights of corporations and their employees, and does not promote the OSG goals of preventing and deterring organizational crime. This section discusses the harms that befall companies and individuals as a result of this cooperation policy.

1. Cooperation Harms the Organization

The DOJ and USSC policy of encouraging cooperation is damaging to organizations in many ways.[113] The most problematic aspect of this policy is that cooperation often involves a full waiver of the attorney-client privilege and work-product

110. Stuart Gilman, President of the Ethics Res. Ctr., Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 60 (Nov. 14, 2002), *available at* http://www.ussc.gov/corp/ph11_02/plenary1.pdf.

111. *See* Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2130 (2003).

112. *Id.* at 2129–30.

113. *See* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why it Is Misguided)*, 48 VILL. L. REV. 469, 544–45 (2003). *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 690–91, 745–52 (1997) (describing the shortcomings of the DOJ corporate liability policy).

protections.[114] As the Supreme Court explained in *Upjohn Co. v. United States*, impairing the attorney-client privilege and work-product protections will "not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten to limit the valuable efforts of corporate counsel to ensure their clients' compliance with the law."[115] In considering the corporate waiver of privilege as a factor in evaluating cooperation, the government drives a wedge between corporations and their employees, which can harm both parties.[116]

For example, the waiver policy incentivizes corporations to disclose the details of conversations between employees and company lawyers, and thus forces corporations to choose between betraying the confidences of employees and facing enhanced punishment from failure to fully cooperate.[117] The consideration of waiver as an element of cooperation negatively affects internal investigations because corporate counsel must explain that they are lawyers for the corporation, not the individual employees, and that the corporation could choose to waive the privilege.[118] Because employees who know that their statements could be disclosed to the government are less likely to speak candidly with corporate counsel, the waiver policy actually defeats the Guidelines' objective of encouraging internal reporting of corporate misconduct and undermines corporations' internal compliance initiatives.[119] The Guidelines thus chill the ability of lawyers to advise corporate clients, who fear that communications might be turned over to the prosecution.[120]

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114. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 347–52 (2007); Breckinridge L. Willcox, *Attorney/Client Privilege Waiver: Wrongheaded Practice?*, 6 BUS. CRIMES BULL., Jan. 2000, at 1, 1.

115. Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).

116. *See* N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, WASH. LAW., Mar. 2005, at 32, 34.

117. *Id.* at 34–36, 44.

118. *Id.* at 35–36.

119. *See id.*; Joseph F. Savage, Jr. & Melissa M. Longo, *'Waive' Goodbye to Attorney-Client Privilege*, 7 BUS. CRIMES BULL., Oct. 2000, at 1, 4 ("[T]he DOJ's policy . . . serves to discourage the acquisition of legal advice by corporations in the first place. Indeed, it may well result in less written legal advice."); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 156–57 (2000).

120. Zornow & Krakaur, *supra* note 119, at 149.

The Guidelines' requirement that the cooperation be timely further diminishes the ability of corporate counsel to give advice.[121] Because the decision to cooperate must be made promptly upon discovery of the criminal conduct, all the facts may not be known at the time of the decision, which deprives the corporation of the opportunity to weigh the risks and benefits associated with any waiver.[122] Furthermore, waiving the privilege may expose the corporation to civil liability as third parties are able to obtain any privileged disclosures.[123] Courts generally do not recognize the validity of selective waivers, and once formerly privileged information is disclosed it is considered to be part of the public domain, as is any information related to the subject matter of the waived material.[124]

Although the DOJ contends that corporations are only requested to waive privilege when necessary, a recent surge in such waiver requests is well-documented.[125] A survey performed by the Association of Corporate Counsel found that nearly seventy-five percent of both inside and outside counsel responded that, in their experience, government agencies expect a corporation to waive legal privileges during investigations.[126] Of the respondents who confirmed that they or their clients had been subject to investigation in the past five years, approximately thirty percent of in-house counsel and fifty-one percent of outside counsel said that the government expected waiver in order to engage in bargaining or for the corporation to be eligible for more lenient treatment.[127] Of the over 675 responses to the survey, almost half of general counsel experienced some kind of privilege erosion caused by sentencing policy.[128] These results show that waiver requests are becoming

121. Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 122–23 (2003).

