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Guideline Amendments Dramatically Change the Structure of Organizational Fines

Paul E. Fiorelli

GUIDELINE AMENDMENTS DRAMATICALLY CHANGE THE STRUCTURE OF ORGANIZATIONAL FINES*

PAUL E. FIORELLI**

INTRODUCTION

As of November 1, 1991, companies that have "good ethics" will be treated significantly better by the courts than those that do not. This slight oversimplification is based upon amendments to the Federal Sentencing Guidelines, submitted to Congress on May 1, 1991, which became law on November 1, 1991. The amendments require federal judges to multiply fines against organizations, by up to a factor of 4.0, or reduce them by up to nine-five percent, depending upon an organization's tolerance towards, or vigilance against, violations.

Part I of this article will analyze the amendments and discuss: (1) their historical development, (2) the sentencing goals, (3) the factors analyzed in determining whether fines will be increased or decreased, and (4) what impact the new probation guidelines may have on organizations. Part II is a call for new initiatives regarding corporate ethics programs.

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PART ONE

I. GUIDELINE AMENDMENTS

A. *Historical Development*

In 1984 Congress created the United States Sentencing Commission (hereinafter referred to as either the "Sentencing Commission" or the "Commission") to establish guidelines for consistent criminal sanctions against organizations violating federal statutes.[1] The Commission was charged with addressing sentencing questions dealing with both individuals (usually with respect to imprisonment) and organizations (usually with respect to fines). The Commission first dealt with individual violators and in April of 1987 presented to Congress the Federal Sentencing Guidelines.[2] These guidelines became law on November 1, 1987, and their constitutionality was immediately challenged in the case of *Mistretta v. United States*.[3] The case ultimately went to the Supreme Court of the United States, and in an 8-1 decision (Scalia dissenting) the court upheld the guidelines' constitutionality.

The Sentencing Commission must present new proposals to Congress before May 1, of any given year, to be included in that year's amendments.[4] If Congress does not change the proposals, they have the effect of law on November 1 of the year presented. Since 1988, the Sentencing Commission has been developing guidelines to deal with organizational fines. It appeared that the Commission would be ready to present proposals to Congress before the May 1, 1990 deadline, but it decided to wait another year to fill three vacancies in the seven-person Sentencing Commission.[5]

The remaining positions were filled during 1990 and the full Commission continued addressing the question of corporate fines by preparing drafts, having public hearings, and soliciting comments from businesspeople, academics, probation officers and attorneys.[6] On May 1, 1991, the Commission sent the proposed amendments to Congress. As they were

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[1] Pub. L. No. 98-473, 98 Stat. 1987 (substantially codified at 18 U.S.C. §§ 3551-3742 (Supp. IV), 28 U.S.C. §§ 991-998 (Supp. IV 1985)).

[2] U.S. Sentencing Commission Guidelines, 52 Fed. Reg. 44,674, 44,675 (1987).

[3] 488 U.S. 361 (1989). The Petitioner was sentenced for the sale of cocaine to 18 months imprisonment pursuant to the Guidelines. *Id.* at 371. The Petitioner argued, unsuccessfully, that the Guidelines violated the separation of powers doctrine and were an excessive delegation of authority to the Commission. *Id.* at 371-412.

[4] 28 U.S.C. § 994(p)(1988).

[5] Fred Strasser, *Lighter Corporate Sentencing*, NAT'L L.J., Apr. 9, 1990, at 3, col. 1.

[6] U.S. SENTENCING COMMISSION, SUPPLEMENTAL REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 2 (Aug. 30, 1991).

unchallenged, the proposals became law on November 1, 1991.

