PLAN NOW OR PAY LATER: THE ROLE OF COMPLIANCE IN CRIMINAL CASES

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I. INTRODUCTION

Compliance failures can cause damage to a corporation's reputation, result in millions of dollars in fines, investigative costs and legal fees, and divert valuable management time and resources. In addition to the economic costs stemming from compliance failures, compliance has become a key corporate charging consideration for federal prosecutors and an important

sentencing consideration for companies convicted of violating federal law.

Compliance as a charging and sentencing consideration is a natural outgrowth of the concept of treating corporations as legal persons criminally responsible for the acts of their employees and agents. In 2010, the Supreme Court reinforced the idea of the corporation as a person in *Citizens United v. Federal Election Commission*.[1] And 2009 marked the hundred year anniversary of the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*, which first minted the idea that corporations could be held criminally liable for the acts of an employee.[2] Over the past hundred years, courts have steadily expanded the holding of *New York Central*.[3] The current framework for corporate criminal prosecutions renders a corporation liable for the criminal acts of its employees if the acts are performed within the scope of employment and with at least a partial intent to benefit the employer.[4]

Over the past century, it has also become easier for prosecutors to charge and convict corporations. The increased ease in prosecution is largely attributable to the evolution of principles such as *respondeat superior*, which holds corporations responsible for the misdeeds of employees undertaken to benefit the company in some way,[5] and collective knowledge, which enables prosecutors to aggregate knowledge of a crime to prove

1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898–99 (2010) (finding that the disputed Section 441b prohibition on corporate independent expenditures constituted a ban on free speech and striking down "[s]peech restrictions based on the identity of the [corporate] speaker"); *see also* Adam Liptak, *The Roberts Court; Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (discussing the increase in the percentage of business cases on the Supreme Court docket in recent years as well as "the percentage of cases won by business interests.").

2. N.Y. Cent. & H.R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909) ("[T]o give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.").

3. Egan v. United States, 137 F.2d 369 (8th Cir. 1943); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946).

4. ANDREW WEISSMANN, ET AL., REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR 3 (2008).

5. BLACK'S LAW DICTIONARY (9th ed. 2009).

corporate criminal liability.[6] These corporate liability principles apply notwithstanding an employee's position in an organization and despite any robust compliance program a company may have in place.[7]

In response to these trends, corporate compliance programs have become increasingly vital tools in helping companies detect and prevent unlawful conduct by employees.[8] As corporations began to focus on compliance, so did the United States Department of Justice (DOJ). Indeed, the DOJ has long considered a company's compliance program in corporate charging, even before it issued formal corporate charging guidelines in 1999.[9]

Now the DOJ's official corporate charging policy, as set out in the United States Attorneys' Manual (USAM) section 9-28.000, directs federal prosecutors to consider compliance with respect to three of the nine factors prosecutors must weigh before filing criminal charges against a company.[10] Compliance is also a key sentencing consideration for calculating corporate fines under the Organizational Guidelines found in Chapter Eight (Organizational Guidelines) of the United States

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6. *See* United States v. Bank of Eng., 821 F.2d 844, 856 (1st Cir. 1987) (upholding trial court's collective knowledge jury instruction—a corporation is considered to have acquired the collective knowledge of employees); Cont'l Oil Co. v. Bonanza Co., 706 F.2d 1365, 1376 (5th Cir. 1983); Saba v. Campagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996).

7. Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 127 (5th Cir. 1962); United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984); United States v. Beusch, 596 F.2d 871, 877–78 (9th Cir. 1979); United States v. Demauro, 581 F.2d 50, 54 (2d Cir. 1978); *contra* United States v. Sci. Applications Int'l Corp. ("SAIC"), 626 F.3d 1257, 1261 (D.C. Cir. Dec 3, 2010) (declining to apply the "collective knowledge" theory and pool the knowledge of all the corporate entity's employees and, as a result, finding that the corporate entity defendant lacked the requisite knowledge for a civil False Claims Act violation).

8. Elizabeth Grace Saunders, *White-Handed: Prevent and Detect White-Collar Crime with Proper Corporate Compliance Programs*, SMART BUSINESS, December 2007, *available at* http:// www.sbnonline.com/Local/Article/13551/68/121/Whitehanded.aspx.

9. Jeffrey M. Kaplan, *The Sentencing Guidelines: The First Ten Years*, ETHIKOS, Nov./Dec. 2001, *available at* http://www.singerpubs.com/ethikos/html/guidelines10years.html.

10. U.S. ATTORNEYS' MANUAL § 9-28.000 (2008) [hereinafter USAM], *available at* http:// www.justice/gov/usao/eousa/foia_reading_room/usam/.

Sentencing Guidelines (USSG).[11] Under the Organizational Guidelines, an adequate compliance program can result in up to a thirty percent reduction of a corporation's advisory guideline fine range, as discussed below.[12] This may translate into a multi-million dollar discount in USSG calculated fines.[13]

The DOJ is not the only regulator to focus on compliance. Regulators such as the Office of Foreign Assets Control (OFAC) and the Securities and Exchange Commission (SEC) also use compliance as a key metric in fine calculations.[14] Even regulators abroad have begun to emphasize compliance programs.[15] Most recently, the UK Bribery Act, which took effect July 1, 2011, punishes companies that conduct business in the UK for failing to prevent bribery of persons associated with the organization.[16] Compliance is the only defense recognized

11. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2010) [hereinafter USSG], *available at* http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm.

12. *Id*.

13. See *infra* Part III (Calculating a Corporate Sentence under Chapter Eight).

14. The SEC considers thirteen factors (known as the Seaboard factors) in determining whether to give a company credit for self-policing and self-reporting. SECURITIES AND EXCHANGE COMM'N, SEC RELEASE NO. 44969, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, (2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499 (setting out thirteen Seaboard factors). One of these factors specifically mentions compliance programs and explains that when bringing an enforcement action against a company the SEC will ask: How did the misconduct arise? What compliance procedures were in place to prevent the misconduct now uncovered? Why did those procedures fail to stop or inhibit the wrongful conduct? *See id.*; *see also* Economic Sanctions Enforcement Guidelines, 31 C.F.R. § 501, app. A (2010) (including "the existence, nature and adequacy of a Subject Person's risk-based OFAC compliance program at the time of the apparent violation" as a factor OFAC will consider when determining the type of enforcement action required).

15. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.justice.gov/dag/ cftf/corporate_guidelines.htm.

16. *See* Bribery Act 2010, c.23, § 7 (Eng.), *available at* http://www.statutelaw.gov.uk/content. aspx?activeTextDocId=3694937; Ministry of Justice, The Bribery Act 2010: Guidance on Procedures Which Relevant Commercial Organisations Can Put into Place To Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010) PP 15–16 (2011) (U.K.), *available at* http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

under the UK Bribery Act,[17] underscoring the importance regulators have placed on corporate compliance.

The DOJ's focus on compliance has forced both U.S. and foreign companies that access U.S. capital markets to reevaluate their approaches toward compliance.[18] Companies have begun to reassess, formalize, and improve what have historically been only informal or general codes of conduct.[19] Faced with the reality that compliance is both a key federal charging consideration and a determinative factor in sentencing, companies today must ensure that their compliance programs contain carefully crafted policies and procedures tailored to minimize the risk of civil and criminal liability.

II. THE U.S. SENTENCING GUIDELINES

A. The Need for Uniform Charging Practices

The genesis of compliance as a charging consideration can be traced back to the Sentencing Reform Act of 1984, which promulgated the USSG and established the United States Sentencing Commission (USSC).[20] Before the USSG, Congress was responsible for setting maximum sentences[21] and judges had broad discretion to impose sentences below the statutory maximums.[22] The result was an unpredictable sentencing scheme further complicated by a parole commission empowered

17. *Id.*

18. *See* Lanny A. Breuer, Assistant Attorney General, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/ speeches/2010/crm-speech-101116.html; Kirk J. Nahra, *Changing Roles for Today's Corporate Compliance Programs*, METRO. CORP. COUNS., Dec. 2004, at 7, *available at* http://www.metrocorpcounsel.com/pdf/2004/December/07m.pdf.

19. Nahra, *supra* note 18. In the Spring 2010, Ryan D. McConnell and Katharine Southard of Haynes and Boone LLP conducted a formal assessment of the Fortune 500 Codes of Conduct and found that numerous companies were in the process of revising their codes. The study is available at http://www.haynesboone.com/codesofsilence.

20. *See* U.S. Sentencing Comm'n, *An Overview of the United States Sentencing Commission*, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf; Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

21. Mistretta v. United States, 488 U.S. 361, 362–65 (1989).

22. *Id.*

to dictate how much of the sentence an offender would actually serve in prison.[23]

This sentencing system produced widely disparate sentences that varied arbitrarily by judge. For example, if a defendant was charged with conspiracy under 18 U.S.C. § 371,[24] which calls for a maximum term of imprisonment of five years, a federal judge could impose a sentence ranging from mere probation to five years imprisonment.[25] Similarly, before the USSG, a defendant sentenced for a federal drug crime in Florida might receive a significantly greater sentence than a defendant in Illinois, even if the two defendants committed the same crime and had identical criminal history records.[26]

To remedy the unfairness in the pre-USSG system, Congress sought to promote uniformity and honesty in sentencing.[27] To this end, the USSG intended to promote certainty by eliminating sentencing disparities for defendants with similar criminal records or comparable criminal conduct.[28] The USSG took effect on November 1, 1987,[29] but did not focus on corporate defendants or corporate compliance programs until the Organizational Guidelines were implemented in 1991.[30] The USSG became advisory in 2005, after the Supreme Court's decision in *United States v. Booker*.[31]

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23. USSG § 1A1.3 (2010) (noting that this system often resulted in prisoners serving only a third of their sentences before becoming eligible for release on parole).

24. Conspiracy to Commit Offense or to Defraud United States, 18 U.S.C. § 371 (2010).

25. *Id.*

26. USSG § 1A1.3 (2010).

27. *Id.*

28. *See* U.S. Sentencing Comm'n, *An Overview of the United States Sentencing Commission*, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (providing a brief history of the Federal Sentencing Guidelines).

29. *Id.* at 2.

30. The guidelines are structured as follows: Chapter 1: Introduction, Authority, and General Application Principles. Chapter 2: Offense Conduct. Chapter 3: Adjustments. Chapter 4: Criminal History and Criminal Livelihood. Chapter 5: Determining the Sentence. Chapter 6: Sentencing Procedures, Plea Agreements and Crime Victims' Rights. Chapter 7: Violations of Probation/Supervised Release. Chapter 8: Sentencing of Organizations. USSG ch.1–8 (2010).

31. United States v. Booker, 543 U.S. 220, 245 (2005).

The mandatory nature of the pre-*Booker* USSG system limited judicial discretion and provided both consistency and predictability in sentencing. Each guideline was intended to encompass a set of typical cases exemplifying the type of conduct that each guideline describes.[32] When a sentencing judge confronted an atypical case, the USSG allowed the judge to consider whether a guideline departure was warranted and, if so, apply a different, and more appropriate, guideline level.[33] If the sentencing judge failed to follow the USSG, this was reversible error.[34]

Applying the USSG to individuals before and after *Booker* is straightforward. The USSG calculate an individual defendant's sentence by taking into account three primary factors: (1) a defendant's conduct, (2) a defendant's criminal history, and (3) the statutory purposes of sentencing.[35]

1. Individual Defendant's Conduct/Offense Level

The USSG calculate a defendant's offense level by first determining the specific guideline section applicable to the particular crime constituting the offense of conviction.[36] For example, the offense level for bank robbery is calculated under USSG § 2B1.1, the guideline for robbery, extortion, and blackmail.[37] Once this base offense level is determined, any

32. USSG § 1A4(b) (2010).

33. *Id.*

34. *In re Solomon*, 465 F.3d 114, 120, n.2 (3d Cir. 2006) (explaining that the pre-USSG standard of review was a highly deferential review of whether a sentence was "plainly reasonable"). After the Supreme Court declared the USSG advisory in *Booker*, abuse of discretion became the standard of review of a sentencing judges' application of the USSG. *See* Koon v. United States, 518 U.S. 81, 91 (1996) (holding that the appropriate standard of review governing appeals from a district court's decision to depart from the USSG was abuse of discretion, not *de novo* review); *cf.* Gall v. United States, 552 U.S. 38, 46 (2007) (explaining that post-*Booker* "appellate review of sentencing decisions is limited to determining whether they are 'reasonable'" and the abuse of discretion standard of review applies).

35. USSG ch. 5, pt. A, introductory cmt. (2010); *see also id*. § 1.3 (2010) (grouping factors into two broad categories of conduct and criminal history).

36. USSG § 1B1.1(a)(1) (2010).

37. *Id.* § 2B3.1 (2010).

adjustments for specific offense characteristics are applied.[38] For instance, in a bank robbery case the USSG add offense levels for the use of a firearm or injury of victims—the worse the particular facts of the crime, the higher the offense level.[39]

After calculating the offense level for the specific crime, the USSG then add victim and role related adjustments, depending on the facts of the particular case, that increase or reduce the final offense level for the crime of conviction.[40] This final offense level will correspond to one of forty-three different USSG levels for offense conduct, with each level prescribing ranges in months of imprisonment that overlap with the ranges in the preceding and succeeding levels.[41]

2. Individual Defendant's Criminal History Points/Category

Having determined the severity of the crime, the USSG then look to the specific defendant and his or her criminal history.[42] The USSG contain different categories for a defendant's criminal history ranging from no criminal history (Category I) to extensive criminal history (Category VI).[43] The USSG assign points based on the number of convictions, the length of the prior sentences, the amount of time elapsed since the prior conviction, and the current charge.[44] If a defendant's criminal history is underrepresented or overstated using this point system, the USSG allow a court to depart and use a higher or lower guideline range to accurately reflect the defendant's conduct.[45] As illustrated by Table I, the guideline sentence is the

38. *Id.* ch. 2, introductory cmt (2010).

39. *Id.* §§ 1B1.1(b)(2), 1B1.1(b)(13) (2010).

40. *Id.* ch. 3 (2010). For example, the USSG ensures that a leader of a criminal enterprise receives a greater sentence than other participants. *Id.* § 3B1.1 (2010) (providing for an upward adjustment in the offense level if the defendant played an "aggravating role" in the offense by serving as "an organizer or leader of a criminal activity that involved five or more participants").

41. *Id.* ch. 5, pt. A (Sentencing Table) (2010).

42. *Id.* § 4A1.1 (2010).

43. *Id.* § 4A1.1 cmt (2010).

44. *See id.* § 4A1.1.(a)–(e) (2010).