122. *Id.* at 112–14; *see also* Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 323 (2003).

123. Finder, *supra* note 121, at 114–20; *see also* Jed S. Rakoff, *Coerced Waiver of Corporate Privilege*, N.Y. L.J., July 13, 1995, at 3, 33.

124. *See* Finder, *supra* note 121, at 123–24.

125. *See* Tamara Loomis, *Privilege Waivers: Prosecutors Step Up Use of Bargaining Chips*, N.Y. L.J., Sept. 7, 2000, at 5, 8; Steve Seidenberg & Tamara Loomis, *DOJ Gets Tougher on Corporations*, NAT'L L.J., Feb. 24, 2003, at A13, A15.

126. AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS 3 (2005), http://www2.acc.com/Surveys/attyclient2.pdf.

127. *Id.*

128. *Id.* at 4.

increasingly prevalent, which is making the waiver of privilege almost a matter of routine in government investigations.

Important lawyer advocacy groups including the American Bar Association and Coalition to Preserve the Attorney-Client Privilege decry the DOJ waiver policy. These organizations contend that the policy compels organizations to waive the attorney-client privilege and work-product protections, undermines internal compliance programs, and pressures corporations to unfairly punish employees during government investigation.[129] In addition to lawyer groups, some former DOJ officials similarly support overturning the Thompson Memo policy because it unfairly impacts individuals and tends to reward corporations that punish employees for asserting their constitutional rights.[130] For example, Andrew Weissmann, the former Director of the DOJ Enron Task Force, admits that the Guidelines do not do enough to protect the attorney-client privilege, which negatively impacts organizations and their associates.[131] Furthermore, Weissmann contends that a lack of supervision over individual prosecutors exacerbates the negative effects of the current policy, especially because many prosecutors lack expertise in corporate matters.[132] As such, the DOJ's most recent statement of its wavier policy allows prosecutors to request privilege waivers with a relatively low showing of need and little oversight. For these reasons, allowing the government to coerce cooperation endangers organizational rights, and the next section shows how these practices also jeopardize the rights of individual employees.

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129. *See* Am. Bar Ass'n Task Force on Attorney-Client Privilege, Resolution Adopted by the House of Delegates (Aug. 7–8, 2006), http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_recommendation_adopted.pdf (opposing federal corporate cooperation policies as established in the McNulty Memo); R. WILLIAM IDE, III, AM. BAR ASS'N TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT (Aug. 2006), http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

130. *See, e.g.*, Letter from Former Senior DOJ Officials to Hon. Alberto Gonzales, Attorney Gen. (Sept. 5, 2006), *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05_privwaiv_ frmrdojltr.pdf.

131. *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 134–35 (2007) (statement of Andrew Weissmann, Partner, Jenner & Block LLP).

132. *Id.* at 130–31.

2. Cooperation Compromises Employee Rights

The Guidelines' consideration of corporate cooperation in charging and sentencing decisions also threatens the rights of employees. The McNulty Memo directs prosecutors to consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" in making charging decisions, and so encourages the government to pursue individual criminal convictions.[133] The Memo also instructs prosecutors to proceed against individual defendants even when corporate prosecution is deferred or when a guilty plea is entered for the entity.[134] The McNulty Memo states that a corporation's cooperation in selecting targets of employee prosecution is critical because prosecutors face various obstacles when attempting to determine individuals responsible for the corporate misconduct, including shared lines of authority within the corporation; dispersed records and personnel; and the intervening promotion, transfer, or termination of culpable or knowledgeable employees.[135] Thus, the DOJ policy asks companies not only to raise the alarm when misconduct occurs, but also to assist in identifying and prosecuting individual employees.[136]

Additionally, in attempting to cooperate with the government, corporations often deny legal fee advances to employees facing prosecution and refuse to share information or enter into joint defense agreements with defendant employees.[137] Corporations are expected not only to withdraw financial support from suspected employees, but also report the documents that employees request for use in their defenses, thus revealing individual defense strategies to prosecutors.[138] Employees also are often deprived of the ability to communicate confidentially with their employers and so are denied an important method of

133. McNulty Memo, *supra* note 48, at 4.

134. *Id.* at 18.

135. *Id.* at 7.