B. *Sentencing Goals*

The stated goals of the Sentencing Commission's amendments are to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct."[7] The guidelines try to accomplish these goals by: (1) providing victim restitution,[8] (2) divesting crime-infested organizations of their net assets,[9] and (3) determining an appropriate, additional fine "based on the seriousness of the offense and the culpability of the organization."[10]

C. *New Factors in Determining Fines*

The amendments with the greatest impact on American business deal with additional fines for organizations whose primary purpose was not to engage in criminal activity. These fines are calculated by determining the "seriousness of the offense and the culpability of the organization."[11] The seriousness of the offense is determined by establishing a base fine, which is the greatest of: (1) the pecuniary loss suffered by the victim,[12] (2) the pecuniary gain received by the defendant organization,[13] or (3) a penalty determined by analyzing the Offense Level Fine Table.[14](See Table 1). Professor John Coffee of Columbia Law School believed prosecutors would generally prefer the last calculation. "The defense won't stipulate, judges are pressed, and prosecutors want to prosecute, not wrangle over damages."[15]

II. OFFENSE FINE LEVEL TABLE

The Offense Level Fine Table, seen below in Table 1, is calculated by

[7] U.S. Sentencing Commission Guidelines, 56 Fed. Reg. 22,786, 22,787 (1991) [hereinafter "Guidelines"]. The Guidelines do not currently address either environmental or food and drug violations. These areas will be addressed in future proposals.

[8] Guidelines § 8C3.3.(a). One of the most important goals is providing restitution to victims. This is apparent by the Guidelines allowing a fine to be reduced or deferred, if it would limit the ability of the defendant to repay the injured party.

[9] *Id.* § 8C1.1. Organizations with a primary purpose to engage in criminal activity were dealt the harshest blow. The Guidelines permit the sentencing judge to construct a fine large enough to disgorge the criminal organization of all of its net assets.

[10] *Id.* at 22787.

[11] *Id.*

[12] Guidelines § 8C2.4.(a)(3).

[13] *Id.* § 8C2.4.(a)(2).

[14] *Id.* § 8C2.4.(a)(1).

[15] Fred Strasser, *U.S. Panel Finishes Up Guidelines*, NAT'L L.J., May 6, 1991, at 3.

using the base offense level, with any adjustments, as established in Chapter Two of the Sentencing Guidelines.[16] The fine range from the Table, before any multiplier or reducer is applied, is $5000 to $72,500,000.[17] With maximum and minimum multipliers of 5% to 400%, this Table range is effectively extended from $250 ($5,000 × 0.05) to $290,000,000 ($72,500,000 × 4.0).[18]

[16] Guidelines § 8C2.3.(a).
[17] *Id.* § 8C2.4.(d).
[18] *Id.* § 8C2.6(d).

TABLE 1[19]

OFFENSE LEVEL FINE TABLE

OFFENSE LEVEL	AMOUNT
6 OR LESS	$ 5000
7	7500
8	10,000
9	15,000
10	20,000
11	30,000
12	40,000
13	60,000
14	85,000
15	125,000
16	175,000
17	250,000
18	350,000
19	500,000
20	650,000
21	910,000
22	1,200,000
23	1,600,000
24	2,100,000
25	2,800,000
26	3,700,000
27	4,800,000
28	6,300,000
29	8,100,000
30	10,500,000
31	13,500,000
32	17,500,000
33	22,000,000
34	28,500,000
35	36,000,000
36	45,500,000
37	57,500,000
38 OR MORE	72,500,000

[19] *Id.* § 8C2.4.(d).

III. CULPABILITY SCORE

Regardless of how the base fine is calculated, this amount can be either increased or decreased, based on an organization's culpability score.[20] As may be seen from Table 2, for any given culpability score, the judge has the discretion to impose a fine within a minimum and maximum range.[21] A higher culpability score establishes a higher minimum and maximum range of multipliers. The maximum multiplier is 4.0, which has the mathematic effect of multiplying a fine by 400%. A lower culpability score decreases the minimum and maximum multipliers, which can dramatically reduce a fine. The minimum multiplier is 0.05, which has the mathematic effect of dividing the fine by twenty.[22]

Table 2[23]

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM MULTIPLIER
10 or more	2.00	4.00
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

The culpability score starts with five points and may be either increased or decreased based upon certain factors.[24] The score will be increased based upon the judge's determination of the: (1) size of the organization,[25] (2) involvement of top officials,[26] (3) prior violations,[27] and (4) obstruction of justice.[28] The culpability score will be decreased based upon the judge's determination of whether the organization: (1) had an

[20] *Id.* § 8C2.5.
[21] *Id.* § 8C2.6.
[22] *Id.*
[23] *Id.*
[24] *Id.* § 8C2.5.(a).
[25] *Id.* § 8C2.5.(b)(1)(5).
[26] *Id.* § 8C2.5.(b)(1)(A)(i).
[27] *Id.* § 8C2.5.(c).
[28] *Id.* § 8C2.5.(e).