45. *Id.* ch. 1, pt. A(4)(b) (2010) (discussing the USSC's policy on departures); *see also id.* § 2B5.3, application note 4 (2010) (providing a safeguard "[i]f the offense level determined under this guideline substantially understates or overstates the seriousness

range reflected in the cell that corresponds to a defendant's criminal history and offense conduct.[46]

Table I: USSG Sentencing Table[47]

		Criminal History Category					
Offense Level		**I (0 or 1)**	**II (2 or 3)**	**III (4, 5, 6)**	**IV (7, 8, 9)**	**V (10, 11, 12)**	**VI (13 or more)**
Zone A	**1**	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	**9**	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	**11**	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	**13**	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105

of the offense, a departure may be warranted.").

46. *Id.* ch. 5, pt. A (Sentencing Table) (2010) (providing for when the imposition of probation is appropriate).

47. *Id.*

	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-Life
	38	235-293	262-327	292-365	324-405	360-Life	360-Life
	39	262-327	292-365	324-405	360-Life	360-Life	360-Life
	40	292-365	324-405	360-Life	360-Life	360-Life	360-Life
	41	324-405	360-Life	360-Life	360-Life	360-Life	360-Life
	42	360-Life	360-Life	360-Life	360-Life	360-Life	360-Life
	43	Life	Life	Life	Life	Life	Life

3. USSG's Effort to Capture "Real Offense" Conduct as Opposed to Charge Conduct

One of the USSG's most significant improvements in the sentencing of individual defendants is the formulation of sentences based on the "real offense," or the actual conduct that the defendant engaged in, as opposed to the charge conduct, or the charges that the prosecutor brought against the defendant.[48] For example, in a fraud case, if the fraud scheme involved loss to a victim through ten transactions involving $100,000 each, the total loss amount would be $1 million.[49] Regardless of whether a

48. *Id.* ch. 1, pt. A, § 4(a) (2010) (comparing and contrasting real offense and charge offense sentencing).

49. *Id.*

single defendant is charged with one transaction or all ten, the USSG look at the actual damage caused and treats the loss as $1 million.[50] Similarly, the USSG aggregate multiple counts charged against a defendant to minimize the likelihood of an arbitrary casting of a single transaction into several counts that would produce a longer sentence.[51] This development is important because it limits the significance of which charges federal prosecutors choose to file.[52] To achieve honesty and fairness in sentencing, the USSG will always consider the universe of the relevant conduct in calculating a sentence, irrespective of the charges filed. The USSG framework focuses on a defendant's relevant conduct, irrespective of which charges were filed,[53] a feature endorsed by United States Attorney General Richard Thornburgh when he complemented the USSG by commanding prosecutors to file only the most serious readily provable charges.[54]

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50. *Id.*

51. *Id.* (explaining that the defendant's actual conduct "imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence" by increasing or decreasing the number of counts in an indictment). Under the grouping rules, a defendant gets more punishment for committing more crimes (depending on seriousness), but the USSG avoids double counting by considering two related crimes together. *Id.* § 4A1.1(e), application note (2010). The general framework for grouping multiple counts is: (1) put counts into a group; (2) assign offense level for group; and (3) come up with a single offense level for the case. *See id.* ch. 3, pt. D, § 1.1(a) (2010). The grouping and relevant conduct provisions ensure that prosecutors do not increase or decrease a sentence through charging (but this does not apply to charges with mandatory minimum consecutive sentences - *e.g.*, 18 U.S.C. §§ 1028A (2 year mandatory minimum sentence for aggravated identity theft) or 924(c) (five to twenty-five year mandatory minimum sentence for certain firearms offenses depending on circumstances of crime)). USSG ch. 1, pt. A, § 4 (2010). Mandatory minimum sentences can be controversial because, absent a section 3553(e) filing, they prevent courts from departing downward below the mandatory minimum. 18 U.S.C. § 3553(e) (2010). As Justice Breyer wrote, these provisions tend to "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring." Harris v. United States, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in judgment).

52. *See* USSG ch. 1, pt. A, 4(a) (2010).

53. USSG § 3B introductory cmt (2010).

54. Alan Vinegrad, *Justice Dep't New Charging, Plea Bargaining and Sentencing Policy*, N.Y. L.J. (June 10, 2010), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202462395978&Justice_Departments_New_Charging_Plea_Bargaining_and_Sentencing_Policy&slreturn=1&hbxlogin=1.

4. The U.S. Probation Office and the Presentence Investigation Report

After a defendant is convicted of a crime, the United States Probation Office prepares a presentence investigation report (PSR).[55] The PSR provides the sentencing judge with a defendant's guideline range, including applicable USSG policy statements based on the defendant's offense level and criminal history, and provides other background information on the defendant relevant to sentencing, such as the defendant's financial assets and personal history.[56] The information in the PSR virtually always includes information beyond what is presented to a jury at trial or provided to the court as a factual basis for a guilty plea.[57]

Consistent with the goal of the USSG, under DOJ policy a federal prosecutor must provide the U.S. Probation Office (and the sentencing judge) with all of the relevant information that may be lawfully used against a defendant at sentencing.[58] Both the prosecution and the defendant have a chance to object to the information in the PSR and the applicable guideline range.[59] At the sentencing hearing, the sentencing judge makes the final

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55. FED. R. CRIM. P. 32(c)(1)(A).

56. FED. R. CRIM. P. 32(d).

57. FED. R. CRIM. P. 11(b)(3) (requiring the court to determine that there is a factual basis for a plea before entering judgment on a guilty plea).

58. Both the USSG and DOJ policy prevent information provided to the government as part of a proffer or immunity agreement from being used for sentencing purposes, provided the defendant adheres to the agreement. *See* FED. R. CRIM. P. 32(d)(3); *see also* Memorandum from John Ashcroft, Attorney General, to Federal Prosecutors on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) [hereinafter Ashcroft Memo] (explaining that federal prosecutors "may not 'fact bargain,' or be party to any plea agreement that results in the sentencing court having less than a full understanding" of all facts).

59. FED. R. CRIM P. 32(e) requires the U.S. Probation Office to disclose the PSR thirty-five days before sentencing. FED. R. CRIM P. 32(e). Both the defendant and the DOJ have fourteen days after receiving the PSR to lodge objections. FED. R. CRIM P. 32(f)(1). The U.S. Probation Office will then comment on the objections (sometimes agreeing with them) and submit unresolved objections along with a sentencing recommendation to the sentencing judge seven days before sentencing. FED. R. CRIM. P. 32(f). Most federal judges do not disclose the U.S. Probation Officer's sentencing recommendation to the DOJ or the defendant. *See* United States v. Baldrich, 471 F.3d 1110, 1114 (9th Cir. 2006).

decision on facts in the PSR by treating undisputed information as findings of fact and ruling on the other objections.[60] Pre-*Booker*, the judge then applied the USSG range.[61]

B. United States v. Booker and the Advisory Guideline System

In 2005, the mandatory guideline system contemplated by Congress became advisory when the Supreme Court decided *United States v. Booker*.[62] *Booker* did away with the mandatory nature of the sentencing system. The Supreme Court held that Booker's sentence violated the Sixth Amendment of the Constitution because Booker's sentencing judge applied the USSG to increase his offense level and sentencing range using facts set forth in the PSR that were not presented to the jury.[63] As a remedy, the Supreme Court excised the language in the federal criminal code that made the USSG binding.[64] Post-

60. The burden is on the defendant to show the information in the PSR is inaccurate, unless DOJ immunity is involved, in which case the burden shifts to the DOJ to show that the information is not based on immunity. United States v. Taylor, 277 F.3d 721, 724 (5th Cir. 2001).

61. FED. R. CRIM P. 32(i).

62. Booker, 543 U.S. at 245. During Booker's trial, the jury was presented with evidence that Booker was found in possession of 92.5 grams of crack cocaine. The jury convicted Booker of possession of more than 50 grams of crack in violation of 21 U.S.C. § 841(a)(1), a conviction that carried a sentencing range of ten years to life. Given Booker's prior criminal history, the USSG prescribed a sentence of between 210 and 262 months. After the trial, during Booker's sentencing, the judge found specific enhancements applicable that increased his offense level based on information in the PSR. The court found that Booker's crime involved an additional 566 grams of crack cocaine as well as obstruction of justice and increased Booker's offense level and sentencing range to 360 months to life. Instead of the maximum of 262 months Booker faced after the jury verdict, he received a 360 month sentence based on the judge's application of the USSG's offense level enhancements. *Id.* at 257. The Supreme Court found that 18 U.S.C. § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, was "incompatible" with the Sixth Amendment requirement that juries, not judges, find facts relevant to sentencing. *Id.* at 222.

63. *Id.* at 246–47 (deciding that Sixth Amendment requirements "mean[] that it is no longer possible to maintain the judicial factfinding that Congress thought would underpin the mandatory Guidelines system that it sought to create").

64. *Id.* at 222. The Supreme Court justified the decision to make the USSG advisory and excise part of 18 U.S.C. § 3553(b) by concluding that a nonbinding system, albeit not the scheme Congress initially enacted, nonetheless retained the essential features that furthered congressional sentencing objectives by "provid[ing] certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing

Booker, the USSG became merely advisory.[65] Sentencing judges must calculate the sentencing guideline range based on information in the PSR but may depart if the case warrants departure under a series of factors set forth in 18 U.S.C. § 3553(a) that would make the case different from the typical guideline case.[66]

The post-*Booker* sentencing framework is a hybrid of the indeterminate sentencing scheme because judges, albeit bound to consider suggested sentencing ranges under the USSG, may, as a practical matter, impose whatever sentence they deem appropriate, so long as the sentence satisfies the factors set forth in section 3553(a).[67] Prosecutors and defense attorneys are free to argue that the guideline range is inappropriate under the section 3553(a) factors and that the sentencing judge should impose a greater or lesser sentence.[68]

An appeal of a sentencing judge's decision to vary from the USSG using the factors in section 3553(a) is reviewed only for reasonableness.[69] As long as the sentencing judge properly calculated the guidelines and noted the factors in section

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disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." *Id.* at 264.

65. *Id.* at 265 (acknowledging that "Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines" but concluding that, taking into account the Sixth Amendment requirements, such a mandatory system "is not a choice that remains open.").

66. These factors, set forth in 18 U.S.C. § 3553(a), include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the applicable sentencing range; (5) any pertinent policy statement; (6) the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a) (2010).

67. Booker, 543 U.S. at 266.

68. In 2010, Attorney General Eric Holder directed federal prosecutors to obtain supervisory approval before requesting variances under section 3553(a). Memorandum from Eric Holder, Attorney General, United States Department of Justice to All Federal Prosecutors on Department Policy on Charging and Sentencing at 3 (May 19, 2010) [hereinafter 2010 Holder Memo], *available at* http://edca.typepad.com/files/holder-memo-re-charging-and-sentencing-decisions-1.pdf (dictating that "[a]ll prosecutorial requests for departures or variances—upward or downward—must be based upon specific and articulable factors, and require supervisory approval.").

69. Rita v. United States, 551 U.S. 338, 341 (2007).

3553(a), any challenge to a variance from the USSG is unlikely to succeed.[70]

Under the advisory guideline system currently in place, the USSG remain a critical consideration for judges.[71] Most federal judges use the USSG as a starting point and recognize that, in the typical case, the applicable guidelines range continues to reflect an appropriate sentencing range.[72]

III. FEDERAL CHARGING PRINCIPLES AND THE DEVELOPMENT OF COMPLIANCE AS A FACTOR IN CORPORATE CHARGING AND SENTENCING

A. General Federal Charging Principles for Both Individual and Corporate Cases

Given the DOJ's limited resources, federal prosecutors cannot prosecute every case referred for prosecution. In 2009, 81,549 new federal criminal cases were reported and 177 of those cases involved organizational defendants.[73] The principles

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70. Another obstacle the DOJ faces in appealing a variance from the USSG using section 3553(a) is that it must seek the approval of the U.S. Solicitor General before appealing any final decision of a district court. 18 U.S.C § 3742(b)(4). The United States has a right to appeal an adverse district court ruling in a criminal case if the district court: (1) dismisses an indictment; (2) grants a new trial after verdict or judgment, unless the double jeopardy clause prohibits further prosecution; (3) grants a motion to suppress; (4) orders the return of seized property before the verdict; or (5) orders the release of a convicted person. 18 U.S.C. § 3731. The United States also may appeal the sentence imposed. 18 U.S.C. § 3742(b).

71. Of the 81,372 cases involving individuals sentenced in 2009: 842 were sentenced above the USSG range, 9,358 were sentenced below the USSG range, 151 received upward departures, and 861 received downward departures. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Tables 32A, 32B, 31B, and 31C (2009), *available at* http://www.ussc.gov/ Data_and_ Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm.

72. 2010 Holder Memo, *supra* note 68, at 2 (noting that prosecutors should typically advocate for a sentence within the applicable guidelines range); *see also* Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable USSG range); Gall, 552 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

73. *See* U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL

of federal prosecution, set forth in USAM 9-27.000, provide directives that federal prosecutors must consider in determining whether to pursue a criminal case.[74] Federal prosecutors must consider these general federal charging principles for all criminal cases.[75] Unlike the corporate charging principles now set forth in 9-28.000, the general principles of federal prosecution have undergone relatively few changes in the past twenty years. Since 1989, taking into account the nuances discussed below, these principles have commanded that federal prosecutors only prosecute the most significant cases and that they charge the most serious, readily provable offenses.[76]

The first step toward a centralized prosecutorial charging policy came in the final days of the Carter Administration, when the DOJ issued principles to guide federal prosecutors.[77] The original "Principles of Federal Prosecution" were very general.[78] In addition to the strength of the government's case, a federal prosecutor was directed to consider factors such as: federal law enforcement priorities; the nature and seriousness of the case; the deterrent effect of prosecution, the culpability of a person, his criminal history, and his willingness to cooperate in the investigation; the probable sentence; the possibility of effective

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YEAR 2009 2 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. There are no public statistics on how many cases are declined for federal prosecution.

74. USAM § 9-27.120 (2008).

75. The charging principles at USAM 9-27.220 provide that federal prosecutors should prosecute only those cases where a federal interest is involved. *Id.* § 9-27.230 (2008) (providing a list of factors to be considered in determining whether a federal interest exists).

76. *Id.* § 9-27.300 (2008).