136. *Cf.* Brown, *supra* note 69, at 937–41 (discussing the barriers to employees engaging in candid communication with corporate attorneys).

137. *See* Lawton P. Cummings, *The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege*, 109 W. VA. L. REV. 669, 674–77 (2007) (explaining the problems individual employees face when the corporation waives attorney-client privilege, including the exposure of potentially incriminating statements); Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 345 (2008).

138. *See* Duggin, *supra* note 137, at 400–02 (discussing the negative effects of corporate withdrawal of financial support to individual employee defendants).

gathering information that could be critical to formulating the defense.[139]

Employee rights may also be compromised during the course of internal compliance investigations, which are often conducted by corporate counsel.[140] In using the employer's power to coerce individual employees into cooperating with the investigation, the government circumvents employees' Fifth Amendment privilege against self-incrimination.[141] Although an employee questioned by the government directly has a right to claim the Fifth Amendment, the same privilege does not exist during a corporate internal investigation, even though the DOJ's cooperation policy makes it likely that the conversations will be disclosed to the government eventually.[142] Furthermore, employees do not always receive fair warning of the extent to which the corporation's interests diverge from their own.[143] When employees are questioned, they are generally offered the classic *Upjohn* warnings that advise them that corporate counsel represents the corporation, but are not directly informed that any statements made during the internal investigation may be turned over to the government if the corporation so chooses.[144] If an employee refuses to cooperate in an internal investigation, he may be terminated and face a cloud of suspicion surrounding the alleged wrongdoing.[145] Employees may also be encouraged to point the finger at coworkers in order to avoid blame, which may cause disloyalty within the corporation.[146] Using scapegoats to avoid responsibility is a time-honored practice, and the current sentencing policy does not

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139. *Id.* at 394–99.

140. Inna Dexter, Note, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515, 526 (2007) ("[I]ncreased focus on cooperation and individual accountability creates the potential for coercion and violation of individual rights, as the resources of the companies and the prosecutors greatly outweigh the resources available to individual employees.").

141. Duggin, *supra* note 137, at 346.

142. *See* Andrew Longstreth, *Double Agent*, AM. LAW., Feb. 2005, at 68, 72–73.

143. *See generally* Colin Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1065–66 (2007) (discussing ethical concerns for attorneys performing internal investigations).

144. *See* Longstreth, *supra* note 142, at 70–71.

145. *See* Marks, *supra* note 143, at 1092–93.

146. *See* William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 652 (2002).

guarantee that the most culpable employees will be punished for corporate crime.[147]

Giving prosecutors access to employee statements made during internal investigations is further problematic because it is often these statements, rather than the alleged underlying misconduct, that form the basis for individual criminal liability.[148] An employee fearing prosecution may display evasive behavior that can be charged as obstructing justice, even though that employee may have been innocent of any wrongdoing prior to questioning. Relatedly, the Sarbanes-Oxley Act heightens the vulnerability of individual employees.[149] Provisions of the Act expand the definition of obstruction, enhance potential penalties for individual criminal misconduct, and require that executives of public companies personally certify financial statements filed with the SEC.[150] By strengthening the enforcement power of prosecutors and adding charging options for obstruction, Sarbanes-Oxley "increases the exposure of corporate managers and directors to criminal sanctions."[151]

Although the use of sentence mitigation to reward corporate cooperation is harmful in many regards, the Sentencing Commission and Justice Department still support the policy.[152] Prosecutors justify corporate-cooperation demands as a means of leveraging limited government resources to hold rich and powerful organizations accountable.[153] Former Deputy Attorney General McNulty asserted that cooperation incentives are essential tools in holding corporate wrongdoers accountable, and that the policies provide "an effective balance between the interests of the business community and the investing public."[154] McNulty emphasized the voluntary nature of the waiver, and asserted that "privilege waiver is often volunteered or agreed to by a company for specific, business reasons," in order to expe-

147. *Id.* at 659–60.

148. *See id.* at 651–57.

149. *See* Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, CHAMPION, Aug. 2003, at 22, 24.

150. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 777, 802, 804–06 (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

151. Moohr, *supra* note 79, at 953.

152. *See* John R. Steer, *Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins To Bear Fruit*, *in* 1 CORPORATE COMPLIANCE 2002, at 113, 124 (PLI Corporate Law & Practice, Course Handbook Series No. B-1317, 2002).