"effective program to prevent and detect violations,"[29] (2) voluntarily disclosed its violations to the appropriate authority,[30] (3) cooperated with an investigation conducted by the appropriate authority,[31] and (4) accepted responsibility for its improper actions.[32]

IV. INCREASED SCORES

A. *Size of the Organization*

If the organization, or a unit of the organization, had 5000 or more employees and an individual within high level personnel either: (1) participated in, (2) condoned, or (3) was willfully ignorant of the offense, add five points to the base score of five points for an aggregate of ten points.[33] This addition to the base score decreases (assuming the same high level participation or ignorance) with the decreasing size of the organization. The respective decrease is: (1) four points for an organization or unit with one thousand or more employees,[34] (2) three points for an organization with two hundred or more employees,[35] (3) two points for an organization with fifty or more employees,[36] and (4) one point for an organization with ten or more employees.[37]

A majority of the violations studied by the Sentencing Commission involved participation by top level management. Table 3 recaps the Commission's findings.[38]

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[29] *Id.* § 8C2.5.(f).

[30] *Id.* § 8C2.5.(g)(1).

[31] *Id.* § 8C2.5.(g)(2).

[32] *Id.* § 8C2.5.(g)(3).

[33] *Id.* § 8C2.5.(b)(1).

[34] *Id.* § 8C2.5.(b)(2). Four points would be added to the five point base score, instead of five points for larger organizations.

[35] *Id.* § 8C2.5.(b)(3).

[36] *Id.* § 8C2.5.(b)(4).

[37] *Id.* § 8C2.5.(b)(5).

[38] UNITED STATES SENTENCING COMMISSION, THE NEW FEDERAL GUIDELINES FOR ORGANIZATIONAL CRIMES: QUESTIONS AND ANSWERS 3 (1991).

Table 3

	1988		1989	
	Frequency	Percent	Frequency	Percent
No managerial involvement identified	13	4.0%	5	1.8%
Owner of organization	169	51.5%	141	51.6%
Top executive	30	9.1%	44	16.1%
Manager	14	4.3%	19	7.0%
Employee	5	1.5%	3	1.1%
Unknown	97	29.6%	61	22.3%

The Commission's rationale for increasing the penalty as an organization's size increases is based upon the thought that as a company gets larger, its management becomes increasingly professional.[39] The Commission also believed that when upper level managers of large corporations tolerate illegal actions, they are not only abusing their position but are also breaching the trust that has been placed in them.[40] Also, if the tolerance is pervasive, there is an increased risk of other offenses being committed within the organization.[41]

B. Prior History

Just as prior criminal activity was taken into account when determining prison sentences for individuals,[42] prior violations of similar offenses would have the effect of increasing the culpability score of organizations.[43] The score is augmented by either one or two points depending on how long ago the similar violation occurred and whether it was a criminal versus a civil or administrative adjudication. Two points will be added to the culpability score if "the organization . . . committed any part of the instant offense less than five years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct . . . ."[44] One point will be added if the abovementioned violation(s) occurred within ten years.[45]

It is interesting to note the differing treatment received by corporations that merge with an organization with a prior history, and a corpora-

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[39] Guidelines § 8C2.5 (Background).
[40] *Id.*
[41] *Id.*
[42] Guidelines Chapter 4.
[43] Guidelines § 8C2.5.(c).
[44] *Id.* § 8C2.5.(c)(2).
[45] *Id.* § 8C2.5.(c)(1).

tion that acquires substantially all the assets of an organization with a prior history. If two organizations merge and maintain their respective identities as separately-managed lines of business, each business retains its prior history.[46] But, "[I]f the company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company."[47]

In addition to having both companies survive the merger, this carryover effect can be avoided by either: (1) the substantial purchase of all of a company's assets,[48] or (2) the acquisition of a company in response to a solicitation by federal government officials.[49] Without this last exception, healthy institutions could be very reluctant to acquire failing or failed institutions (i.e., banks and savings and loans). Prior history of violations should become a consideration in any future merger and acquisition strategy.

