SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS

AUGUST 30, 1991

Introduction

This Supplementary Report on Sentencing Guidelines for Organizations supplements and further explains the sentencing guidelines for organizational defendants (proposed Chapter Eight of the Guidelines Manual) submitted to Congress on May 1, 1991, as Amendment 60, by the United States Sentencing Commission.

The relevant governing statute, 18 U.S.C. § 994(p), calls for "a statement of reasons" for guideline amendments. The Commission intends that the Commentary in Amendment 60 will provide the basic information to comply with this legislative mandate.

This Supplementary Report provides additional information to assist in understanding the sentencing guidelines for organizational defendants, the guidelines' background, structure, underlying rationale, empirical basis, and significant estimated effects. Chapter One discusses the procedures followed by the Commission in developing the organizational guidelines. Chapter Two discusses the Commission's resolution of major issues. Chapter Three discusses the structure of past practice for fines imposed upon organizations, the magnitude of average fines imposed, and the probable effect of the guidelines on the level of fines.

[Chapter Three and Appendices are available for inspection at the offices of the United States Sentencing Commission.]

Chapter One

Commission Procedure

Due to the complexity of the subject matter and the tight deadlines imposed by the Sentencing Reform Act, the Commission decided in 1986 to defer the drafting of organizational guidelines for offenses other than antitrust until after it had developed and implemented the first iteration of guidelines for individual defendants. Throughout the period from 1986 to 1991, however, the Commission conducted empirical research and analysis on organizational sentencing practices.

The development of organizational guidelines was iterative, with various succeeding drafts providing vehicles for public comment and analysis. Using empirical research, estimates of past practice, theoretical and statutory analysis, and public input, the Commission refined its approach to the complex issues inherent in organizational sentencing as it debated the key questions the guidelines needed to address.

A. Commission Research

When the Commission began its consideration of sentencing guidelines for organizations, no comprehensive data base of past sentencing of organizations was available. Therefore, to conduct empirical analyses and model draft guidelines, the Commission assembled a comprehensive data set on organizational sentencing practices from 1984 to1990. The purpose of this multi-year data set was to enable the Commission to explore the relationship between estimates of loss caused by the offense and sanctions imposed by the courts.

It is important to note the limitations of the Commission's data resulting from the lack of "guideline relevant" information in the court documentation forwarded to the Commission for analysis. Because the presentence reports were written before implementation of sentencing guidelines, factors such as loss, gain, and level of management involvement were not always readily apparent from the case files. Notwithstanding these limitations, the Commission collected information on more than 80 relevant variables from 774 organizations and associated individual defendants sentenced between 1988 and 1990 to produce a comprehensive data set of organizational sentencing practices. Additionally, the Commission earlier had gathered data related to the sentencing of 1,226 organizations for non-antitrust offenses from 1984 to 1987 to study the types of organizational offenses and offenders prosecuted in federal courts, the sentences imposed, and factors that may have influenced fine levels. The Commission also used these data to simulate likely sentences under various drafts of the guidelines.

B. Advisory and Working Groups

The Commission benefitted from the assistance of advisory and working groups of judges, attorneys, probation officers, and academicians in the development of guidelines for both individuals and organizations. Working groups of scholars and experts from various government agencies were formed to help shape the Discussion Materials on Organizational Sanctions circulated by the Commission for comment in July 1988.

Late in 1988, a working group of private defense attorneys was formed to develop for the Commission's consideration a set of practical principles for sentencing organizations. This attorney working group, chaired by Joseph E. diGenova of Washington, D.C., conducted bi-weekly meetings from December 1988 to April 1989. On May 18, 1989, the working group submitted to the Commission its *"Recommendations Regarding Criminal Penalties for Organizations."*

In the fall of 1990, an advisory group of federal judges was convened to review and comment on draft guidelines then under consideration. The observations of this group provided the Commission with a judicial perspective that helped in shaping the guidelines.

In April 1991, a working group of federal probation officers was convened from judicial districts with the largest numbers of organizational sentencings. This group evaluated the workability of the draft guidelines by applying them to past cases. The insights of this group further assisted the Commission in its efforts to draft guidelines that could be readily applied by judges and practitioners.