153. Duggin, *supra* note 137, at 345.

154. Statement of Paul J. McNulty, *supra* note 100, at 2.

dite the resolution of an investigation.[155] Even though the DOJ continues to defend its waiver policy, the evidence shows that coercing organizations into cooperating with government investigations imperils the rights of corporations and their employees at all levels, and is ineffective at preventing organizational crime.

The increasing prevalence of corporate fraud has caused the DOJ to step up its efforts in investigating organizational misconduct. The OSG provide for corporate sentence mitigation if the organization cooperates with government investigators and has in place an effective compliance and ethics program at the time of the alleged misconduct. As shown in this Part, offering sentence mitigation based on these factors has the potential to endanger the rights of both corporations and employees, and fails to further the goals of detecting and preventing corporate crime. The next Part suggests a strategy for reform that would better advance sentencing goals and addresses the potential criticisms of this proposal.

III. REVISING THE ORGANIZATIONAL SENTENCING GUIDELINES

In light of the compelling evidence that the OSG mitigation provisions do little to deter or detect organizational crime, the Guidelines should be revised to eliminate sentence reduction based on compliance programs and cooperation. Under this revised framework, the mandatory reduction in the culpability score based on these factors would be abolished. Rather, whether sentence reduction is warranted based on a particular organization's compliance program or cooperation with the investigation should be weighed within the current Guidelines framework that allows judges to consider multiple factors when fashioning a sentence.[156]

Under this proposed revision, judges would still calculate the Guidelines range, but would omit the point reductions currently mandated for compliance programs and cooperation. Still, this does not mean that judges could not take into account these factors if actually warranted. After calculating the Guidelines range, the Supreme Court has explained that trial judges

155. *Id.*

156. *See, e.g.*, United States v. Booker, 543 U.S. 220, 259–60 (2005) (holding that judges cannot be mandated to issue sentences within the Guidelines, but that trial courts must apply the factors enumerated in 18 U.S.C. § 3553(a) to determine the proper sentence).

must tailor a defendant's sentence in light of the § 3553(a) factors, including the nature and circumstances of the offense, and the history and characteristics of the defendant.[157] Thus, in each case, a judge must consider specific facts to determine the appropriate and just sentence for the defendant.[158] Rather than providing separate mitigating conditions for organizational criminals and requiring judges to reduce sentences based on these factors, the USSC should advise trial judges to instead consider the relevant § 3553(a) factors, which *may* include compliance programs and cooperation, to determine the proper sentence adjustment.[159]

This framework is preferable because it allows for a case-specific determination of punishment by the trial court, which has an institutional advantage over appellate courts and administrative agencies in deciding the proper sentence.[160] The legal principle that trial judges are in the best position to hand down just sentences rests upon their primary exposure to the evidence, witnesses, and facts.[161] If a judge decides that a Guidelines departure is warranted after making an individualized assessment based on the facts presented, the judge must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the

157. 18 U.S.C. § 3553(a)(1) (2006); *Booker*, 543 U.S. at 249.

158. Judges may choose to deviate from the Guidelines based on many factors and the Supreme Court has recently begun to grant trial courts greater discretion to choose when to depart. *See, e.g.*, Spears v. United States, 129 S. Ct. 840, 842 (2009) (upholding that the trial judge's decision to grant a significant downward departure "based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates 'an unwarranted disparity within the meaning of'" the statutory sentencing factors and was at odds with those factors (quoting United States v. Spears, 533 F.3d 715, 719 (8th Cir. 2008) (Colloton, J., dissenting))).

159. 18 U.S.C. § 3553(a)(1).

160. *See* Koon v. United States, 518 U.S. 81, 81 (1996) (establishing the standard of review for departure from the Guidelines to be abuse of discretion).

161. Gall v. United States, 552 U.S. 38, 51 (2007) ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." (quoting Brief for Federal Public and Community Defenders et al. as Amici Curiae Supporting Petitioner at 16, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949))); *see also* Rita v. United States, 551 U.S. 338, 357–58 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.").

variance,"[162] explaining the reasons that an unusually lenient sentence is appropriate in a particular case with sufficient justifications.[163] Through this process, as opposed to the consideration of rigid factors such as compliance programs and cooperation, judges would be able to issue a just sentence to the defendant that achieves the Guidelines' goals of deterring, detecting, and justly punishing organizational crime.