C. *Violation of an Order and Obstruction of Justice*

The last two factors to consider in adding to a culpability score deal with: (1) violation(s) of orders, and (2) obstruction of justice. If committing the instant offense violated a condition of probation, one point shall be added to the culpability score.[50] If committing the "instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization . . . violated a condition of probation by engaging in similar misconduct, . . . add two points."[51] If the organization either obstructed, encouraged, aided, or willfully failed to prevent, the obstruction of justice, an addition of three points is appropriate.[52]

IV. DECREASED SCORES

Culpability scores have the effect of increasing the fine range for organizational "bad behavior" and significantly decreasing the range for organizational "good behavior." The firm can reduce its culpability score by up to eight points by complying with the Commission's ethics recommendations. This "carrot and stick" approach will provide a strong incentive for organizations to: (1) implement effective programs to detect and prevent violations, (2) disclose violations to the appropriate authorities, (3)

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[46] *Id.* § 8C2.5. (Commentary, Application Notes: 6).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* § 8C2.5.(d)(2).
[51] *Id.* § 8C2.5.(d)(1).
[52] *Id.* § 8C2.5.(e).

cooperate in any investigation, and (4) accept responsibility for any violations. Saying that "Good Ethics is Good Business" may seem cliché, but it takes on a new meaning when analyzing the bottom line impact of fines on organizations that comply with the guidelines, compared with those that violate them.

A. *Effective Programs to Prevent and Detect Violations of Law*

In 1990, the Behavior Research Center conducted a comprehensive survey of ethics programs for the Ethics Resource Center.[53] The survey included a cross sectional analysis of many diverse companies. The survey included large and small companies, defense contractors, retailers, agricultural, Business Roundtable members and many other representative groups. While eighty-five percent of the respondents claimed that they had a code of ethics, or other policy statement,[54] only thirty-six percent of the same companies stated that their monitoring efforts were very effective.[55] Forty-nine percent said their programs were somewhat effective,[56] and eight percent said that their programs were not very effective.[57]

While a surprisingly high number of companies had written policies, it is equally surprising that fifty-seven percent of the participants stated that the monitoring efforts were only somewhat or not very effective. These statistics lead one to believe that there is a difference between merely having written policies and having an effective ethics program.

The Sentencing Commission agrees that written codes alone will not entitle an organization to a three point reduction in the culpability score. "The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."[58] The "minimum requirements" to qualify for the culpability score reduction based on an effective program to detect and prevent violations will be based on an organization: (1) having compliance standards and procedures that are reasonably capable of reducing criminal conduct,[59] (2) specifically designating high level individuals within the organization to over-

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[53] THE ETHICS RESOURCE CENTER AND THE BEHAVIOR RESEARCH CENTER, ETHICS POLICIES AND PROGRAMS IN AMERICAN BUSINESS (1990).

[54] *Id.* at 6.

[55] *Id.* at 41.

[56] *Id.*

[57] *Id.*

[58] Guidelines § 8A1.2. (Commentary, Application Notes: 3(k)). *See* Paul E. Fiorelli, *Fine Reductions Through Effective Ethics Program*, 56 ALB. L. REV. 403 (1992) (discussing companies that establish ethics programs).