Throughout the process, the Commission received informational briefings from a variety of resource groups, including government agencies, business groups, and practitioners.

C. Liaison with Other Federal Agencies

The Commission solicited views from a variety of federal agencies, particularly with respect to organizational offenses occurring within the agencies' area of responsibility. During the guideline development process, the Council of Economic Advisers, the Departments of Justice, Defense, Health and Human Services, and Interior, the Environmental Protection Agency, the Securities and Exchange Commission, and the Federal Trade Commission provided the Commission with written and oral comments. In addition, the Criminal Division of the Department of Justice prepared a version of proposed organizational guidelines for Commission consideration.

D. Published Drafts

The Commission published and requested comment on three major drafts of sentencing guidelines for organizations. In addition, numerous interim drafts and working papers were made available to interested members of the public. Throughout the process, the Commission was aided by comments filed by individuals, law firms, trade associations, public interest groups, corporations, and government agencies.

The first major published draft, *Discussion Materials on Organizational Sanctions* (and associated working papers), was circulated for comment in July 1988. This draft proposed basing organizational fines on the loss caused by the offense and the probability that the offense would be detected and prosecuted. In November 1989, the Commission published for comment a draft containing two options for setting fines: 1) offense levels that reflected the seriousness of the offense, adjusted to reflect aggravating and mitigating factors; and 2) the higher of loss, gain, or an amount corresponding to the offense level, subject to upward or downward adjustment for aggravating and mitigating factors. In November 1990, the Commission published for comment a third draft prepared by a staff working group based on a set of principles adopted by the Commission. (The principles are set out in Appendix A.) At the same time, at the request of the Attorney General, an ex-officio member of the Commission, the Commission published a set of proposed guidelines prepared by the Department of Justice. From March through May 1991, the Commission made available to the public various drafts as the Commission refined the organizational guidelines.

E. Public Hearings

Public hearings were conducted at the beginning of the guideline-development process and following the publication of each major draft. The topic of organizational sentencing guidelines was first addressed at an informational hearing held on June 10, 1986, at the Commission's offices. Public hearings on the July 1988 discussion draft were held in New York City on October 11, 1988, and in Pasadena, California on December 2, 1988. Public hearings were held in Washington, D.C., on the November 1989, and November 1990 drafts on February 14, 1990, and December 13, 1990, respectively. (Appendix B lists the witnesses who testified at each of these hearings.)

Chapter Two

Major Issues in Drafting Organizational Guidelines

A. Philosophical Bases for Sentencing Organizations

A careful review of the existing literature on organizational sanctions and the public comment to the Commission made clear that there was no consensus as to a single theory of organizational sentencing. In developing a framework for organizational guidelines, the Commission therefore drew especially strong guidance from the principles of sentencing specified by Congress. Those principles, set out in section 3553(a) of title 18, United States Code, include: (1) just punishment ("to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); (2) adequate general deterrence ("to afford adequate deterrence to criminal conduct"); (3) specific deterrence and incapacitation ("to protect the public from further crimes of the defendant"); (4) rehabilitation ("to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"); (5) the elimination of unwarranted disparity ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); and (6) appropriate remedial measures ("the need to provide restitution to any victims of the offense").[1] In addition, Congress imposed the constraint that a sentence imposed should be "sufficient, but not greater than necessary" to achieve just punishment, adequate deterrence, specific deterrence, incapacitation, and rehabilitation.

Various sections of Chapter Eight are designed to respond to one or more of the congressionally specified purposes of sentencing. The restitution and other remedial provisions in Part B of Chapter Eight are designed to ensure that appropriate remedial measures will be taken. Section 8C1.1 (Determining the Fine – Criminal-Purpose Organizations) is designed to incapacitate organizations that operate primarily for a criminal purpose or primarily by criminal means. The probationary provisions in Part D of Chapter Eight are designed, in part, to achieve specific deterrence and, in part, to rehabilitate convicted organizations. Rehabilitation is addressed by placing organizations on probation to ensure that changes designed to reduce the likelihood of future criminal conduct are made within the organization. The fine provisions in Part C, Subpart 2 (Determining the Fine – Other Organizations) are designed to achieve just punishment and adequate deterrence. Overall, the guidelines and policy statements in Chapter Eight are intended to achieve the goal of reducing unwarranted disparity.