77. Attorney General Benjamin R. Civiletti originally promulgated the Principles of Federal Prosecution on July 28, 1980. *See* U.S. Dep't of Justice, Principles of Federal Prosecution (1980), now expanded and contained in §§ 9-27.001–.760 of the U.S. ATTORNEYS' MANUAL (2008). Later, the DOJ's hundred-page "Prosecutors Handbook on Sentencing Guidelines" was issued on November 1, 1987, the same day that the USSG went into effect. USAM, *supra* note 10, § 9-27.001. Two days later, then-Assistant Attorney General of the DOJ's Criminal Division, Stephen Trott, issued a parallel policy statement. *See* U.S. Dep't of Justice, Principles of Federal Prosecution (1980), now expanded and contained in §§ 9-27.001–.760 of the U.S. ATTORNEYS' MANUAL (2008).

78. *Id.*

prosecution in another jurisdiction; and the adequacy of any non-criminal alternatives to prosecution.[79] The original iteration of the DOJ's charging policy simply stated that a prosecutor should enter into a plea bargain only where the offense pled to bore "'a reasonable relationship to the nature and extent' of the defendant's conduct and the plea would result in an appropriate sentence considering the circumstances of the case."[80]

In March 1989, Attorney General Richard Thornburgh issued a memorandum (Thornburgh Memo) that provided a roadmap for prosecutors on how to charge criminal cases (as opposed to the more general guidance on plea agreements).[81] The Thornburgh Memo directed federal prosecutors to charge the "most serious, readily provable offense."[82] The Thornburgh Memo allowed prosecutors to dismiss charges if it became apparent post-indictment that the charges were not readily provable or that some other circumstance, such as the need to protect a cooperating witness, supported the decision.[83] Additionally, the Thornburgh Memo provided that cooperation was to be rewarded with a motion for relief under USSG § 5K1.1 if the factors set out in section 5K1.1 were satisfied.[84] But the

79. *Id.*

80. *See* Vinegrad, *supra* note 54.

81. Memorandum from Richard Thornburgh, United States Attorney General, to Federal Prosecutors (Mar. 13, 1989), *in* 6 Fed. Sent. R. 347 (1994) [hereinafter Thornburgh Memo].

82. *Id.* The Thornburgh Memo provided that "a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct." *Id.*

83. *Id.* at 2. The Thornburgh Memo also contemplated two exceptions to the "most serious, readily provable offense" charging policy. The first exception allowed readily provable charges to be dismissed "if the applicable guideline range from which a sentence may be imposed would be unaffected." *Id.* at 2. The second exception allowed federal prosecutors to drop readily provable charges, with supervisory approval, if a particular U.S. Attorneys' Office was "particularly overburdened" and the case would prove too time-consuming to try. *Id.* at 3.

84. Section 5K1.1 permits a court to depart from the USSG if the defendant provides substantial assistance to the authorities. USSG § 5k1.1 (2010). The court is to determine whether substantial assistance exists by examining a number of factors, including: the significance and usefulness of the defendant's assistance; the truthfulness and reliability of any information the defendant provides; the nature and extent of the

Thornburgh Memo was clear that the initial charges must be those that resulted in the highest guidelines range (the most serious, readily provable offense).[85]

On September 22, 2003, Attorney General John Ashcroft issued a new federal charging memo (Ashcroft Memo) that echoed Thornburgh's stance of filing the most serious, readily provable charges, with certain narrow exceptions.[86] The Ashcroft Memo also refined the DOJ's plea bargaining policy by mandating that prosecutors require defendants plead guilty only to the most serious, readily provable charges (or those that did not reduce a defendant's sentence).[87]

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defendant's assistance; any danger the defendant or his family may face as a result of the defendant's assistance; and the timeliness of the defendant's assistance. *Id.* § 5K1.1(a)(1)–(5) (2010). Most U.S. Attorneys' Offices and DOJ components have policies and committees of prosecutors that govern under what circumstances 5K1.1 motions are appropriate and what type of reductions may be sought. *See generally*, Ashcroft Memo, *supra* note 58. Once a 5K1.1 motion has been filed by a prosecutor, the sentencing judge may depart as low as the judge deems appropriate. Occasionally, these motions are denied. Moreover, the sentencing judge still must consider the factors in section 3553(a) after the guidelines are recalculated based on the DOJ's 5K1.1 motion. USSG § 5k1.1 cmt. background (2010).

85. *See* Thornburgh Memo, *supra* note 81 ("Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the [USAM], a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct"); *see also* Ashcroft Memo, *supra* note 58 (defining "[t]he most serious offense or offenses a[s] those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.").

86. The exceptions to the basic charging policy, as set out in the Ashcroft Memo, included (1) if the sentence would not be affected; (2) "fast-track" programs; (3) post-indictment reassessment; (4) substantial assistance; (5) statutory enhancements; and (6) other exceptional circumstances. *See* Ashcroft Memo, *supra* note 58.

87. *Id.* Civiletti's original construction of the DOJ's plea bargaining policy stated that a prosecutor could enter into a plea bargain to a charged offense "or a lesser related offense" if the plea bargain offense bore "a reasonable relationship to the nature and extent" of the defendant's conduct. Vinegrad, *supra* note 54. The Thornburgh Memo refined the plea-bargaining standard, instructing that a defendant should generally be required to plead guilty to the most serious readily provable offense, but allowing three exceptions: (1) if the prosecutor determined the charge was not readily provable; (2) if the applicable USSG range would be unaffected; or (3) if a supervisor approved the plea bargain. Thornburg Memo, *supra* note 81. The Ashcroft Memo made the plea bargaining policy more stringent, authorizing prosecutors to negotiate a plea for less than the most serious readily provable charge only if one of the following exceptions applied: (1) the sentence would be unaffected; (2) the case was part of a "fast-track" program; (3) the

Broadly speaking, the charging framework established in the Thornburgh and Ashcroft Memos sought to ensure that DOJ policy was consistent with the USSG goal of accurately capturing the defendant's conduct to make a proper guideline determination.[88] These policies sought to ensure that defendants were charged uniformly and that prosecutors did not threaten more serious charges in order to induce defendants to plead.[89] Under the guidance from Thornburgh and Ashcroft, after a federal prosecutor decided there was a federal interest in prosecution, the prosecutor would look to the USSG, decide which charge represented the most serious, readily provable offense, and file the charge that would achieve the greatest sentence.[90] Pursuant to the Ashcroft Memo, once charges were filed against a defendant, the defendant could only plead to those charges that resulted in the highest sentencing guideline

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charge was no longer readily provable; (4) to secure a defendant's cooperation; or (5) in rare cases with supervisory approval. Ashcroft Memo, *supra* note 58. Plea-bargaining under the Ashcroft Memo was stricter in that it did away with the "individualized assessment" allowed under Thornburgh, which had entrusted prosecutors with the discretion to enter a plea bargain for less than the most serious charge based on a determination that the initial indictment exaggerated the seriousness of the offense. Adam Liptak & Eric Lichtblau, *New Plea Bargain Could Swamp Courts*, N.Y. TIMES, Sept. 24, 2003, *available at* http://www.nytimes.com/2003/09/24/ national/24PROS.html; *see also* Ashcroft Memo, *supra* note 58, at Section II.C ("Charges may be declined or dismissed pursuant to a plea agreement only to the extent consistent with the principles set forth in Section I of this Memorandum.").

88. *See* Joy Anne Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 603 (stating uniformity of sentencing as the goal of the USSG, and explaining how the DOJ's policy under Thornburg and Ashcroft of charging the most serious, readily provable offense is consistent with this goal).

89. *See* Thornburgh Memo, *supra* note 81 ("Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct."); *see also* Ashcroft Memo, *supra* note 58, at Section I.A. (providing that "charges should not be filed simply to exert leverage to induce a plea").

90. *See* Ashcroft Memo, *supra* note 58 (noting that it is the policy of the Justice Department for federal prosecutors to charge and pursue the most serious readily provable offenses and that the most serious offense or offenses are "those that generate the most substantial sentence under the Sentencing Guidelines"); *see also* Vinegrad, *supra* note 54, at 1 (Explaining that the Thornburgh Memo instructed that "a defendant should generally be required to plead guilty to the most serious readily provable offense").

level.[91] This policy ensured that the charging for all defendants was the same, reinforcing the USSG policy of uniformity and honesty in sentencing.

Only a few years passed before it became apparent that the absence of charging guidance tailored to corporations was impeding both the prosecution and sentencing of corporate defendants.[92] Companies were unique defendants because they could not go to jail but could take significant steps, through use of a compliance program, to prevent criminal conduct before it occurred.[93] Notwithstanding a widespread recognition that corporate defendants were different from individual defendants both in form and in substance, neither courts nor prosecutors were asking the fundamental question of whether corporations had tried to prevent criminal conduct with a comprehensive compliance program.

B. The Organizational Guidelines and the Rise of Compliance as a Charging Consideration

In 1991, after years of studying how to adequately address the differences between sentencing corporations and sentencing individuals, the USSC issued the Organizational Guidelines, found in Chapter Eight of the USSG.[94] Recognizing that what

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91. *See* Ashcroft Memo, *supra* note 58 (noting that it is the duty of federal prosecutors to ensure that "circumstances in which it will request or accede to downward departures in the future are properly circumscribed." Additionally, it notes a US attorney can only accede to a downward departure at sentencing only if the defendant provides substantial assistance to the Government's case or if it falls within one of the "fast track" programs).

92. *See* Win Swenson, *The Organizational Guidelines' "Carrot and Stick" Philosophy, and Their Focus on "Effective" Compliance*, in Proceedings of the Second Symposium on Crime and Punishment in the United States, "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation" (Sept. 7–8, 1995), at 25, *available at* http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf (noting that, before the USSG, the sentencing of corporations lacked a coherent, consistent rationale as "judges truly were struggling to find meaningful ways to sanction corporations").

93. Kathryn Keneally, *Corporate Compliance Programs: From the Sentencing Guidelines to the Thompson Memorandum and Back Again*, CHAMPION MAGAZINE, June 2004, at 42.

94. *See* U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS (1991), *available at*

constitutes an effective compliance program varies depending on factors such as the size of a company, the nature of its business, and its prior compliance history, the USSC outlined seven general criteria that were necessary components of an effective compliance program.[95] To have an effective compliance program, a company must:

(1) Establish compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct.

(2) Assign specific high-level personnel the oversight responsibility for company standards and procedures.

(3) Use due care not to delegate substantial discretionary authority to individuals whom the organization knows, or should know, have the propensity to engage in illegal activities.

(4) Effectively communicate company standards and procedures to all employees, *e.g.*, through employee training programs.

(5) Take reasonable steps to achieve compliance with company standards, *e.g.,* by utilizing monitoring and auditing systems designed to detect criminal conduct by employees and by having in place a reporting system for employees to report suspected misconduct.

(6) Consistently enforce compliance standards through appropriate disciplinary mechanisms.

(7) After an offense has been detected, take all reasonable steps necessary to respond to the offense and prevent similar offenses, *e.g.*, through modification or revision of the compliance program.[96]

The 1991 Organizational Guidelines made clear that an effective compliance program meant a program that has been reasonably designed, implemented, and enforced so that it will

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http://www.ussc.gov/Guidelines/Organizational_Guidelines/Historical_Development/OrgGL83091.pdf (detailing the USSC's effort to conduct empirical research and analysis on organizational sentencing practices, which included gathering information on more than 80 variables from 774 organizations and associated individual defendants sentenced between 1988 and 1990, before ultimately drafting the Organizational Guidelines).

95. USSG § 8A1.2, application note 3(k) (2010).

96. *Id.* § 8B2.1(b) (2010).

be effective in preventing and detecting criminal conduct.[97] While failure to prevent an offense does not automatically mean a compliance program is ineffective, the hallmark of an effective compliance program is a company's exercise of due diligence to prevent and detect criminal conduct by its employees.[98] The seven criteria outlined above are critical due diligence steps a company must undertake to have an effective compliance program.

The significance of the Organizational Guidelines for the corporate charging process and compliance programs cannot be overstated. The Organizational Guidelines provided companies a framework that set forth a floor for an effective compliance program. At the same time, they also implemented a frame of reference to help prosecutors determine what constitutes the most serious, readily provable offense in the context of corporate defendants. When prosecutors evaluated which charges to file against a company and what sort of fine the company would pay, they now had guidance to decide on the appropriate resolution. Compliance was the touchstone of that analysis; indeed, a strong compliance program provided companies with an opportunity to reduce a fine under the USSG by up to thirty percent.[99]

Not only did the Organizational Guidelines formally insert compliance into the federal charging and sentencing analysis, they also spawned an industry of compliance and ethics professionals.[100] In 1992, the Ethics & Compliance Officer Association was formed with seven officers.[101] Today the organization has thousands of members who devote their careers to counseling companies on compliance issues.[102]

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97. *Id.*

98. *Id.* § 8B2.1(a) (2010).

99. *See infra* Part III (Calculating a Corporate Sentence under Chapter Eight).

100. *See History of the ECOA*, ETHIC AND COMPLIANCE OFFICER ASSOCIATION, http://www.theecoa.org/imis15/ECOAPublic/ABOUT_THE_ECOA/History_of_the_ECOA/ECOAPublic/AboutContent/History.aspx?hkey=43ce057e-1870-408c-a6b3-b2f27c5b2950 (last visited June 4, 2011).

101. *Id.*

102. *ECOA Global Network*, ETHIC AND COMPLIANCE OFFICER ASSOCIATION, http://www.theecoa.org/imis15/ECOAPublic/ABOUT_THE_ECOA/ECOA_Global_Network/ECOAPub

Despite this focus on compliance, virtually no company that has been convicted of a federal crime has been found to have an adequate compliance program.[103]

In 1995, the USSC began to track whether corporations sentenced under the Organizational Guidelines had effective compliance programs.[104]

Because the USSC's dataset only tracks organizations convicted and sentenced in federal court, it is not representative of the reductions received through other settlement methods such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[105] But these statistics, which are set forth below in Table II, indicate that companies that are the targets of DOJ criminal investigations do indeed suffer from compliance deficiencies.

lic/AboutContent/Global_Network.aspx (last visited June 4, 2011).

103. U.S. SENTENCING COMM'N, ANNUAL SOURCEBOOKS (1996–2009), *available at* http://www.ussc.gov/Data_and_Statistics/archives.cfm.

104. *See* U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT 120–28 (1995), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1995/ANNUAL95.htm.

105. *See* U.S. SENTENCING COMM'N, GUIDE TO PUBLICATIONS & RESOURCES (2010), *available at* http://www.ussc.gov/Publications/2010_Guide_to_Publications_and_Resources.pdf.