[59] Guidelines § 8A1.2.(k)(1).

see the program,[60] (3) exercising due care not to delegate significant authority to a person known to have criminal tendencies,[61] (4) developing a method of communicating the policies and procedures to all employees and other agents either by ethics training or distributing practical publications explaining the program,[62] (5) taking steps to "achieve compliance with its standards, . . . by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees . . . and by having in place and publicizing a reporting system whereby employees . . . could report criminal conduct by others within the organization without fear of retribution,"[63] (6) consistently enforcing the standards through "appropriate disciplinary mechanisms",[64] and (7) taking the necessary steps to prevent any similar occurrences in the future, including modifying the ethics program.[65]

B. *Self Reporting, Cooperation, and Acceptance of Responsibility*

Even without an effective program to detect and prevent violations, an organization can reduce its culpability score by: (1) voluntarily disclosing information about violations, (2) cooperating with any subsequent investigation, and (3) accepting responsibility, which usually takes the form of a guilty plea. If you merely accept responsibility, you may receive a one point deduction.[66] To underscore the seriousness associated with accepting responsibility, the judge may require the organization's chief executive officer to be present at the sentencing.[67] If you also fully cooperate in the investigation you receive a two point (total) reduction.[68] If you accept responsibility, fully cooperate, and voluntarily disclose the information to the appropriate authority, an organization can reduce its culpability score by five points.[69] Given that the base culpability score is five, if the defendant had no aggravating factors that would add to the score, the defendant's culpability score would be zero, which would mitigate the fine from a maximum of twenty percent of the base amount, to a possible minimum of five percent of the base fine.[70]

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[60] *Id.* at (k)(2).
[61] *Id.* at (k)(3).
[62] *Id.* at (k)(4).
[63] *Id.* at (k)(5).
[64] *Id.* at (k)(6).
[65] *Id.* at (k)(7).
[66] *Id.* § 8C2.5.(g)(3).
[67] *Id.* § 8C2.5. (Commentary, Application Notes: 14).
[68] *Id.* at (g)(2).
[69] *Id.* at (g)(1).
[70] *Id.* § 8C2.6. *See* Table 2.

Self-Reporting

Perhaps the self reporting provision requires managers to take the largest leap of faith. When managers discover potential problems, human nature tells them to cover up, rather than open up. Even though managers might become aware of a problem employee or problem process, they wonder whether governmental authorities will ever find out. If they wait long enough, perhaps the problem will go away, or they will have a different job and it will be someone else's problem.

To encourage self-reporting, the guidelines provide a three point marginal reduction in the culpability score for organizations that report an offense to the appropriate government authority.[71] To receive the reduction, the organization itself must make the report.[72] This means that a business cannot attempt to use unsanctioned reports by "whistleblowers" to decrease its fine range. The report must be voluntary, and not a last minute response to an imminent investigation by the authorities.[73] This does not mean that an organization must report every rumor upon receipt of the allegation. The business can take a reasonable time to investigate the complaint, but it must ultimately disclose all relevant information to receive the three point marginal reduction.[74]

C. Probation

The amendments dealing with organizational probation contain guidelines which judges must follow and policy statements which they may follow. Section 8D1.1.(a) of the Guidelines requires a judge to impose probation if: (1) "such sentence is necessary to secure payment of restitution, . . . enforce a remedial order, . . . or ensure completion of community service,"[75] (2) the organization is unable to pay a monetary fine,[76] (3) the organization has more than fifty employees and it did not have an effective program to prevent and detect violations,[77] (4) the organization engaged in similar wrongdoings within five years before the sentencing,[78] (5) a high level official of the organization participated in the offense and had engaged in similar misconduct within five years before the sentencing,[79]

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[71] Guidelines § 8C2.5.(g)(1). The three point marginal reduction is calculated by comparing the five point reduction for self-reporting, cooperation and acceptance of responsibility with the two point reduction for cooperation and acceptance of responsibility.

[72] *Id.* § 8C2.5. (Commentary, Application Notes: 12).

[73] *Id.* § 8C2.5.(g)(1)(A).

[74] *Id.* § 8C1.5 (Commentary, Application Notes: 12).

[75] *Id.* § 8D1.1.(a)(1).

[76] *Id.* at (a)(2).

[77] *Id.* at (a)(3).

[78] *Id.* at (a)(4).

[79] *Id.* at (a)(5).