The fine guidelines seek to achieve the purposes of sentencing set forth in section 3553(a) by setting fines based upon a combination of the "base fine," which measures the seriousness of the offense, and the "culpability score," which is designed to measure the culpability of the organization with respect to the offense committed. The base fine is determined in most instances by using the highest of an amount from an offense level fine table, the pecuniary gain from the offense, or the pecuniary loss from the offense.

Because an organization is vicariously liable for actions taken by its agents, the Commission determined that the base fine, which measures the seriousness of the offense, should not be the sole basis for determining an appropriate sentence. Rather, the applicable culpability

[1] The Commission is directed to consider these purposes of sentencing. See 28 U.S.C. § 991(b)(1)(A).

score, which is determined primarily by "the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed" also influences the determination of a fine range.[2]

Specifically, the organization's culpability is determined by the level or extent of involvement in or tolerance of the offense by certain personnel, the organization's prior history, whether an order was violated when the organization committed the offense, whether the organization obstructed or attempted to obstruct justice, whether the organization had an effective program to prevent and detect violations of law, and whether the organization reported the offense, cooperated fully in the investigation, and accepted responsibility for its criminal conduct. The guidelines increase the fine range when organizations are more culpable and reduce the fine range when organizations are less culpable.[3]

B. Guidelines Versus Policy Statements

One of the issues presented to the Commission was whether to issue guidelines or policy statements. Some outside parties contended that the Commission lacks the authority to issue guidelines to govern the sentencing of organizations. Others contended that the Commission, for policy reasons, should issue policy statements rather than guidelines. In resolving this issue, the Commission took into consideration statements by Congress that: 1) sentences for offenses committed by organizations should reflect the potentially greater financial harm caused when organizations, as opposed to individuals, commit offenses;[4] 2) an "organization found guilty of an offense shall be sentenced . . . to . . . a term of probation . . . or . . . a fine . . . ";[5] 3) the Commission "shall promulgate . . . guidelines . . . for use of a sentencing court in determining . . . whether to impose a sentence to probation, or a fine . . . [and] the appropriate amount of a fine or the appropriate length of a term of probation . . . ";[6] and 4) "the guidelines promulgated [by the Commission] shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." [7]

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[2]Chapter Eight, Introductory Commentary.

[3]In some cases, the base fine may not adequately measure the seriousness of the offense and the culpability score may not adequately measure the culpability of the organization. In such cases, a sentence above or below the applicable fine range (i.e., departure) may be appropriate. Consistent with the principles set forth in the Introduction to the guidelines, see U.S.S.G. Ch. 1, Pt. A(4)(b), intro. comment., the Commission has identified a number of circumstances under which departure may be appropriate, but has not attempted to make an exhaustive list in Chapter Eight.

[4]S. Rep. No. 98-225, 66-67, 98th Cong., 2d Sess. (1984).

[5]18 U.S.C. § 3551(c)(1).

[6]28 U.S.C. § 994(a)(1)(A) and (B).

[7]28 U.S.C.§ 994(b)(1).

In light of these congressional statements and other policy considerations consistent with the Commission's overall mandate, the Commission made the following determinations regarding guidelines and policy statements. Chapter Eight contains guidelines that specify when restitution, a sentence of a fine, or a sentence of probation shall be imposed. Guidelines set forth the fine range and adjustments that may or must be made to the guideline fine range. Other aspects of the application of the guidelines to organizational sentencing are addressed by policy statements, including: the use of remedial measures other than restitution; setting of the fine within the guideline fine range; departures from the guideline fine range; the conditions of probation to be imposed; and the sanctions to be imposed for a violation of a condition of probation.