Table II: Companies with Compliance Programs that were Convicted and Sentenced, By Year[106]

	96	**97**	**98**	**99**	**00**	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**
Organizations with effective compliance program	0	1	0	1	0	0	0	0	0	0	0	1	0	0
Organizations with compliance program, but program was not effective	0	0	0	0	14	2	0	0	0	0	0	0	0	0
Organizations without effective compliance program	94	112	118	91	118	90	143	90	20	69	108	88	93	96
Total	**94**	**113**	**118**	**92**	**132**	**92**	**143**	**90**	**20**	**69**	**108**	**89**	**93**	**96**

The most recent statistics set forth in Table II indicate that only three companies from 1996 to 2009 received a culpability score reduction for having an effective compliance program. An additional sixteen companies had compliance programs in place, but the programs did not meet the minimum requirements under the Organizational Guidelines to be considered effective. The Organizational Guidelines provided companies with a baseline for their compliance model and prosecutors with a framework for evaluating a company's conduct both for charging and sentencing purposes. These statistics highlight that an effective corporate compliance program is a critical component of deterrence but that most companies convicted of violating federal law still lack effective compliance programs.

106. U.S. SENTENCING COMM'N, ANNUAL SOURCEBOOKS (1996–2009), *available at* http://www.ussc.gov/Data_and_Statistics/archives.cfm.

C. Federal Charging Principles Applicable to Organizations

There is no empirical evidence that before 1991 courts considered compliance in deciding how to sentence a corporation or that prosecutors considered compliance as a consideration for charging. After 1991, federal prosecutors considered a company's compliance program when following the Thornburgh Memo (and later the Ashcroft Memo) and calculating a corporate defendant's sentencing guidelines before filing charges.[107]

In 1999, then-Deputy Attorney General Eric Holder issued formal corporate charging guidance (1999 Holder Memo) that memorialized the factors prosecutors must consider in making a charging decision against a company.[108] The 1999 Holder Memo officially recognized what had become obvious to federal prosecutors and judges: corporate charging and sentencing decisions involve distinct variables from those at play in the charging of individuals.[109] To address these differences, the 1999 Holder Memo supplemented the general federal charging policy of charging the most serious, readily provable offense by outlining eight specific considerations for prosecutors to weigh when charging corporations.[110] These factors were to be considered in addition to the general charging considerations applicable to individuals.[111]

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107. *See* Thornburg Memo, *supra* note 81; *see also* Ashcroft Memo, *supra* note 58.

108. Memorandum from Eric Holder, Deputy Attorney General, to Component Heads and United States Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter 1999 Holder Memo], *available at* http://www.justice.gov/criminal/fraud/documents/ reports/1999/charging-corps.PDF; *see also* Lawrence D. Finder and Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 7 (2006) (explaining that the 1999 Holder Memo "took a set of post-investigation procedures and policies (the Organizational Guidelines) and merged it with a set of pre-trial policies and initiatives (the U.S. Attorneys' Manual), an amalgamation that transformed DOJ corporate charging policy.").

109. 1999 Holder Memo, *supra* note 108, at Section II.A (outlining specific factors when dealing with corporate defendants).

110. *Id*.

111. *Id.* (stating that, "[g]enerally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals . . . However, due to the nature of the corporate 'person,' some additional factors may be present.").

The framework outlined in the 1999 Holder Memo urged consideration of the following eight factors in deciding whether to criminally prosecute a corporation: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) a corporation's history of similar conduct; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with investigating agents; (5) the existence and adequacy of the corporation's compliance program; (6) the corporation's remedial efforts; (7) any collateral consequences, including disproportionate harm to shareholders and employees not personally culpable; and (8) the adequacy of available non-criminal remedies.[112]

Although cooperation received all of the initial press, compliance was specifically incorporated into the charging guidance. In fact, three of these eight factors addressed compliance.[113] Only one addressed cooperation.[114] The 1999 Holder Memo instructed prosecutors to consider compliance in the following three factors: (1) the pervasiveness of corporate wrongdoing, (2) the existence of a compliance program, and (3) a corporation's remedial actions.[115] First, in the factor that addressed evaluating the pervasiveness of corporate

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112. *Id*.

113. *See* USAM §§ 9-28.500, .800, .900 (2008) (providing the Principles of Federal Prosecution of Business Organizations).

114. The 1999 Holder Memo stated that cooperation was one factor to be considered in deciding whether to prosecute a corporation. 1999 Holder Memo, *supra* note 108, at VI. In assessing cooperation, prosecutors could weigh "the completeness of [a corporation's] disclosure including, if necessary, a waiver of the attorney-client and work product protections." *Id.* Because substantial scholarship has been devoted exclusively to the role of cooperation in pre-trial agreements, this article focuses on compliance and addresses cooperation only in passing. *See, e.g.,* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 324–26 (2007) (criticizing deferred prosecution agreements for imposing excessive and inappropriate managerial control on the involved corporations); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 78–81 (2006) (discussing arguments related to abusive government tactics in prosecution agreements); Finder & McConnell, *supra* note 108, at 17 ("Consistent with the Thompson Memo, the central theme of a pre-trial agreement is cooperation with the government.").

115. Christopher A. Wray and Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1100 (2006).

wrongdoing, the 1999 Holder Memo noted that it may not be appropriate to impose liability on a corporation with a robust compliance program under a *respondeat superior* theory for the single isolated act of a rogue employee.[116] Second, prosecutors were urged to examine the effectiveness of a corporation's compliance program as a stand-alone consideration.[117] Finally, the third factor instructed prosecutors to consider any efforts taken by a company to implement a remedial compliance program after a violation occurred.[118]

A key concept in the 1999 Holder Memo was the idea that companies should not have "paper program[s]."[119] The 1999 Holder Memo cautioned prosecutors against giving credit for compliance when a corporation maintains only the façade of a compliance program, or a "paper program" that does not actually effectuate compliance.[120] To make this determination, Holder's guidance instructed prosecutors to "determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts."[121] The 1999 Holder Memo instructed that "the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether management is enforcing the program."[122] For companies facing a DOJ charging decision, this meant that even the most well-written compliance policy deserved no compliance-related charging consideration (or discounted fine calculation) if the corporation had not taken steps to implement the policy and ensure employees understood and followed the compliance model.[123]

In 2003, Deputy Attorney General Larry Thompson issued a

116. *See* USAM § 9-28.500 (2008).

117. USAM § 9-28.300 (2008).

118. *See* USAM §§ 9-28.500, .800, .900 (2008) (providing the Principles of Federal Prosecution of Business Organizations).

119. 1999 Holder Memo, *supra* note 108, at Section VII.B.

120. *Id*.

121. *Id*.

122. *Id*.

123. *Id*.

memorandum (Thompson Memo) that provided federal prosecutors with revised guidance on corporate charging.[124] The Thompson Memo, however, left unchanged the substance of the factors dealing with compliance—instead adding a ninth factor relating to the adequacy of prosecution of individuals to the corporate charging framework.[125] Notably, the Thompson Memo explicitly mentioned pre-trial diversion as a suitable reward for a company's cooperation and compliance initiatives, further laying the foundation for the subsequent proliferation of DPAs and NPAs.[126] These agreements, discussed below, are loaded with compliance features and allow companies that adhere to compliance reforms and cooperate with the DOJ's investigation to escape criminal convictions.[127] Although the DOJ would later

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124. *See* Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having At All?*, 30 SEATTLE U. L. REV. 155 (2006) (detailing the many problems associated with attorney-client privilege waivers); *see also* Finder & McConnell, *supra* note 108, at 9 (noting that the waivers of corporate attorney-client and work product privileges were the most controversial provisions stemming from the 1999 Holder Memo).

125. Thompson Memo, *supra* note 15. The Thompson Memo further fortified the theme of cooperation by requiring companies to take controversial actions such as waiving attorney-client privilege, turning over materials gathered during internal investigations, and refusing to provide company executives with company lawyers. *Id*. This revised cooperation guidance was subsequently scaled back in a confusing memorandum issued by Deputy Attorney General Paul McNulty in 2006, which attempted to categorize potentially privileged information into different categories and implemented an approval process for privilege waivers. *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorney on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf. The McNulty Memo was abandoned in 2008 and replaced with USAM § 9-28.000, which specifically instructs prosecutors not to request privilege waivers or consider corporate fee advancements or joint defense arrangements for charging purposes. USAM § 9-28.000 (2008). Companies, however, remain free to voluntarily waive both the attorney client and work-product privileges. *Id.*

126. *See* Thompson Memo, *supra* note 15. The Thompson Memo acknowledged that no compliance program can ever prevent all criminal activity by a corporation's employees but urged that the critical factors in the DOJ's evaluation of a compliance program are "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." *Id.*

127. Wray, *supra* note 115.

retreat from positions on corporate cooperation dealing with attorney-client privilege and attorneys' fees, corporate fee advancements to employees under investigation, and joint-defense agreements, the DOJ policies remained steadfast with respect to the importance of compliance as a corporate charging consideration.[128]

In 2010, Attorney General Eric Holder slightly modified the general federal charging directive from Ashcroft and Thornburgh that prosecutors charge the most serious, readily provable conduct by changing "must" to "should" and otherwise providing more discretion to federal prosecutors in charging by instructing prosecutors to make individual assessments.[129] But the basic theme has remained constant since 1989: prosecutors are to base any charging decisions on an analysis of the USSG.[130] Since 1991, this analysis for corporations has included compliance as a key consideration under the Organizational Guidelines, and still allows for up to a thirty percent reduction of a corporate fine calculation.[131] Additionally, since 1999, the

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128. *See* Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations, (Aug. 28, 2008) [hereinafter Filip Memo], *available at* http://www.justice.gov/dag/ readingroom/dag-memo-08282008.pdf (reconsidering corporate cooperation credit in the areas of privilege waivers, employee indemnification, joint defense agreements, and employee termination and moving the corporate charging principles into section 9-28.000 of the USAM); *see also* United States v. Stein, 541 F.3d 130, 150 (2d Cir. 2008) (holding that government pressure on a company to demonstrate its cooperation by refusing to indemnify officers and directors violated the Sixth Amendment rights of the officers and directors). Interestingly, the instructions to federal prosecutors accompanying the Filip Memo specifically advised prosecutors to reference the current corporate charging policy in 9-28.000 as a DOJ policy in the USAM, not as a policy associated with a particular attorney general or deputy attorney general (*e.g.*, Holder Memo, Thompson Memo, McNulty Memo). Filip Memo, *supra*. Now the corporate charging principles in 9-28.000 are referenced simply as USAM § 9-28.000.

129. 2010 Holder Memo, *supra* note 68 (providing that "[t]he reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws."). The 2010 Holder Memo did not address the corporate charging factors set forth in 9-28.000.

130. 2010 Holder Memo, *supra* note 68 ("For nearly three decades, the Principles of Federal Prosecution, as reflected in Title 9 of the [USAM], Chapter 27, have guided federal prosecutors . . .").

131. *See* USSG § 8C2.5 (2010).

charging analysis has also included a framework where at least a third of the charging principles address compliance.[132]

IV. CALCULATING A CORPORATE SENTENCE UNDER CHAPTER EIGHT

In accordance with the Thornburgh, Ashcroft, and the 2010 Holder Memos set forth in USAM 9-27.000 and the DOJ's corporate charging principles now set forth in 9-28.000, a corporate defendant's guideline range must be calculated by prosecutors before criminal charges are filed.[133] Calculations under the Organizational Guidelines differ from USSG calculations for individuals because corporate sentencing considers unique factors, such as any steps a company has undertaken to combat criminal conduct by employees, the company's level of cooperation, and the size of an organization.[134]

Under the Organizational Guidelines, unless a corporation's primary purpose was to engage in criminal activity, the USSG range is calculated by (1) determining the offense level; (2) applying the offense level to the corporate fine table; (3) determining the culpability score; and (4) applying a multiplier to the culpability score to determine the maximum and minimum fines under the USSG.[135] Calculating a hypothetical USSG range quickly reveals the significant benefits organizations may receive for an effective compliance program—benefits that are considered both at the charging and sentencing stages.

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132. *See* 1999 Holder Memo, *supra* note 108 (the framework of the charging principles contain three of eight factors that address compliance).

133. USAM §§ 9-27.000 to 9-28.000 (2008).

134. Paula A. Tuffin, *Effective Compliance and Ethics Programs Under the Amended Sentencing Guidelines*, NEWSLETTER OF THE ABA BUSINESS LAW SECTION COMMITTEE ON CORPORATE COMPLIANCE (Summer 2010), http://www.abanet.org/buslaw/committees/CL925000pub/ newsletter/201007/tuffin.pdf.

135. If the organization's primary purpose was to engage in criminal activity, the USSG requires a fine sufficient to divest the company of all of its assets. USSG § 8C1.1 (2010).

A. Step 1: Determining the Offense Level

The first step toward determining a guideline sentence under the Organizational Guidelines involves analysis that is very similar to determining a guideline range for an individual. The offense guideline formulas in USSG Chapter 2 are used to determine the underlying offense conduct.[136] For instance, if the company's offense conduct was bribery under the FCPA, the base offense level is determined using section 2C1.1.[137]

This guideline has a base offense level of 12 (unless the defendant was a public official) and then applies specific offense characteristics such as the number of bribes involved and the value of the payments made or benefits received.[138] The guideline then refers to the financial loss table set forth in the economic crime guideline under Chapter 2B1.1, which is to be used to increase the number of offense levels corresponding to the amount of the loss.[139]

> § 2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions
>
> (a)Base Offense Level:
>
> (1)14, if the defendant was a public official; or
>
> (2)12, otherwise.
>
> (b)Specific Offense Characteristics
>
> (1)If the offense involved more than one bribe or extortion, increase by 2 levels.
>
> (2)If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest,

136. *See* USSG § 1B1.1(a)(2) (2010) (explaining the steps of the guideline formula application process and how USSG Chapter 2 is utilized).

137. USSG § 2C1.1 (2010).

138. USSG § 2C1.1(a)(2) (2010).

139. USSG § 2C1.1(b)(2) (2010).

exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3)If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4)If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c)Cross References

(1)If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

(2)If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.

(3)If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.

(d)Special Instruction for Fines - Organizations

(1)In lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery;

Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a)Base Offense Level:

(1)7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2)6, otherwise.

(b)Specific Offense Characteristics

(1)If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)		**Increase in Level**
(A)	$5,000 or less	No increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26
(O)	More than $200,000,000	add 28
(P)	More than $400,000,000	add 30.

If a company paid more than one bribe and the economic gain totaled $50 million, the total offense level under section 2C1.1 would be 36.[140]

B. Step 2: Applying the Offense Conduct to the Fine Table

The second step requires the application of the offense level from USSG section 2C1.1 to a base fine table set forth in the Organizational Guidelines.[141] In our hypothetical, this would

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140. An offense level of 36 points is arrived at by aggregating the following: the base offense level of 12 points (under section 2C1.1(a)(2)) plus 2 points because the offense involved more than one bribe (under section 2C1.1(b)(1)) plus an additional 22 points because the value of the bribe was $50,000,000 (cross reference to section 2B1.1(b)(1)(L) (loss amount of more than $20,000,000)).

141. Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 329–32 (2006). The fine guidelines under the Organizational Guidelines apply so long as the underlying count is one referenced in section 8C2.1. The guidelines applicable to the counts most commonly charged in connection with FCPA violations (sections 2C1.1, 2B1.1, 2B4.1) are included in section 8C2.1. Once it is determined that the Organizational Guidelines apply, the base fine calculation analysis begins with USSG § 8C2.4, which provides that the base fine is the greatest amount of (1) the base amount set out in the Offense Level Fine Table (found in section 8C2.4(d)) or (2) the pecuniary gain to the organization or (3) the pecuniary loss caused by the organization. Importantly, section 8C2.4(b) notes that any time the applicable offense guideline provides special instructions for organizational fines, those special instructions apply. Chapter Two guidelines frequently contain special instructions for organizational fines. The special instruction provides that, instead of considering pecuniary loss, *i.e.*, the third option listed under section 8C2.4(a)(3), the greatest of (1) the value of the unlawful payment or (2) the value of the benefit received or (3) the consequential damages from the unlawful payment, should be applied. *See, e.g.*, USSG §§ 2C1.1(d)(1), 2B4.1(c)(1) (2010) (both including the special instruction for organizational fines).

Essentially, this means that the base fine amount will generally be the greatest of: (1) the base fine table; (2) the pecuniary gain to the organization; (3) the value of the unlawful payment; (4) the value of the benefit received from the unlawful payment; or (5) the consequential damages from the unlawful payment. Any time the Chapter Two guidelines for the specific offense include a special instruction for organizational fines, that instruction in effect does away with the consideration of the pecuniary loss from the offense and replaces it with the latter three factors listed above.

Additionally, in any instance where the value of the bribe or the value of the benefit received as a result of the bribe exceeds $72.5 million, that number will be applied as the base fine amount because the Offense Level Fine Table is capped at $72.5 million and so will never be the greatest amount when the amount of the bribe was higher. *Compare* Deferred Prosecution Agreement, United States v. Technip S.A., No. 4-10-CR-00439 (S.D. Tex. June 28, 2010) [hereinafter Technip DPA] (calculating a $199 million fine

result in a base fine level of $50 million (which is greater than the fine provided for in the offense level fine table in section 8C2.4).[142] If the pecuniary gain had been lower than the amount set out as corresponding to the 36 point offense level in the Offense Level Fine Table, then the amount in the table would have served as the amount of the base fine.[143]

> **§ 8C2.4. Base Fine**
>
> (a)The base fine is the greatest of:
>
> (1)the amount from the table in subsection (d) below corresponding to the offense level determined under § 8C2.3 (Offense Level); or
>
> (2)the pecuniary gain to the organization from the offense; or
>
> (3)the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.
>
> (b)*Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.
>
> (c)*Provided*, further, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

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based on the value of the benefit received under § 8C2.4 and § 2C1.1(d)(1)(B)), *with* Deferred Prosecution Agreement, United States v. Pride International, Inc., No. 10-CR-766 (S.D. Tex. Nov. 4, 2010) [hereinafter Pride Int'l DPA] (using the Offense Level Table base fine of $72.5 million where the total benefit received by the company was only $13 million), *and* Deferred Prosecution Agreement, United States v. Aibel Group Limited, No. 07-CR-005 (S.D. Tex. Jan. 5, 2007) [hereinafter Vetco DPA] (applying the benefit received ($5,945,562 million) as the base fine where the Offense Level Table only recommended a base fine of $1.6 million).

143 *See* USSG §§ 2C1.1 & 8C2.4 (2010) (applying the language in 2C1.1 to the base fine found in 8C2.4 gives us a base fine level of $50 million).

143. Here, the pecuniary gain to the hypothetical organization was $50 million whereas the amount corresponding to the 36 point base offense level was $45.5 million. Because the base fine is calculated as the *greatest of* the amount from the fine level or the pecuniary gain to the organization or the pecuniary loss caused by the organization, $50 million—the highest amount—serves as the base fine amount under section 8C2.4(a).

(d)Offense Level Fine Table

Offense Level	Amount
6 or less	$5,000
7	$7,500
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 and more	$72,500,000.

C. Step 3: Determining the Culpability Score

The third step involves determining the culpability score, which can either halve this fine amount on one end of the spectrum or double it on the other, depending on the size of the organization, the level of cooperation (if any), and whether the company had an effective compliance program in place.[144] This calculation begins with a base number of five under USSG § 8C2.5.[145] In our example, assuming the company had over 1,000 employees, but failed to self-report the violation, refused to cooperate with the investigation, and lacked an adequate compliance program, the multiplier number would be 9.[146]

> § 8C2.5. Culpability Score
>
> (a)Start with 5 points and apply subsections (b) through (g) below.
>
> (b)Involvement in or Tolerance of Criminal Activity
>
> If more than one applies, use the greatest:
>
> (1)If —

144. *See* USSG § 8C2.5 (2010) (depending on the size the organization, the level of cooperation, and whether the company had an effective compliance program in place, the USSG will require that the culpability score be either increased or decreased).

145. USSG § 8C2.5(a) (2010).

146. The culpability score of 9 is arrived at by beginning with the base culpability score of 5 (§ 8C2.5(a)) and adding 4 because the hypothetical company had over 1,000 employees but less than 5,000 employees (§ 8C2.5(b)(2)(A)). Here the hypothetical provides that the company did not cooperate with the investigation. If the company had actually impeded the investigation it would receive an additional 3 points for obstruction of justice under 8C2.5(e). In contrast, if the company had an effective compliance program in place, the score could have decreased by 3 points under 8C2.5(f)(1) (provided that there was no delay in reporting the offense).

(A)the organization had 5,000 or more employees and

(i)an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B)the unit of the organization within which the offense was committed had 5,000 or more employees and

(i)an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 5 points; or

(2)If —

(A)the organization had 1,000 or more employees and

(i)an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B)the unit of the organization within which the offense was committed had 1,000 or more employees and

(i)an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 4 points; or

(3)If —

(A)the organization had 200 or more employees and

(i)an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B)the unit of the organization within which the offense was committed had 200 or more employees and

(i)an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii)tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 3 points; or

(4)If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add 2 points; or

(5)If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add 1 point.

(c)Prior History

If more than one applies, use the greater:

(1)If the organization (or separately managed line of business) committed any part of the instant offense less than 10 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, add 1 point; or

(2)If the organization (or separately managed line of business) committed any part of the instant offense less than 5 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, add 2 points.

(d)Violation of an Order

If more than one applies, use the greater:

(1)(A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add 2 points; or

(2)If the commission of the instant offense violated a

condition of probation, add 1 point.

(e)Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add 3 points.

(f)Effective Compliance and Ethics Program

(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.

(2)Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3)(A)Except as provided in subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in § 8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B)There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i)within high-level personnel of a small organization; or

(ii)within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

(C)Subparagraphs (A) and (B) shall not apply if—

(i)the individual or individuals with operational

> responsibility for the compliance and ethics program (see § 8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);
>
> (ii)the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
>
> (iii)the organization promptly reported the offense to appropriate governmental authorities; and
>
> (iv)no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.
>
> (g)Self-Reporting, Cooperation, and Acceptance of Responsibility
>
> If more than one applies, use the greatest
>
> (1)If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points; or
>
> (2)If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 2 points; or
>
> (3)If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 1 point.

D. Step 4: Applying the Culpability Score to the Multiplier Table

The final step applies this culpability score to the multiplier table in the Organizational Guidelines.[147] In our example, this would yield a minimum multiplier of 1.8 and a maximum

147. Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 336–37 (2006).

multiplier of 3.6.[148] If applied to our $50 million fine from Step 3, this yields a maximum fine of $180 million and a minimum fine of $90 million.[149] Because the maximum fine under the FCPA is $2 million or twice the gross gain to the company, the maximum fine would be $100 million by statute.[150]

The existence of an effective compliance program under the Organizational Guidelines would have changed this number significantly by reducing the culpability score from 9 to 6.[151] This new score changes the multiplier from a minimum of 1.2 to a maximum of 2.4 with a fine range under the USSG of $60 million to $120 million (with the same statutory cap of $100 million).[152] In other words, an effective compliance program reduces the potential guideline fine by over $40 million—in addition to the charging considerations set forth in the three DOJ corporate factors under USAM 9-28.000.[153]

Additionally, if the company had voluntarily disclosed the conduct and cooperated with the investigation, the culpability score could decrease by as many as five additional levels for a culpability score of 1 instead of the original score of 9.[154] This would result in a minimum multiplier of .2 and a maximum multiplier of .4 with a fine under the USSG of $10 million to $20 million, or less than the benefit received by the company.[155]

§ 8C2.6. Minimum and Maximum Multipliers

Using the culpability score from § 8C2.5 (Culpability

148. USSG § 8C2.6 (2010) (the minimum multiplier corresponding to a culpability score of 9 is 1.80 while the maximum multiplier is 3.60).

149. *See id.*

150. 15 U.S.C. § 78dd-2(g)(1)(A) (2010).

151. The culpability score is decreased by 3 points if the company has an effective compliance program in place. *See* USSG § 8C2.5(f)(1) (2010).

152. USSG § 8C2.6 (2010) (the minimum multiplier corresponding to a culpability score of 6 is 1.20 while the maximum multiplier is 2.40).

153. USSG § 8C2.5(f)(1) (2010).

154. 8C2.5(g) allows 5 points to be subtracted if the company self-reports, cooperates, and accepts responsibility; or 2 points to be subtracted if the company cooperates and accepts responsibility; or 1 point to be subtracted if the company merely accepts responsibility. The greatest number applies.

155. USSG § 8C2.6 (2010) (the minimum multiplier corresponding to a culpability score of 1 is .20 while the maximum multiplier is .40).

Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

Culpability Score	**Minimum Multiplier**	**Maximum Multiplier**
10 or more	2.00	4.00
9	1.80	3.60
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.

Countless law review articles have discussed the intangible and tangible benefits of cooperation,[156] but it is clear from the guideline calculations for our hypothetical FCPA violating entity

156. *See, e.g.,* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117–18 (2003) (explaining that a company must carefully weigh the possible benefits and hazards of cooperation prior to conducting an internal investigation). Many criticisms of the cooperation requirement argue that companies receive very little in return for cooperation. *See* Robert Tarun & Peter Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 216–17 (2010) (opining that the DOJ Antitrust Division's Corporate Leniency Program should be applied in the FCPA context as well to give a break to companies who voluntarily report antitrust violations); *see also* Prepared Remarks of Former Deputy Attorney General George Terwilliger (June 23, 2010), http://www.complianceweek.com/s/documents/TerwilligerRemarks.pdf (arguing that "[c]urrent [DOJ] policies do not provide any certain benefit that a company can point to as a result of voluntarily disclosing a potential criminal violation" and advocating for a presumption of no criminal disposition in return for a company's voluntary disclosure).

that cooperation is only half of the equation. To receive the most significant guideline benefit at sentencing (of up to an additional 30% off of the fine range using a lower multiplier), a company must have an effective compliance program in place.[157] Because prosecutors must determine the probable sentence as part of any charging consideration under USAM 9-28.000, the focus on compliance is equally important in the context of charging.

V. 2010 REVISIONS TO THE ORGANIZATIONAL SENTENCING GUIDELINES

In 2010, the USSC undertook the most significant revisions to the Organizational Guidelines since 1991 in revising the definition of an effective compliance program found at USSG section 8C2.5(f)(3).[158] Following the amendment, a company's compliance program may still be considered "effective" even if senior-level employees were involved in the corporate wrongdoing provided that: (1) the compliance professional has "direct reporting obligations" to the governing authority such as the audit committee of the board of directors; (2) the compliance program is effective at ferreting out wrongdoing; (3) the

157. In 2010, the U.S. Congress passed the Dodd-Frank Act, which contains whistleblower provisions that incentivize employees—with the promise of as much as 30% of the monetary sanctions collected by the SEC in a successful enforcement action—to report suspected compliance violations directly to regulators rather than reporting through a company's internal compliance system. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173. The Dodd-Frank Act threatens to make internal compliance programs less effective and undermines the USSG posture on compliance. Samuel J. Lieberman & Jennifer Rossan, *Chief Compliance Officers:* Sullivan v. Harnisch *and SEC Proposed Whistleblower Rules Bolster Internal Compliance Programs While Creating Catch-22 for Compliance Officers*, THE HEDGE FUND LAW REPORT, Mar. 18, 2011, at 1. The USSG allows a company time to perform an internal investigation and reward a company's initiative in self-reporting with lower guideline ranges at sentencing. *See* McNulty Memo, *supra* note 125. In contrast, the Dodd-Frank Act encourages whistleblowers to race to report immediately to the SEC, not allowing a company the opportunity to demonstrate the effectiveness of its compliance program and denying the company any benefit at sentencing. Ashby Jones & Joann S. Lublin, *Critics Blow Whistle on Law*, WALL ST. J., Nov. 1, 2010, at B1.

158 U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES (2010), *available at* http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20100503_RFP_Amendments.pdf.

misconduct is self-reported; and (4) no individual with operational responsibility for the program participated in (or turned a blind eye to) the illegal conduct.[159]

The amendment defines "direct reporting obligations" to require a direct communication line with a company's board of directors.[160] The definition requires that a company give the compliance professional the express authority to communicate promptly and personally with a corporate body, such as the audit committee, regarding any actual or suspected criminal conduct.[161] This revision took effect in November 2010.[162]

Not only does this revision provide an avenue for corporations facing criminal fines to receive a reduction in fines for an effective compliance program, it invites prosecutors making a charging decision to scrutinize the reporting line for the chief compliance officer (CCO).[163] After this amendment, not only should the CCO have a communication line to the board of directors, the CCO should report to the board no less than annually about the effectiveness of the compliance program.[164]

The USSC's emphasis on a direct reporting line between a company's board of directors and its CCO finds support in recent prosecution agreements. A recent trend in DPAs and NPAs is to revise the compliance structure so that the company's CCO can report directly to the audit committee.[165] This reporting line

159. USSG § 8C2.5(f)(3)(A)–(C) (2010).

160. USSG § 8C2.5, application note 11 (2010).

161. *Id*.