(6) this type of sentence is required to change the organization to decrease the probability that similar events will happen in the future,[80] (7) the sentence does not include a fine,[81] or (8) it is "necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2)."[82]

The term of probation shall not exceed five years,[83] and in the case of a felony, shall be at least one year.[84] One of the conditions of probation is "that an organization shall not commit another federal, state or local crime during the term of probation."[85] Another condition of probation for felonies is that, unless extraordinary circumstances exist which would make this imposition unreasonable, the court will impose at least one of the following: (1) fine, (2) restitution, or (3) community service.[86]

While the abovementioned probation guidelines are mandatory, the discretionary policy statements offer judges the latitude to design a sentence tailored to the individual organization. Judges may require organizations to publicize their conviction and how they plan to prevent future violations.[87] If there is a question about whether a company is able to pay a fine, the court can have outside experts or probation officers conduct unannounced audits of the company's books and records.[88] The company will have to pay all costs associated with hiring these outside experts. If the organization did not have an effective program to prevent and detect violations, it may be required to submit one for the court's approval.[89] This would include a schedule for implementation. Any violation of the abovementioned conditions would permit the court to revoke probation and resentence the organization.[90]

The guideline amendments should change the emphasis organizations have placed on ethics programs. Traditionally, ethics were fine as long as they did not interfere with business. Companies should examine their ethics programs and policies on self-disclosure and cooperation. Failing to do so could cost them significantly more money in fines if the company is convicted of violations after November 1, 1991.

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[80] *Id.* at (a)(6).
[81] *Id.* at (a)(7).
[82] *Id.* at (a)(8).
[83] *Id.* § 8D1.2.(a)(2).
[84] *Id.* at (a)(1).
[85] *Id.* § 8D1.3.(a).
[86] *Id.* § 8D1.3.(b).
[87] *Id.* § 8D1.4.(a).
[88] *Id.* § 8D1.4.(b)(2).
[89] *Id.* § 8D1.4.(c)(1).
[90] *Id.* § 8D1.5.

PART TWO

I. ETHICS RECOMMENDATION

Companies can no longer rest on their laurels of dusty codes, while sending explicit or implicit signals to employees to disregard the code of ethics.[91] Top management must create an environment in which "doing the right thing" becomes second nature. Employees must know that if they report an improper procedure, the procedure, and not the reporter, will be corrected.

Organizations must commit resources to this process by placing high level, respected managers in a position to develop effective ethics programs. Without high level personnel championing ethics programs, ethics will remain a low priority. Unless employees believe that their company is serious about ethics, there is no reason for them to report problems or change improper behavior. They will not risk their careers if the company does not support their "ethical" positions.

A. *Training*

All employees must be either trained or retrained about the company's true values. The organization's code of ethics should be the employee's guiding light. It should be both readable and somewhat flexible. Readable, so employees can understand and accept its provisions, and flexible enough to allow the company to adapt to any required future changes.

In the past, when a company's Code of Ethics came in conflict with business practices, the code lost. This must change. Companies have to do more than pay lip service to codes of ethics. They must breathe new life into their codes, and convince their employees that not all business is "good business." The company must support employees who refuse to act illegally or unethically. Without reinforcing corporate values, organizations send employees the message, "Do whatever it takes, just don't get caught. And by the way, if you do get caught, you're on your own."

B. *Consistency*

Violators must be treated consistently. Guideline Section 8A1.2. states that one requirement of an effective program to prevent and detect violations is that "the standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate,

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[91] For further explanation about signals sent by managers to employees *see* Paul Fiorelli, *Winking Through the Blindfold: What Motivates White Collar Criminals?*, 21 AKRON L. REV. 327 (1988).

discipline of individuals responsible for the failure to detect an offense."[92] Managers cannot be "blinded by production" or make exceptions based upon performance.[93] One example of this would be if cheating on an account is wrong, the star salesperson should receive similar disciplinary action as the average salesperson. Without this sense of consistency, employees will believe that it does not matter what you do, just who you know. When employees see these discrepancies, they become disheartened and cynical about the company's code.