C. Scope of Applicability

In developing guidelines for organizations, the Commission examined questions related to the scope of Chapter Eight's applicability: What types of organizations and offenses should be covered by the guidelines? Should the applicability of the fine guidelines be as broad as the remedial and probationary guidelines?

As a starting point, the Commission followed the pattern of applicability of the individual guidelines[8] and limited the applicability of Chapter Eight to felonies and class A misdemeanors. In light of the limited number of organizations sentenced for class B or C misdemeanors or for infractions,[9] and in light of the lack of coverage of such offenses by the individual guidelines, the Commission decided that such offenses should be excluded from Chapter Eight.

Two approaches were used in deciding which offenses should be covered by the fine guidelines. First, the Commission examined the types of offenses for which organizations have been sentenced in federal courts in the past to ascertain whether there were reasons to exclude any of these offenses from the applicability of the fine guidelines. Second, the Commission examined the types of offenses covered by Chapter Two (the offense conduct chapter) of the individual guidelines to decide which of these guidelines appear appropriate for organizational fines.

In the end, certain types of offenses were excluded from this first set of organizational fine guidelines. Offenses falling under the Contempt (§2J1.1) and Obstruction of Justice (§2J1.2) guidelines were excluded because fines based on the applicable offense levels might be too low to reflect the seriousness of the offense and to deter other similar offenses. Environmental offenses (Part Q of Chapter Two) and most food, drug, and agricultural products offenses (Part N of Chapter Two) were excluded from the initial set of organizational guidelines, pending additional discussion and research on appropriate fine determinants. Export violations (§§2M5.1 and 5.2) were excluded because the offense levels in those guidelines (offense levels 14 and 22) may not adequately translate into appropriate organizational fines given the variety of cases that involve these guidelines. These excluded offenses share a common characteristic in that the harm or loss

[8] See U.S.S.G. §1B1.9 (Class B or C Misdemeanors and Infractions).

[9] For example, of the 328 organizations sentenced in 1988, only six were sentenced for violations of petty offenses.

caused or threatened often cannot easily be translated into monetary terms. Moreover, the dollar loss may not adequately reflect the societal harm caused by the offense.

The proposed fine guidelines do, however, cover some offenses for which harm or loss cannot readily be quantified in dollar amounts. For some of these offenses, the Commission has provided special fine instructions that base fines on factors that can be measured more readily than pecuniary loss, but are closely related to factors that measure the seriousness of the offense. For example, in antitrust cases, fines are based on the volume of commerce (see §2R1.1); in money laundering offenses, fines are based on the amount of funds involved (see, e.g., §2S1.1); and in bribery offenses, fines are based on the greatest of the value of the unlawful payment, the value of the benefit received or to be received in return for the unlawful payment, or the consequential damages resulting from the unlawful payment (see, e.g., §2C1.1).

D. Treatment of Large versus Small Organizations

One of the more difficult issues debated in developing organizational guidelines was whether larger organizations should be treated differently from smaller organizations. During the debate, at least three justifications were advanced for differentiating between large and small organizations. First, compared to the total number of organizations convicted of federal crimes, relatively few are large corporations. Second, the difficult issue of vicarious liability is typically more critical for larger organizations. With smaller organizations, an owner is generally involved in the offense and directly subject to prosecution. Third, it was proposed that a larger fine would be needed to sufficiently punish and deter a larger organization.

In assessing the treatment of large versus small organizations, the Commission considered both statutory guidance and empirical research. Section 3572(a) of title 18, United States Code, provides that in determining the amount of a fine, the court should consider "the defendant's income, earning capacity, and financial resources" and "if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense." This statutory language, while instructive, provided the Commission with only limited concrete guidance.

Empirical evidence also failed to illuminate clearly the relationship between the size of an organization and the fine imposed. For example, cases in which no fine was imposed most frequently involved smaller organizations, but this difference appears to relate more to ability to pay than to size. The highest fines were imposed upon larger organizations, but this difference appears to relate more to the magnitude of the loss caused or the seriousness of the offense, rather than to the size of the organization.