162. Tuffin, *supra* note 134.

163. *See* Jay Martin and Ryan D. McConnell, *How Revised Sentencing Guidelines Impact CCOs*, COMPLIANCE WEEK (May 4, 2010), http://www.complianceweek.com/pages/login.aspx? returl=/how-revised-sentencing-guidelines-impact-ccos/article/186734/&pagetypeid=28&articleid=186734&accesslevel=2&expireddays=0&accessAndPrice=0 (In order to receive the three-step downward adjustment in the fine table the compliance professional must have a direct reporting line to the governing authority.).

164. *Id*.

165. *See*, *e.g.,* Deferred Prosecution Agreement, United States v. Tidewater Marine International, Inc., No. 10-CR-770 (S.D. Tex. Jan. 5, 2007) [hereinafter Tidewater DPA] (requiring the company to assign the corporate official tasked with overseeing the compliance program "direct reporting obligations to independent monitoring bodies, including internal audit").

overlaps with existing section 8B1(b)(2)(C) of the USSG, which specifies that an effective compliance program will have a "specific individual within the organization . . . delegated day-to-day . . . responsibility . . . [who] report[s] periodically to high-level personnel and, as appropriate, to the governing authority . . . and [has] direct access to the governing authority" or an appropriate sub-group.[166] The 2010 USSG CCO reporting line amendments illustrate the intersection of the USSG and the corporate charging factors in 9-28.000 as manifested through DPAs and NPAs—highlighting that a corporate compliance program under the USSG should also address the guidance set forth in DPAs and NPAs.[167]

VI. OECD GUIDANCE

While the USSC was mulling over the CCO reporting line changes to the Organizational Guidelines, the Organization for Economic Co-Operation and Development (OECD) released its "Good Practice Guidance on Internal Controls, Ethics and Compliance" in March 2010.[168]

This OECD framework provides companies with guidance on

166. USSG § 8B2.1(b)(2)(C) (2010). The USSC considered and rejected proposed language that would have required both high-level personnel, personnel with substantial authority, and all employees to "be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines." Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 75 Fed. Reg. 3525, 3535 (Jan. 21, 2010). Additionally, the USSC chose not to incorporate one of the proposed amendments to the commentary for section 8B2.1(b)(7) that would have allowed "[t]he organization [to] take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." *Id*. The USSC also rejected proposed language endorsing the independent monitor as a tool to be used to assess a company's rehabilitation efforts while on probation following a conviction. *Id*. Instead, the USSC adopted language allowing a company to hire outside counsel to review its compliance program, while leaving the job of overseeing a company's remedial compliance efforts post-conviction to the U.S. Probation Office. *See* Martin, *supra* note 163.

167. *Id*.

168. *See* Organization for Economic Cooperation and Development, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE 2010 (Adopted Feb. 18, 2010) [hereinafter GOOD PRACTICE GUIDANCE], *available at* http://www.oecd.org/dataoecd/5/51/ 44884389.pdf.

how to combat bribery.[169] The OECD Secretary-General Angel Gurría touted the publication as "the most comprehensive guidance ever provided to companies and business organisations [sic] . . . on this issue." [170] Although the guidance is legally non-binding, it is intended to aid companies in developing effective internal controls, ethics, and compliance programs to combat the type of corruption and bribery that would violate the FCPA.[171]

The OECD guidance sets out twelve elements a company should consider to ensure effective compliance programs.[172] These twelve elements include: (1) support for the compliance programs from a company's senior management personnel; (2) a clearly articulated and visible corporate policy prohibiting bribery; (3) recognition that all employees are obligated to comply with internal controls and compliance programs; (4) appropriate oversight of a compliance program, including a direct reporting line between the officer tasked with oversight and an independent monitoring body of the board of directors; (5) ethics and compliance programs specifically addressing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments, and solicitation and extortion; (6) compliance programs that include third-party business partners; (7) a system of accounting procedures developed to ensure accurate books and records; (8) training for all employees as well as subsidiaries; (9) measures to encourage observance of compliance programs; (10) disciplinary proceedings to redress compliance failures; (11) a system where employees can report suspected compliance violations and where employees can receive urgent advice when confronting potential violations in foreign countries; and (12) periodic reviews to evaluate the

169. *See id.*

170. *See OECD calls on businesses to step up their fight against bribery*, OECD (Mar. 3, 2010), http://www.oecd.org/document/41/0,3343,en_2649_34487_44697385_1_1_1_1,00.html.

171. *Id*.

172. Jeremy B. Zucker and T. Clark Weymouth, *An International Standard for Corporate Compliance?*, LAW360 (May 14, 2010), http://www.hoganlovells.com/files/Publication/932cd41d-8dcf-41b5-bf03-0f987601275a/Presentation/PublicationAttachment/d7e215fe-c1e4-4f1c-a86e-14e2669401f2/ZuckerWeymouthLaw360.com.pdf

effectiveness of a compliance program.[173]

Although the DOJ has not adopted guidelines for compliance programs as explicit as those set out in the OECD guidance, recent DPAs and NPAs, discussed below, have language that parallels the OECD guidance.

VII. KEY CONCEPTS IN CORPORATE COMPLIANCE AND HOW TO USE COMPLIANCE PROGRAMS EFFECTIVELY

A. An Overview of Deferred and Non-Prosecution Agreements

After the Organizational Guidelines went into effect in 1991, federal prosecutors utilized the guideline factors to assess the adequacy of a company's compliance program. Apart from the seven factors set out in the Organizational Guidelines, there was little explicit guidance for companies on what constitutes an effective compliance program for charging and sentencing purposes.[174]

In 1993, in the wake of the Organizational Guidelines' implementation, prosecutors began to break from the binary choice to either indict or not charge at all, and instead entered into agreements with corporate targets that resolved corporate criminal cases without a conviction.[175] These agreements either took the form of an agreement not to prosecute a company, called an NPA, or an agreement to defer prosecution against a company, known as a DPA.[176]

Both DPAs and NPAs are agreements between the DOJ and a corporation to resolve a criminal case short of a criminal conviction, provided the company adheres to a number of

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173. GOOD PRACTICE GUIDANCE, *supra* note 168.

174. *See* USSG § 8B2.1(b) (2010).

175. *See* Peter J. Henning, *The Organizational Guidelines: RIP?*, 116 YALE L.J. 312, 312–13 (2007).

176. Scott D. Michel & Kevin E. Thorn, *Deferred Prosecution Agreements: Implications for Corporate Tax Departments*, THE TAX EXECUTIVE, Jan.-Feb. 2006, at 50–51, *available at* http://www.capdale.com/files/Publication/f3aeb828-5d17-4719-b741-89ec48afd09d/Presentation/ PublicationAttachment/70ab2303-1321-44b0-ad52-8cbbc995b19f/Deferred%20Prosecution% 20Agreements.pdf.

conditions in the agreement.[177] Conditions typically include business and compliance reforms, cooperation, a substantial fine, and a promise to refrain from future illegal conduct.[178] Frequently, these agreements also require the company to retain a monitor who reports to the DOJ on the company's efforts to comply with the agreements.[179] DPAs and NPAs have similar formats. DPAs are typically filed with a court, contain paragraph numbers, and are drafted in a case style similar to a plea agreement.[180] An NPA usually takes the form of a letter issued on DOJ letterhead by the particular DOJ component investigating the entity (such as the U.S. Attorney's Office in Houston).[181] Both NPAs and DPAs must be signed by the DOJ and the company under investigation.[182]

DPAs and NPAs typically last from one to five years, which is the typical range of probation for a company convicted of a federal crime and sentenced to probation by a federal judge.[183] Instead of the U.S. Probation Office watching over the company

177. *See id.*

178. *See id.*

179. *See* Memorandum from Craig Morford, Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, note 2 (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

180. *See*, *e.g.*, Deferred Prosecution Agreement, United States v. Wachovia Bank, N.A., No. 10-20165-CR-LENARD (S.D. Fla. Mar. 16, 2010); Deferred Prosecution Agreement, United States v. Transocean Inc., No. 10-CR-768 (S.D. Tex. Oct. 21, 2010) [hereinafter Transocean DPA].

181. *See* Letter from Donald J. DeGabrielle, Jr., U.S. Attorney, to Dennis Cain, Esq., Moen, Cain, & O'Brien (Oct. 1, 2008) (on file with the Univ. of Va. School of Law), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/republicservices.pdf (NPA letter on DOJ letterhead sent from the U.S. Attorney's Office in Houston); *see also* Steven S. Scholes, *U.S. Securities and Exchange Commission Enforcement Manual*, 1819 PRACTISING LAW INST. 299 (2010) (outlining the Securities and Exchange Commission's procedures in using a NPA).

182. Lawrence D. Finder, Ryan D. McConnell, & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreement – Corporate Pre-Trial Agreement Update – 2008*, 28 CORPORATE COUNSEL REVIEW 1, 2 (2009).

183. *See* Finder & McConnell, *supra* note 108, at app. (listing the length of individual DPAs and NPAs; noting that five years has been the longest timeframe agreed upon, as found in the Prudential NPA).

and reporting back to the sentencing judge, the DOJ performs this function, often with the assistance of a monitor.[184] Most of the terms found in the agreements are fairly uniform. A company typically (1) admits to wrongdoing, (2) waives the statute of limitations for a period of time, (3) acknowledges that the agreement and the factual basis is admissible in court, (4) agrees that the company will no longer violate the law, (5) consents to help the DOJ prosecute any wrongdoers (*e.g.*, by making employees available to testify for grand jury proceedings or at trial and providing documents in addition to other evidence to the DOJ), and (6) agrees that company employees will not contradict the terms of the agreement.[185]

If the DOJ suspects that the company has violated the agreement, the DPA or NPA sets forth an appeals process for the company to pursue before the DOJ declares that the company breached the agreement and proceeds with a criminal prosecution using the factual basis the company has agreed is admissible in court.[186] The substantive result under both DPAs and NPAs is the same: a significant monetary penalty, typically in the millions of dollars, and no criminal conviction for the company.[187]

B. Compliance and Deferred and Non-Prosecution Agreements

Three key compliance concepts flow from the Organizational Guidelines and OECD guidance: detection, prevention, and response.[188] Compliance programs must be designed to detect and prevent unlawful conduct as well as respond to red flags within the company as they arise. Without any published

184. *Id.* at 23.

185. Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. DOJ, Address at the OECD Competition Committee: The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All (Oct. 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm.

186. Finder & McConnell, *supra* note 108, at 17 (noting that if a company fails to follow the terms of a DPA or NPA, "the DOJ has a roadmap to a criminal conviction with the company having admitted to wrongdoing").

187. *See* Finder & McConnell, *supra* note 108, at app. (listing the amount of fines for individual DPAs and NPAs).

188. *See* GOOD PRACTICE GUIDANCE, *supra* note 168.

guidance from the DOJ on what constitutes an effective compliance program under the Organizational Guidelines, DPAs and NPAs provide a paradigm that addresses these three concepts. Companies are able to learn from these compliance failures and evaluate how corporations under investigation have changed their compliance programs in DPAs and NPAs to conform to the Organizational Guidelines and resolve DOJ criminal investigations.

Many of the early DPAs and NPAs addressed remedial measures only cursorily. But over the past five years, the DOJ has entered into a significant number of prosecution agreements, set out in Table III, that outline detailed compliance program features that should serve as a guide to companies seeking to implement a compliance program which conforms to the Organizational Guidelines.[189] These agreements provide companies seeking to avoid compliance problems with a useful model of what the DOJ looks for in a compliance program.

Table III: Recent Deferred Prosecution Agreements and Non-Prosecution Agreements[190]

2005	Adelphia, **AEP Services**, Bank of NY, **Bristol Myers**, Friedman's Inc., **Hilfiger**, KPMG, **MCI**, Micrus Corp., **Monsanto**, Orthoscript, **Univ. Med & Dentistry NJ**
2006	AIG, **Bank Atlantic**, BAWAG, **Boeing**, Endocare, **FirstEnergy Nuclear**, HealthSouth, **HVB**, Intermune, **Medicis**, Mellon Bank, **MRA Holdings**, Operations Mgmt. Int'l, **Prudential**, Roger Williams Med. Cntr., **Royal Ahold**, Schnitzer Steel, **Statoil**, Western Geco LLC, **Williams Power**
2007	ABT, **Akzo Nobel**, Alabama Contract Sales, **Am. Express Bank Int'l**, Appalachian Oil Co., **Baker**

189. *See* Orland, *supra* note 114, at 60.

190. DPAs and NPAs that include compliance reforms are bolded. This article only covers NPAs and DPAs entered into with the DOJ before January 2011. We did not consider agreements entered into with other enforcement agencies, such as the SEC, the DOJ's Antitrust Division, or state attorneys general, in any of the statistics included in this article. And we only included agreements that we were able to locate using public databases such as court documents and SEC filings.

	Hughes, Biomet, **Blue Cross & Blue Shield RI**, BP, **Chevron**, Collins & Aikman Corp., **DePuy Orthopedics**, Echo Inc**., El Paso**, English Const. Co., **Express Scripts**, Hoy and Newsday, **Ingersol Rand**, ITT Corp., **Jazz Pharm.**, Jenkins Gilchrist, **Lucent Tech. Inc.**, Maximus, **Mirant Energy**, NETeller PLC, **NetVersant**, Omega Advisors, **Paradigm BV**, Pfizer, **Purdue Pharma**, Reliant Energy, **Smith & Nephew**, Stryker Orthopedics, **Textron**, Union Bank of California, **United Bank of Africa**, Vetco, **York Int'l Corp.**, Zimmer Inc.
2008	AB Volvo, **AGA Medical**, American Italian Pasta, **Biovail Pharm.**, ESI, **Faro Tech.**, Fiat, **Fine Host**, Flowserve, **IFCO Systems**, Jackson Country Club, **Lawson Products**, Milberg, **Parkway Village**, Penn Traffic, **Republic Services**, Sigue, **WABTEC**, Willbros
2009	AGCO Corp., **Beazer Homes USA**, Columbia Farms, **Credit Suisse AG**, Fisher Sand & Gravel, **Halliburton**, Helmerich & Payne**, Lloyds ISB Bank**, McSha Properties, **NeuroMetrix**, Novo Nordisk, **Optimal Group**, Party Gaming Plc, **Petrocelli**, Pilgrims Pride, **Quest Diagnostics**, Sirchie Acquisition, **Spectranetics**, Trace America, **Trammo Petroleum**, UBS AG, **UT Starcom**, Wellcare Health Plans
2010	ABB Ltd., **ABN Amro Bank**, Alcatel-Lucent, **Alliance One Int'l**, Barclays Bank, **Ceramic Protection**, CVS, **Daimler**, Daimler China, **Deutsche Bank**, Exactech, **General Reinsurance**, Kos Pharm., **Louis Berger Group**, MetLife, **Noble Corp.**, Panalpina, **PPG Paints Trading**, Pride Int'l, **RAE Systems**, Shell Nigeria, **Shiavone Construction**, Shoppers Food Warehouse Corp., **Snamprogetti**, Sportingbet PLC, **Technip**, Tidewater, **Transocean**, Universal, **Wachovia**, Wright Medical

Compliance reforms as a condition of DPAs and NPAs began with the very first DPA utilized by the U.S. Attorney's Office in Los Angeles in 1993, when that office entered into a DPA with

Armour of America for export control violations.[191] This DPA recognized the USSG principle that an effective compliance program could significantly minimize the risk of an ethics or legal violation. Not only was this the first use of a DPA to resolve a corporate criminal case,[192] but it was the first public and transparent example of a federal prosecutor using compliance as a consideration in whether to file criminal charges.[193] Because of Armour's compliance reforms and payment of a $20,000 fine, the U.S. Attorney's Office agreed to dismiss the charges after Armour paid the total fine amount.[194]

The following year, in 1994, the United States Attorney's Office in Manhattan reached a DPA with Prudential Securities for securities fraud.[195] The Prudential DPA pointed to compliance as a principle reason for the favorable disposition of the case without a conviction for Prudential.[196] A letter written by Prudential's outside counsel and attached to the DPA argued that Prudential should not be charged with a crime based on its substantial compliance modifications.[197] The letter noted that "[i]n early 1991, [the new CEO] initiated a series of improvements and reforms to begin the process of creating an appropriate and unifying firm-wide culture."[198] In other words, compliance was a key corporate charging consideration.