C. *Additional Reporting Mechanisms*

Companies should set up Additional Reporting Mechanisms ("A.R.M.") to handle situations when the traditional method of reporting to a supervisor is inappropriate. A.R.M. is used instead of "whistleblower hotline" because the term "whistleblower" conjures up negative images of disgruntled employees. Unfortunately, very few people think of whistleblowers as "loyal company employees," "workers with a conscience," or "corporate heroes."

Employees may want to use an A.R.M. when a supervisor is either directly involved in the problem (i.e., sexual harassment) or has totally disregarded past complaints (i.e., failure to respond to a misvouchering claim). A.R.M.s are a required part of the Guidelines' "effective programs to prevent and detect violations." "The organization must have taken reasonable steps to achieve compliance with its standards . . . and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution."[94]

Many defense contractors already have A.R.M.s in place. In 1986, thirty-three major contractors voluntarily became signatories to the Defense Industry Initiative (DII).[95] In 1990, the number rose to forty-five. In the 1990 DII Report, all forty-five signatories answered the following question affirmatively-"Is there a corporate review board, ombudsman, corporate compliance, or ethics office or similar mechanism for employees to report suspected violations to someone other than their direct supervisor, if necessary?"[96] Ombudsmen, ethics officers or review boards, are all examples of A.R.M.s. Management must understand that A.R.M.s are

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[92] *Id.* § 8A1.2. (Commentary, Application Notes: (k)(6)).

[93] Interview with James Helms, Vice President of Agency, Western-Southern Life Insurance Company (Oct. 28, 1991).

[94] Guidelines § 8A1.2. (Commentary, Application Notes: 3(k)(5)).

[95] For an overview of ethics in the defense industry *see* Paul Fiorelli, *In Defense of Ethics: New Considerations After the Packard Commission*, 34 CATH. LAW. 157 (1991).

[96] DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS AND CONDUCT, 1990 ANNUAL REPORT TO THE PUBLIC AND DEFENSE INDUSTRY 11 (1991).

meant to supplement, not supersede, the traditional line of corporate communication and should not be perceived as a threat.

II. NEUTRALITY

A.R.M.ers (people using A.R.M.s) must believe that their careers will not be affected by reporting suspected violations. A.R.M.ers are prisoners of circumstances, who cannot ignore their knowledge of potential wrongdoings. Companies should not kill the messenger; rather they should deal with the message. The A.R.M.er must believe that an independent party, (i.e., an Ombudsman) will conduct a thorough, expedient investigation. The Ombudsman will make appropriate recommendations, and should have enough authority within the organization to have the recommendations followed.

III. ANONYMITY

Whenever possible, the A.R.M.er's identity should be confidential. Ombudsmen must balance the privacy rights of the accuser against the reputation rights of the accused. After the initial report, the only time it would be necessary to know the A.R.M.er's identity would be if the investigator believed that the complaint was maliciously filed to injure someone's reputation. At this point, the A.R.M.er should be disciplined. Employees under suspicion must believe that an investigation will only be initiated based upon substantial evidence, and not rumors. There should be no stigma attached to their reputation if the investigation is either inconclusive or establishes their innocence.

CONCLUSION

Before the Sentencing Commission's submission of guidelines dealing with organizational fines, discussions of ethics programs were typically reserved for academics. The amended guidelines place a premium on an organization's detection and prevention of problems through effective ethics programs. Once detected, potential problems should not be ignored or "covered up." They must be thoroughly investigated, and if an actual violation did occur, ultimately disclosed. Organizations should cooperate with, rather than obstruct, investigations by the appropriate authorities. Once an investigation has established a violation, the company should admit the wrongdoing and try to modify its behavior to prevent similar offenses in the future.

Congress has provided adequate incentives and deterrents to influence changes in organizational behavior. This change will not be easy, and can only be accomplished by a strong commitment to ethics from top executives. Codes of ethics must be revisited and revitalized. Employees must feel they are being treated fairly and consistently. Companies should institute A.R.M.s and the entire organization should be trained on how to properly use an A.R.M. Employees must believe that management is willing to listen to and deal with the problems they encounter. Once these changes become part of the corporate culture, an organization will be less culpable for its mistakes and more deserving of lenient treatment through reduced fines.