The Commission's general approach in resolving this conceptually difficult issue was to take the size of the organization into account, but only under certain prescribed circumstances. First, recognizing that small organizations may frequently be the alter egos of their owners, the Commission provided a permissive offset for fines imposed upon closely-held corporations. This provision is neutral with respect to size, but will probably be applied most frequently in cases involving smaller corporations. Second, the Commission provided that fine magnitudes should vary based upon the interaction between size of the organization and the involvement in or tolerance of criminal activity by certain personnel of the organization. Under these provisions, fines do not increase merely because an organization is large. However, the guideline fine range does increase as the size of an organization (or a unit of an organization) increases if persons who set the policy for or control the organization (or the unit of the organization) were involved in the offense. Thus, fines can be higher for larger organizations, but the basis for the increase is not the size of the organization, per se.

E. Use of Pecuniary Loss and Gain to Calculate Base Fine

In developing the organizational guidelines, the Commission had to determine whether loss, gain, both, or neither should be used in setting the base fine range. In the end, the Commission concluded that, as a general rule, the greater of pecuniary loss or gain should be used, subject to the constraint that pecuniary loss should only be used "to the extent the loss was caused intentionally, knowingly, or recklessly."[10]

The Commission relied upon the guidance provided by Congress as its starting point in resolving this issue. Section 3571(d) of title 18, United States Code, provides for statutory maximum fines of up to twice the greater of the gross pecuniary loss or gross pecuniary gain. Accordingly, the Commission concluded that pecuniary loss and gain should provide alternative bases for setting the base fine.

The Commission recognized the validity of an argument that because some losses cannot be translated into monetary terms, pecuniary loss may sometimes be an inappropriate measure of the seriousness of an offense. Thus, the Commission determined that when pecuniary loss cannot be measured, a proxy for loss should be used.

In addition, because the magnitude of loss in a particular case could greatly exceed an amount that should have been expected, the use of the full extent of loss could be inappropriate. Giving weight to the statutory purposes of sentencing, the Commission decided that it would be inappropriate to use loss amounts greater than the loss that had been caused intentionally, knowingly, or recklessly. Thus, the Commission decided that loss should be used as one of the alternative determinants of offense seriousness, but that the magnitude of the loss used to compute the base fine should be limited in certain instances.

F. Past Practice Analyses

Section 994(m) of title 28, United States Code provides:

The Commission shall insure that the guidelines reflect the fact that, in many cases, current

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[10] §8C2.4(a)(3).

> sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial set of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

Consistent with this statutory directive, the Commission examined both the structure and the magnitude of average fines imposed in the past.

Based on past practice analysis, the Commission concluded that estimates of the average fines imposed upon organizations are less meaningful than were estimates of past practice relating to the length of imprisonment terms served by individuals. For many organizations, it appears that fines had been set based on inability or limited ability to pay a fine. Moreover, the amount of dollar loss in organizational offenses has significantly increased in the last few years, as has the maximum fine amounts authorized by statute.

Even though the average fine imposed in the past was not particularly meaningful, analyses of past practice were nevertheless useful. For example, an examination of how fine/loss multiples varied by loss magnitudes was helpful in determining base fine levels and the minimum and maximum multipliers. Past practice was also considered when determining adjustments to the culpability score, selecting factors that should be considered in setting the fine within the range, and identifying potential bases for departure.

G. Relationship of Guideline Fine Ranges to Maximum Fines Permitted by Statute

The Commission sought to draft guidelines that would accommodate the maximum statutory fines in the most egregious cases, while avoiding guideline fine ranges that would frequently exceed statutory maxima. Federal statutes set out different maximum fines depending on the type of offense. For example, in some cases pecuniary gain or loss will determine the maximum fine; in others, the type of offense (e.g., antitrust, money laundering) will control. Finally, in some cases the class of offense (i.e., felony, misdemeanor) will set the maximum fine.

In the end, three different approaches were used to coordinate the proposed guideline fine ranges with statutory maximum fines.