The Prudential reforms included: (1) increasing the size of the compliance department to ninety-five employees and

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191. Deferred Prosecution Agreement, United States v. Armour of America (C.D. Cal. Dec. 29, 1993) [hereinafter Armour DPA]. We cite the Armour DPA as the first DPA because the only prior agreement, Aetna's agreement with the U.S. Attorney's Office in August 1993, was a civil agreement.

192. *See id*.; *see also* WASHINGTON LEGAL FOUNDATION, SPECIAL REPORT: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES 6-2 (2008), *available at* http://www.thefederation.org/documents/Final+ Timeline+PDF%5B1%5D.pdf (commenting on how the Department of Justice first used a DPA in 1993).

193. *See* Armour DPA, *supra* note 191; *see also* FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES, *supra* note 192, at 6-2.

194. Armour DPA, *supra* note 191.

195. Letter from Mary Jo White, U.S. Attorney for S.D.N.Y., to Scott W. Muller & Carey R. Dunne, Prudential Counsel (Oct. 27, 1994) [hereinafter Prudential Agreement].

196. *Id*.

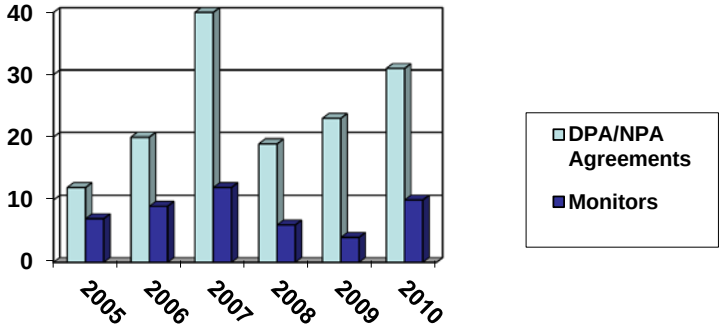
197. *Id*.

198. *Id*.

allocating an annual budget of $10.4 million; (2) creating a risk management group comprised of senior executives who reported to the CEO to coordinate legal and compliance functions; (3) establishing a business review committee to systematically examine all transactions; (4) improving training to include expenditures of $70,000 for each new financial advisor and spending $10 million on training facilities; and (5) enhancing the audit programs to detect and deter misconduct.[199] These enhancements were consistent with the seven principles set forth in the Organizational Guidelines.[200] Prudential also appointed a compliance committee within the board of directors and established regional compliance officers for Prudential's eight regions.[201] The U.S. Attorney's Office agreed to dismiss the charges after three years, provided Prudential implemented these reforms and paid a $330 million fine.[202]

After the indictment and implosion of Arthur Andersen in 2002 and the resulting loss of 28,000 jobs,[203] the prevalence of these agreements spiked as the DOJ increasingly turned to DPAs and NPAs as a means of limiting the collateral consequences of corporate indictments and convictions.

Spike in DPAs and NPAs Post-Arthur Andersen



199. *Id*.

200. *See* USSG ch.8 (2010).

201. *See* Prudential Agreement, *supra* note 195.

202. *Id*.

203. Joseph Weber, *Huron Consulting Group: From the Ashes of Andersen*, BUS. WK., June 4, 2007, *available at* http://www.businessweek.com/magazine/content/07_23/b4037412.htm.

C. The Emergence of Compliance as the Central Feature in DPAs/NPAs

Aside from Prudential and Armour, early DPAs and NPAs focused on cooperation, ensuring the company cooperated with the DOJ's investigation to prosecute culpable individuals. In the last six years, however, compliance has evolved as a central theme in DPAs and NPAs.

D. Recent DPAs and NPAs Reflect Compliance as a Trend

Virtually every DPA and NPA now requires some modification to a company's compliance program.[204] While earlier agreements merely mentioned the development of a compliance program in passing, more recent agreements provide detailed compliance frameworks.[205] These detailed compliance revisions highlight the importance of compliance as a charging and sentencing consideration and illustrate that compliance serves as a key ingredient for a company under criminal investigation to receive a DPA or NPA as opposed to a criminal conviction. The detailed compliance reforms in recent DPAs and NPAs also provide a framework for an effective compliance program under the Organizational Guidelines and measures for preventing future compliance-related failures.[206]

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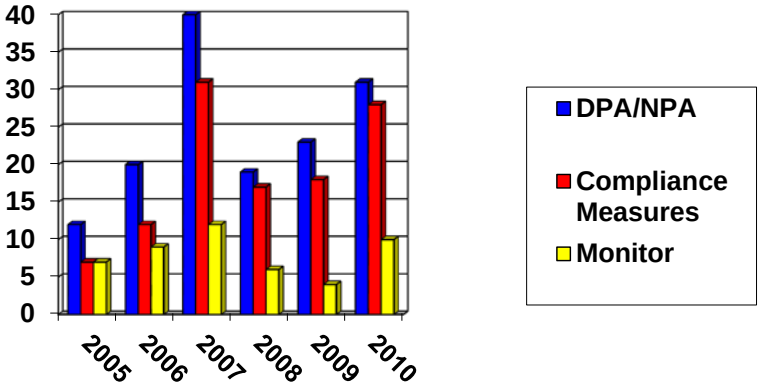
204. Melissa Aguilar, *DPA-NPA Tally Marks Decade's Second Highest*, COMPLIANCE WEEK (Jan. 20, 2011), http://www.complianceweek.com/dpa-npa-tally-marks-decades-second-highest/ printarticle/193990/.

205. *Compare* Armour DPA, *supra* note 191, *with* Non-Prosecution Agreement, U.S.-Party Gaming Plc (2009) (illegal internet gambling) (on file with the Houston Journal of International Law).

206. *See supra* Part II(B) (discussing compliance reforms in recent DPAs and NPAs).

Remedial Compliance Measures in DPAs and NPAs[207]



In recent years, the number of DPAs and NPAs declined slightly following the record high of forty agreements in 2007.[208] However, 2010 brought a notable rise in the number of DPAs and NPAs from 2008 and 2009.[209] In 2008 and 2009 there were nineteen and twenty-three agreements, respectively.[210] In 2010,

207. This chart covers public non-antitrust NPAs and DPAs entered into with the DOJ before January 2011. If we could not obtain and review the actual agreement, it is not included.

208. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 13 (2009), *available at* http://www.gao.gov/new.items/d10110. pdf.

209. *Id*. at 13. While DPAs and NPAs are most commonly reached in the context of violations of the Foreign Corrupt Practices Act, the Anti-Kickback Statute, export control violations, and similar types of corruption and fraud, recent agreements have also addressed corporate criminal conduct as divergent as environmental violations and illegal internet gambling. *See*, *e.g.* Press Release, Dep't of Justice, Firstenergy Nuclear Operating Company to Pay $28 Million Relating to Operation of Davis-Besse Nuclear Power Station (Jan. 20, 2006), *available at* http://www.justice.gov/opa/pr/2006/January/06_enrd_029.html; Deferred Prosecution Agreement, United States v. MRA Holdings, No. 5:06CR79/RS (N.D. Fla. Sept. 12, 2006) (failure to create and maintain age and identity records); Non-Prosecution Agreement, U.S.-Pilgrim's Pride Inc. (2009) (unlawful employment of aliens) (on file with the Houston Journal of International Law); Non-Prosecution Agreement, U.S.-Party Gaming Plc (2009) (illegal internet gambling) (on file with the Houston Journal of International Law).

210. GAO-10-110, *supra* note 208, at 13.

the number of DPAs and NPAs rose to thirty-two.[211]

The most significant trend in recent DPAs and NPAs is the increasing number of agreements that explicitly require compliance measures as part of a company's business reforms.[212] In 2005 and 2006, almost 50 percent or fewer of all agreements contained compliance-related reforms (seven out of twelve in 2005 and eight out of twenty in 2006).[213]

In 2007, the presence of remedial compliance measures began to increase as thirty-one out of forty agreements contained compliance-related reforms.[214] The years 2008, 2009, and 2010 suggest that the emphasis on compliance-related business reforms in DPAs and NPAs is only growing stronger.[215]

In 2008, 89.47% of DPAs and NPAs contained compliance

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211. It has been reported that BL Trading entered into a DPA in December 2010, but the agreement has not yet been filed with the court and is therefore not included in our statistics. *See generally* Press Release, Dep't of Justice, Two EMC Employees and a Massachusetts Business Charged in "E-Fencing" Scheme (Dec. 7, 2010), *available at* http://www.justice.gov/usao/ma/Press% 20Office%20-%20Press%20Release%20Files/Dec2010/KellyKevinPR.html.

212. Ryan McConnell and Charlotte Simon, *Remedial Compliance Programs: A Key Ingredient in the Enforcement Recipe*, THE FCPA BLOG (Jan. 18 2011) [hereinafter *Remedial Compliance Programs*], http://www.fcpablog.com/blog/2011/18/18/remedial-compliance-programs-a-key-ingredient-in-the-enforce.html.

213. *Id.*

214. *Id.*

215. *Id*. Further, the DOJ is not the only agency taking advantage of prosecution agreements. The SEC entered into its first ever NPA in 2010, bucking the trend of employing NPAs and DPAs only in the criminal context. *See* Craig S. Warkol, Kevin J. O'Connor, LaShon Kell & Philip J. Bezanson, *SEC Enters Its First Non-Prosecution Agreement-But Are Companies Better Off?*, BRACEWELL & GIULIANI NEWS & PUBLICATIONS (Dec. 22, 2010), *available at* http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/412807af-fc95-43c1-a849-46a574849415/SEC_Enters_Its_First_NonProsecution_Agreement__But_Are_Companies_Better_Off.cfm. The SEC's use of DPAs and NPAs is odd given that the main benefit to a company in an NPA or DPA is avoiding a criminal conviction and the SEC has no authority to bring criminal charges. The SEC's use of DPAs and NPAs may portend a bizarre new trend toward use of DPAs and NPAs in the civil enforcement arena of corporate compliance. Non-Prosecution Agreement, U.S.-Carter's Inc. (2010), *available at* http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf; *see also* Press Release, SEC, SEC Charges Former Carter's Executive With Fraud and Insider Trading (Dec. 20, 2010), *available at* http://www.sec.gov/news/press/2010/2010-252.htm (noting the non-prosecution agreement between the SEC and Carter's Inc.).

requirements (seventeen out of nineteen agreements).[216] The same year, the DOJ reaffirmed the importance of DPAs and NPAs as an instrument of corporate reform when Deputy General Paul McNulty revised the corporate charging principles (McNulty Memo).[217] Although most of the commentary focused on the McNulty Memo's confusing framework, which categorized information obtained during corporate investigations for cooperation and privilege waiver purposes, a significant change in the corporate charging policy addressed DPAs and NPAs.[218] Specifically, this corporate charging policy now provides that "[non]-prosecution and deferred prosecution agreements . . . occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[219] Prior to 2008, the only charging guidance addressing the potential use of DPAs and NPAs was vague, allowing that "[i]n some circumstances . . . pretrial diversion may be considered in the course of the government's investigation."[220]

In 2009, the number of DPAs and NPAs containing compliance features remained high, at 78.26% (eighteen out of twenty-three agreements).[221] Additionally in 2008, the DOJ moved the corporate charging principles found in the McNulty Memo into USAM 9-28.000—the section immediately following

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216. *Remedial Compliance Programs*, *supra* note 212.

217. *See* McNulty Memo, *supra* note 125 (outlining principles of federal prosecution for business organizations).

218. *See generally* USAM § 9-28.1000 (2008) (addressing collateral consequences considered for purposes of NPAs and DPAs).

219. USAM § 9-28.200(B) (2008). Importantly, the new language discussing the merits of DPAs and NPAs is located in the section of the corporate charging guideline that discusses the collateral consequences of a criminal conviction, highlighting the fact that DPAs and NPAs are important mechanisms to limit the collateral consequences of a corporate conviction for innocent third parties. *See* USAM § 9-28.1000 (2008) ("where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism.").

220. *See* McNulty Memo VII(B)(1), *supra* note 125; *see generally* Finder & McConnell, *supra* note 108 (discussing how the DPA and NPA policy evolved and applicability of the USAM provisions cited by the McNulty and Thompson Memos).

221. *Remedial Compliance Programs*, *supra* note 212.

the general federal charging principles.[222] Although the DOJ abandoned McNulty's complex privilege waiver framework and prohibited prosecutors from seeking privilege waivers and considering the corporations' advancement of attorney fees to an employee for charging purposes, the focus on compliance remained.[223] Indeed, three of the nine corporate charging principles in the USAM now focus on compliance programs.[224]

Additionally, USAM 9-28.800 specifically instructs prosecutors to ask the following questions:

(1) Is the corporation's compliance program well designed?

(2) Is the program being applied earnestly and in good faith?

(3) Does the corporation's compliance program work?[225]

To answer these questions, federal prosecutors are directed to the definition of an effective compliance program found in the Organizational Guidelines.[226] The framework of USAM 9-28.000 and the new language focused on prosecution agreements underscores that compliance is not only an important part of any charging consideration, it is an integral ingredient to receiving preferential charging treatment in the form of a DPA or NPA.