In eliminating the sentence mitigation provisions and the corresponding mandatory culpability score reduction for organizational criminals, the USSC would make it more difficult for corporate defendants to escape harsh punishment unless such leniency is truly justified. Although eliminating the automatic reduction in culpability score would increase the calculated OSG sentence range, the judge could depart downward from the Guidelines range if she concludes, for example, that the defendant-organization had in place a highly effective compliance and ethics program at the time of the misconduct that significantly changed the characteristics and circumstances of the offense, or if the defendant cooperated in such a way that a lesser sentence is warranted. Furthermore, whether an organization has cooperated meaningfully with the investigation could be considered as part of the relevant history and characteristics of the defendant, and the judge could grant a downward departure based on this § 3553(a) factor.[164]

Thus, trial courts would remain able to grant downward departures from the Guidelines range based on an especially effective compliance and ethics program or cooperation with the investigation, but the judge would have to justify such a departure as based on a "special factor" not specifically mentioned in the Guidelines.[165] As the Supreme Court has stated, if the particular special factor is absent from the Guidelines, "the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' decide whether it is sufficient to take the case out of the Guideline's [sic] heartland."[166] This is a fairly high bar—the

162. *Gall*, 552 U.S. at 50.

163. *Id.* at 46.

164. *See id.* at 49–50 & n.6.

165. *Koon*, 518 U.S. at 96.

166. *Id.* (citing United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)). The Court in *Koon* advised sentencing courts considering departure to analyze the case along the following lines:

> 1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case? 2) Has the

Court further requires judges to consider the USSC's instruction that departures based on grounds not included in the Guidelines should be "highly infrequent,"[167] which suggests that under this framework adherence to the Guidelines will be the norm, and most organizational defendants will be punished to the fullest extent of the law.

Critics of this approach may argue that it would be unjustly difficult for a judge to grant a downward departure even if clearly warranted. This would not be the case. Once a court sentences a defendant, the decision is given substantial deference on appeal because it embodies the sentencing court's traditional exercise of discretion.[168] This is true whether the trial court issues a sentence within the Guidelines or departs from them.[169] In reviewing a trial court sentencing decision, an appellate court is not permitted to adopt a presumption of unreasonableness for sentences outside the Guidelines.[170] Furthermore, the Supreme Court has made it clear that "extraordinary circumstances" are not required for a Guidelines departure to be justified.[171] Thus, if the facts of a specific case justify a variation from the Guidelines range, a judge is permitted to exercise discretion to impose an adjusted sentence, and this decision is given substantial deference on appeal.

Another argument against this approach is that eliminating the specific focus on compliance programs and cooperation would remove any incentive for organizations to pursue these measures, and thus remove any marginal deterrence and detection benefits they provide. Again, this would not be the case. As already stated, judges would still be permitted, and even encouraged, to consider compliance and cooperation under the § 3553(a) factors. Furthermore, organizations with especially effective compliance programs may use them as an affirmative defense.[172] At least in the Title VII context, the Supreme Court

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Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?

Id. at 95 (quoting *Rivera*, 994 F.2d at 949).

167. *Id.* at 96.

168. *Id.* at 98 (citing Mistretta v. United States, 488 U.S. 361, 367 (1989)).

169. *Gall*, 552 U.S. at 51.

170. Rita v. United States, 551 U.S. 338, 352–55 (2007).

171. *Gall*, 552 U.S. at 47.

172. *See* Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, *in* ADVANCED CORPORATE COMPLIANCE AND ETHICS WORKSHOP 2009, *supra* note 52, at 73, 106–07 (stat-

has held that companies can avoid liability altogether if they have in place comprehensive compliance policies to prevent the misconduct.[173] The reasoning of these cases suggests that the Court would be willing to extend the use of compliance programs as an affirmative defense in other contexts.[174] Lastly, different government institutions encourage, and in some cases require, the implementation of compliance programs.[175] The DOJ,[176] Securities and Exchange Commission,[177] Environmental Protection Agency,[178] Department of Health and Human Services,[179] and the Federal Energy Regulatory Commission[180] are just a few examples of administrative agencies with separate compliance program standards. Companies also have other incentives to cooperate in investigations, perhaps most importantly to avoid being seen as criminal in the public eye. Thus, incentives outside the OSG would remain for companies to adopt compliance programs and to cooperate with federal prosecutors.