1) Statutory Maxima Based on Pecuniary Loss or Gain

Congress has provided for fines up to twice the pecuniary loss caused by, or twice the pecuniary gain resulting from, an offense.[11] The proposed guidelines use 2.00 as the minimum multiplier when the culpability score is 10 or more and as the maximum multiplier when the culpability score is 5. By using a minimum multiplier of 2.00, the guidelines define a class of cases in which the minimum of the guideline fine range will be equal to the statutory maximum fine. That class of cases will have the following characteristics: (1) pecuniary loss or gain will be used to calculate the base fine; (2) the controlling statutory maximum fine will be based on pecuniary loss or gain; and (3) the culpability score for the organization will be 10 or more. Within this subset of cases that consist of the most culpable organizations, courts will be required to impose the statutory maximum fine (absent inability to pay, an offset for the fine on an owner in the case of a closely-held organization, or a circumstance warranting departure). At the same time, when the fine is based on pecuniary loss or gain, the guidelines should never require a guideline fine higher than the statutory maximum. Since the highest minimum multiplier is 2.00, a court can always impose a fine that will simultaneously be within the guideline fine range and at or below the statutory maximum.[12]

Since the guidelines and policy statements call for a large number of factors to be considered in selecting a fine within the guideline fine range, it is conceivable that the most egregious cases with a moderate culpability score may be as serious as the least egregious case with a high culpability score. To accommodate this possibility, the guidelines permit a fine equal to twice the base fine when the culpability score is 5. Thus, in the most egregious cases with no guideline aggravators or mitigators (i.e., a case with a culpability score of 5), the sentencing court will be able to impose a guideline fine equal to twice the base fine.

Some commentators proposed that the Commission not use multipliers greater than 2.00 because that is the highest multiplier permitted by 18 U.S.C. § 3751(d). This argument overlooks the fact that the multiplier of 2.00 based on pecuniary loss or gain is only one of the possible statutory maxima. When other statutory maxima are controlling, multipliers higher than 2.00 can be imposed. For example, in all felony cases with a base fine of less than $250,000, a multiplier higher than 2.00 can be used because the statutory maximum for a single felony count is $500,000. At lower offense levels, the amounts in the offense level fine table will exceed the loss caused by the offense, thereby permitting higher fine/loss multiples.

2) Statutory Maxima Based on Class of Offense

For a single misdemeanor count, Congress has established a statutory maximum fine of

[11] 18 U.S.C. § 3571(d).

[12] As discussed infra, a fine of twice the pecuniary loss or gain will be below the statutory maximum penalty if a higher statutory maximum, not based on loss or gain, applies. For example, 18 U.S.C. § 3571(c) provides a general maximum of $500,000 per felony conviction. In a single count case, this maximum will be higher than the statutory maximum based on loss or gain if the loss or gain were less than $250,000.

$200,000 for organizations.[13] For a single felony count, the statutory maximum fine is $500,000.[14] To accommodate these statutory maxima, the Commission identified ranges for certain offense level fine amounts corresponding to those statutory maxima.

For offenses covered by Chapter Two of the guidelines, offense level 13 is the highest offense level that permits a sentence of less than a year and a day imprisonment when an individual is sentenced, and thus represents the offense level most closely calibrated to the most serious misdemeanors.[15] Accordingly, in a case with an offense level of 13 and a culpability score of 10, the guideline fine range for organizations should accommodate the maximum fine of $200,000 provided by statute. To satisfy this objective, the offense level amount at offense level 13 must be at least $50,000 and not more than $100,000. Section 8C2.4(d) of the guidelines sets the offense level fine amount for offense level 13 at $60,000.