Finally, revising the OSG to make it more difficult for organizations to be awarded sentence mitigation based on compliance programs and cooperation is consistent with the broader goals of sentencing policy. The recent sentencing policy of the DOJ has trended toward imposing harsher sentences in order to show the public that the government is "tough on crime." From the Guidelines' promulgation in 1991 to 2008, on-

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ing that the Supreme Court permits the use of corporate compliance policies and procedures as an affirmative defense in the sexual harassment context).

173. *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545–46 (1999); Burlington Indust., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998).

174. *See* Walker, *supra* note 172, at 106–07.

175. *See id.*

176. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.800 (2008), *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

177. *See* Report of Investigation Pursuant to Section 21(a) of the Security Exchange Act of 1934 and Commissioner Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969, 76 SEC Docket 220 (Oct. 23, 2001).

178. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

179. *See, e.g.*, OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF HEALTH AND HUMAN SERVS. & THE AM. HEALTH LAWYERS ASS'N, CORPORATE RESPONSIBILITY AND CORPORATE COMPLIANCE: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS (2003), http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf.

180. Revised Policy Statement on Enforcement, 123 F.E.R.C. ¶ 61,156, ¶¶ 62,019–20 (Fed. Energy Regulatory Comm'n May 15, 2008).

ly one of the 262 substantive amendments proposed would have favored a defendant.[181] Every other amendment proposed to the Guidelines would have resulted in harsher sentences, most often by increasing an offense level, changing a definition to one more favorable to the prosecution, adding a sentence enhancement, or adding a base offense level to a new crime.[182] Further evidence of the DOJ's intent to get tough on crime is revealed by recent statements and actions of Attorney General Eric Holder and President Obama. Along with Holder's recent statements to the Financial Crisis Inquiry Commission, he recently announced the President's Executive Order creating the Financial Fraud Enforcement Task Force in an effort to crack down on corporate financial crime.[183] To that end, President Obama recently created a task force to investigate and prosecute incidences of fraud within health care organizations, after estimating that such fraud costs American taxpayers about sixty billion dollars per year.[184] If the Administration aims to actually increase the deterrence and detection of organizational crime, it should lobby the USSC to remove the sentence mitigation provisions from the Guidelines that allow organizations to escape the full extent of punishment for their crimes.

CONCLUSION

In the wake of the publicity surrounding recent incidences of corporate fraud, the public is pressuring the government to carefully monitor and harshly punish organizational crime. To this end, the current OSG sentence mitigation provisions are counterproductive because they fail to deter and detect corporate misconduct. Rather, through coercing cooperation and encouraging the establishment of facially effective compliance programs, the Guidelines cause companies to waste resources

181. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 535 (2009).

182. *See id.*

183. Exec. Order No. 13,519, 74 Fed. Reg. 60,123 (Nov. 17, 2009); Press Release, U.S. Dep't of Justice, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-opa-1243.html.

184. U.S. Dep't of Health and Human Servs. & U.S. Dep't of Justice, HEAT Task Force Success: Health Care Fraud Prevention and Enforcement Action Team (HEAT), http://www.stopmedicarefraud.gov/heatsuccess/index.html (last visited Apr. 12, 2010); *see also Medicare Fraud: A $60 Billion Crime*, CBS NEWS, Oct. 25, 2009, http://www.cbsnews.com/stories/2009/10/23/60minutes/main5414390.shtml.

and implement policies that damage both the organization and its employees. To remedy these deficiencies, the Sentencing Commission should revise the OSG to eliminate the sentence mitigation provisions and advise judges to consider sentence reductions under the § 3553(a) factors, which would permit greater judicial discretion and decrease unjust sentence mitigation. In doing so, the Guidelines would further the Justice Department's policy of harshly penalizing organizational crime and would better protect the public from corporate crime.