The selection of a specific guideline offense level to associate with the maximum statutory fine of $500,000 was designed to harmonize two alternative statutory maximum fine provisions. 18 U.S.C. § 3571(c)), which allows fines of $500,000 per count; and 18 U.S.C. § 3571(d), which allows fines of twice the pecuniary loss caused by the offense. Pegging the statutory fine maximum of $500,000 per count to an offense level that is itself tied to pecuniary loss of $250,000 allows a consistent application of the two fine maximum provisions. Specifically, this linkage permits a transition of progressively higher fine amounts moving from cases with loss below $250,000 to cases with loss increasingly above this figure. Offense level 16 is the offense level best tied to the key statutory fine maximum of $500,000 because: (1) fraud is the predominant federal offense for which guideline offense levels are determined based on the amount of loss; (2) organizational fraud typically involves more than minimal planning; and (3) level 16 is the guideline offense level from Chapter Two for a fraud with more than minimal planning involving loss of $250,000. In order to ensure that the statutory maximum fine of $500,000 can be imposed in cases at offense level 16 involving more culpable organizations, the amount in the offense level fine table at offense level 16 must be between $125,000 and $250,000. Section 8C2.4(d) of the guidelines sets the offense level fine amount for offense level 16 at $175,000.

3) Statutory Maxima Based on Offense Type

For antitrust violations, Congress has provided a maximum statutory fine of $10,000,000.[16] For money laundering violations, Congress has provided a maximum statutory fine of twice the

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[13] 18 U.S.C. § 3571(c)(5).

[14] 18 U.S.C. § 3571(c)(3).

[15] See 18 U.S.C. § 3581 (authorizing a term of imprisonment for a Class A misdemeanor not to exceed one year).

[16] 15 U.S.C. § 1.

amount of money laundered.[17] The Commission has promulgated special instructions for fines in cases involving antitrust and money laundering violations that accommodate these higher statutory maxima. For antitrust cases under the guidelines, courts are to use 20 percent of the volume of commerce in lieu of pecuniary loss for purposes of determining the base fine. This allows higher fines in cases that involve larger volumes of commerce.[18]

In money laundering cases, the applicable guideline sets the base fine equal to the higher of a specified sum or a stated percent of the value of the funds. For the most serious cases (i.e., those involving defendant organizations convicted under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A) where it was known that the funds were proceeds of unlawful activity involving manufacture, importation, or distribution of controlled substances), the base fine is set alternatively at $250,000 or 100 percent of the value of the funds. Thus, under this guideline, a fine equal to the higher of two potential statutory maxima ($500,000 under 18 U.S.C. § 3571(c) or twice the amount of money laundered under 18 U.S.C. § 1956(a)) could be imposed in a case with a culpability score of 5, and must be imposed in a case with a culpability score of 10.

H. Selection of Specific Amounts in the Offense Level Fine Table

The rate of increase in the offense level fine table slowly declines and accommodates statutory maxima while providing for higher fines for more serious offenses. The starting point of $5,000 for offense level 6 or less was selected because $10,000 is the highest fine permitted by statute for the classes of offenses not covered by the guidelines. Thus, in a case involving no aggravating or mitigating factors (i.e., with a culpability score of 5) for the typical less serious offense covered by the guidelines (i.e., offense level 6),[19] the court would be able to impose the statutory maximum fine for a Class B misdemeanor. In a case at the same offense level but with the highest culpability score (10 or more), a court would be required to impose a fine of at least $10,000. Beginning with this starting point of $5,000, the offense level fine table gradually increases. The rate of increase allows fines at offense levels 13 and 16, respectively, to accommodate the statutory maximum fines of $200,000 for a Class A misdemeanor and $500,000 for a felony.[20] Above offense level 16, the offense level fine amounts continue to increase in magnitude, but at a progressively slower rate, consistent with the pattern for sentences to imprisonment for individual defendants.

[17] 18 U.S.C. § 1956(a).

[18] For example, in a case involving an antitrust defendant having a volume of commerce of $25,000,000 and a culpability score of 5, the court may impose the maximum statutory fine of $10,000,000. In a case involving an antitrust defendant having a volume of commerce of $25,000,000 and a culpability score of 10, a sentencing court would be required to impose the maximum statutory fine.

[19] For a few offenses covered by the organizational guidelines, the applicable offense level is 4 or 5. See, e.g., U.S.S.G. §2B1.3 (Property Damage or Destruction) (base offense level 4; but note that with more than minimal planning the offense level is 6); U.S.S.G. §2T1.1 (Willful Failure to File Return, Supply Information, or Pay Tax) (base offense level of 5 if no tax loss).

[20] See pages 12-13, supra.