In 2010, the number of DPAs and NPAs with new or revised compliance programs rose significantly again, with 90.32% of DPAs and NPAs containing compliance enhancements (twenty-eight out of thirty-one agreements).

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222. USAM § 9-28.300 (2008).

223. *See* Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J. (Sept. 10, 2008), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202424398325&slreturn=1&hbxlogin=1 (discussing that while prosecutors are now prohibited from requesting waivers of "core" privileged information; the essence of the inquiry is still on obtaining the facts regardless of the possibility that the facts flow from privileged information); *see also* Filip Memo, *supra* note 128, § 9-28.720 (suggesting that corporations can choose to conduct internal investigations in a manner that will not confer attorney-client privilege on the results of an investigation, and that the government's effort to obtain the facts should not suffer merely because a corporation has employed attorneys to conduct its investigation).

224. USAM § 9-28.300(A) (2008).

225. *Id.* § 9-28.300 (2008).

226. USSG § 8B2.1 (2010).

1. Lessons from DPAs/NPAs: Elements of an Effective Compliance Program

An examination of the compliance features in DPAs and NPAs reveals a few uniform features for compliance programs present throughout the agreements. These features are consistent with the framework set forth in the USSG and OECD and, in some ways, go beyond the basic floor set by the USSG:[227]

(1) a code of conduct (ethics) and training program designed to educate employees about the code of conduct, including certification by the employees that have received the appropriate training;

(2) a CCO with dedicated resources and a reporting line to the Board or the CEO;[228]

(3) a system of internal controls and procedures monitored by the corporate compliance officer and designed to ensure wrongdoing is discovered; and

(4) a method, such as a hotline or email system monitored by the corporate compliance officer, to ensure that employees accurately and timely report any suspected compliance issues.[229]

While these four features listed above are present in almost all of the agreements from 2008 onward, more recent agreements, for example, the ABB DPA from September 2010, provide an in-depth description of what each of the four components entails.[230]

Compliance Code: A compliance code is now a required feature of almost all DPAs and NPAs. A compliance code must

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227. USSG § 8B2.1 (2010).

228. Ben W. Heineman, *Don't Divorce the GC and Compliance Officer*, CORPORATE COUNSEL (Jan. 29, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202479547797 (noting that the structure where a CCO reports to the GC builds on the vital need in a corporation for a strong, broad-gauged GC because it avoids significant organizational overlap and confusion and focuses the CCO on critical process management, uniformity, and rigor across the corporation and because the GC is an expert in many areas with compliance as a core concern).

229. Finder & McConnell, *supra* note 108, at 17; USSG § 8B2.1 (2010).

230. Deferred Prosecution Agreement, United States v. ABB Ltd., No. H-IO-665 (S.D. Tex. Sept. 29, 2010) [hereinafter ABB DPA].

take the form of a "clearly articulated" and "visible" corporate policy against whatever illegal conduct is at issue.[231] A compliance code should be directed to all company employees and should reflect "strong, explicit, and visible support and commitment from senior management" to the policy.[232] DPAs and NPAs addressing FCPA violations now nearly uniformly require that such a compliance code include specific policies governing: gifts; hospitality, entertainment, and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion.[233] Unsurprisingly, a compliance code is a bedrock principle of the USSG and OECD.

Internal Controls: Significantly, DPAs and NPAs now require a company to adopt or modify a system of internal controls and procedures to aid in the discovery of future wrongdoing.[234] Such internal controls are increasingly tailored to prevent the type of conduct that previously got the company in trouble. For example, when FCPA violations are at issue, internal controls may refer to internal accounting controls to ensure that the company keeps accurate books and records in compliance with FCPA provisions or cash control issues.[235] In the case of tax fraud or securities fraud violations, a company may choose to implement measures requiring specific transactions to be processed through groups or committees within the company designated to act as checkpoints before a transaction is approved.[236] Additionally, recent agreements

231. ABB DBA, *supra* note 230.

232. *Id.* at 23.

233. *Id.*; *see also* Non-Prosecution Agreement, U.S.-Alliance One Int'l, Inc., at App. B (Aug. 6, 2010) [hereinafter Alliance One NPA], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ alliance-one/08-06-10alliance-one-npa.pdf; Deferred Prosecution Agreement, United States v. Panalpina World Transport (Holding) Ltd., No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010) [hereinafter Panalpina DPA].

234. ABB DBA, *supra* note 230, at 22.

235. *See id.*

236. *See*, *e.g.*, Non-Prosecution Agreement, U.S.-Deutsche Bank AG, Ex. B (Dec. 21, 2010) [hereinafter Deutsche Bank NPA], *available at* http://www.gibsondunn.com/publications/Documents/ DeutscheNPA.pdf (outlining tax-specific policies to review structured transactions and tax-avoidance transactions); *see also* Non-Prosecution Agreement, U.S.-General Reinsurance (Jan. 18, 2010) at 5

emphasize that a company is to develop such internal controls *on the basis of a risk assessment.*[237] Such an assessment must take into account the unique risks facing a company due to factors such as its geographical organization, interaction with foreign governments, and the specific industry in which it operates.[238] Thus, DPAs and NPAs contemplate internal controls that are company-specific. This mirrors the approach adopted by the USSG and OECD.[239]

Chief Compliance Officer: No compliance program will be effective unless ethics and compliance are emphasized from the top down—as part of the "tone at the top."[240] Recent agreements reflect this by requiring companies to designate a CCO to oversee the implementation and continued oversight of remedial compliance measures.[241] A CCO is usually a member of the company's senior management.[242] Consistent with the USSG, the individual designated CCO will have a direct reporting obligation to an independent body of the company's board of directors, such as to an audit committee or the company's legal counsel or legal director.[243] An effective CCO will operate with sufficient autonomy from the company but will simultaneously have the full support of a company's resources.[244] This is consistent with the USSG and OECD framework, which both insist that the CCO have a reporting line to the board or governing authority.[245]

[hereinafter General Reinsurance NPA] (outlining a series of risk-transfer protocols, including formation of a Complex Transaction Committee, implemented to ensure that reinsurance transactions are not intended to "falsify, manipulate, and/or window-dress . . . financial statements").

237. ABB DPA, *supra* note 230.

238. *Id.* at 24.

239. *See* USSG § 8B2.1 cmt. n.2 (2010)(The manual looks at the industry in practice, the size of the company, and similar misconduct).

240. Heineman, *supra* note 228.

241. ABB DPA, *supra* note 230.

242. *See id.* at 24.

243. *See*, *e.g.*, Deferred Prosecution Agreement, United States v. Shell Nigeria Exploration and Production Co., Ltd., No. 10-CR-769 (S.D. Tex. Nov. 4, 2010) [hereinafter Shell Nigeria DPA], *available at* http://www.justice.gov/opa/documents/shell-dpa.pdf.

244. ABB DPA, *supra* note 230, at 24.

245. USSG § 8B2.1 (2010).

Training and Discipline: Consistent with the 2010 OECD guidance, recent agreements emphasize the need to include *all* company employees in the compliance process. Including employees in the compliance process typically implicates three separate elements: (1) training, (2) reporting, and (3) discipline.[246] Employees must be trained on the company's compliance code, given a method whereby they can report incidents of suspected non-compliance without fear of retribution, and be subject to disciplinary measures for non-compliance.[247] All employees, ranging from directors and officers to, in some cases, business partners, must receive periodic training and annual re-certification.[248] In addition to the guidance in the DPAs and NPAs, a company must incentivize managers to accomplish compliance goals by making compliance a component of a manager's performance reviews, bonus awards, and consideration for career advancement opportunities.[249]

NPAs and DPAs typically require that a company create a confidential hotline or comparable reporting system whereby employees can report concerns about non-compliance directly to the company's chief compliance officer.[250] In addition to guidance found in DPAs and NPAs, a company should recognize that any such hotline must solicit sufficient information for conducting investigations.[251] Making such a hotline effective will likely require provisions for two-way communications between the reporter (employee) and the investigator (compliance officer).[252] The CCO should keep records of all reports of suspected violations in a database to ensure all the reports are properly tracked and all potential violations are addressed. Finally, DPAs and NPAs usually give a company the

246. GOOD PRACTICE GUIDANCE, *supra* note 168.

247. *Id.*

248. *See*, *e.g.*, Pride Int'l DPA, *supra* note 141 (agreement states that all employees must receive training.)

249. USSG § 8B2.1 (2010).

250. ABB DPA, *supra* note 230, at 25–26.

251. GOOD PRACTICE GUIDANCE, *supra* note 168.

252. *See id.* (instructing that implementing changes within all levels of employees' two way communication is important so that effective guidance and advice can be provided to the directors and officers).

discretion to implement appropriate disciplinary procedures to address violations of anti-corruption or other laws and violations of the company's compliance and ethics codes.[253]

Due Diligence for Business Partners: Recognizing that the misconduct of business partners and agents is often attributed to the company, recent DPAs and NPAs mandate the inclusion of third-party business partners in the compliance process.[254] These requirements include mandatory due diligence prior to engaging third-party business partners[255] and mechanisms to ensure third parties are aware of a company's compliance code.[256]

Some of the DPAs go so far as to require reciprocal commitments to compliance from business partners and to mandate inclusion of standard contractual language allowing for termination of third-party business relationships for non-compliance with anti-corruption policies.[257] This requirement is also found in the 2010 OECD guidance.[258]

Periodic Testing: Recent corporate settlements also highlight the need for testing or auditing to ensure that a compliance program is not merely a "paper program."[259] Agreements reached in late 2010 emphasize the need to critically evaluate the effectiveness of a compliance program through periodic testing.[260] Such testing is designed to evaluate and improve the effectiveness of a compliance program.

In addition to the guidance found in the DPAs and NPAs, a company may find it effective to engage external auditors to

253. *Id*.

254. *See* ABB DPA, *supra* note 230, at 27.

255. GOOD PRACTICE GUIDANCE, *supra* note 168.

256. Deferred Prosecution Agreement at 42–43, United States v. Snamprogetti Netherlands B.V., No. 4:10-cr-00460, (S.D. Tex. Jul. 07, 2010) [hereinafter Snamprogetti DPA], *available at* http: //www.justice.gov/criminal/fraud/fcpa/cases/docs/07-07-10snamprogetti-dpa.pdf.

257. *Id*. at 44.

258. GOOD PRACTICE GUIDANCE, *supra* note 168.

259. Filip Memo, *supra* note 128.

260. *See*, *e.g.*, Snamprogetti DPA, *supra* note 256, at 44; Non-Prosecution Agreement, U.S.-Universal Corp. (Aug. 3, 2010) [hereinafter Universal Corp. NPA], *available at* http://www. justice.gov/criminal/fraud/fcpa/cases/universal-corp/08-03-10universal-corp-npa.pdf.

ensure that compliance code provisions are independently reviewed by outside counsel and auditors. Periodic review of the compliance program should coincide with any relevant developments, both substantive developments in the governing laws and changes in the industry in which the company operates, to guarantee the compliance program is as comprehensive as possible. Both the OECD and the USSG note that periodic review is essential to an effective compliance program.[261]

Reporting to the DOJ: Recent agreements suggest that an alternative to a corporate monitor may entail the CCO of the company reporting back to the DOJ on the company's compliance reforms. Several recent DPAs and NPAs included a separate, detailed "corporate compliance reporting" arrangement, whereby the company agrees to make an initial report to the DOJ within four to six months of finalizing the DPA, typically followed by annual reports for the duration of the DPA.[262]

2. Model Compliance Programs and the FCPA

A significant and increasing percentage of DPAs and NPAs have been negotiated to settle violations of the Foreign Corrupt Practices Act (FCPA).[263] In recent years, the number of FCPA

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261. GOOD PRACTICE GUIDANCE, *supra* note 168; USSG § 8B2.1(5)(B) (2010).

262. *See*, *e.g.*, Panalpina DPA, *supra* note 233; Shell Nigeria DPA, *supra* note 243243; Tidewater DPA, *supra* note 165.

263. *See* SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 2 (2008), *available at* http://www.shearman.com/files/upload/FCPA_Trends.pdf (noting that "the DOJ has increasingly used non-prosecution (or deferred prosecution) agreements in FCPA matters . . ."). The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 in response to the admission of over 400 companies to making payments in excess of $300 million to foreign government officials in order to secure favorable treatment. *See* U.S. DEP'T JUSTICE, *Foreign Corrupt Practices Act: An Overview*, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Feb. 2, 2011); *see also* H.R. REP. NO. 95-640, at 8 (1977). The anti-bribery provisions of the FCPA prohibit the (1) willful use of the mails or other interstate facilities (2) to corruptly (3) offer money or something else of value (4) to influence a foreign official (in his or her official capacity), induce the official to perform in a particular manner in violation of his or her duties, or secure an improper business advantage. Federal Corrupt Practices Act, 15 U.S.C. § 78dd-1(a)(1) (2006).

cases brought by the DOJ and the SEC has risen dramatically.[264] The FCPA poses unique compliance challenges because internal control deficiencies and failures are often the leading cause of FCPA violations.[265] Because an effective

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The anti-bribery provisions of the FCPA apply to all U.S. persons and companies and foreign issuers of securities registered with the SEC, in addition to foreign firms and persons who cause, directly or through agents, an act in furtherance of a corrupt payment to take place within the territory of the United States. *Id*. The FCPA recognizes an exception for "facilitating" payments. *Id*. This exception allows companies to accelerate normal government functions without receiving special treatment by a foreign official, such as processing government papers or providing routine government services. *Id*.

The FCPA also requires companies whose securities are listed in the United States to comply with its accounting provisions. *Id*. § 78m(b). Legislators designed the accounting provisions in light of the FCPA's anti-bribery provisions, which require corporations to maintain records that truthfully show the transactions of the corporation as well as develop and implement a suitable system for internal accounting controls. *Id*. Willful accounting violations may be punishable as criminal offenses. *Id*. The maximum penalty for violating the anti-bribery provisions is a fine up to $2,000,000 or twice the gross gain for corporations, and up to five years in prison. U.S. DEP'T JUSTICE, *Lay Person's Guide*, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf. The SEC may seek disgorgement. *See*, *e.g.*, Statoil, ASA, Exchange Act Release No. 54599 (Oct. 13, 2006) (SEC admin. proc. ordering $10.5 million in disgorgement).

264. *See* SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 at v (2009), *available at* http://www.shearman.com/files/upload/fcpa_digest.pdf. Both the DOJ and the SEC enforce the FCPA: DOJ for criminal enforcements and the SEC for civil enforcements. *See Lay Person's Guide*, *supra* note 263. The SEC and DOJ have also begun working together to bring joint enforcement actions against unrelated companies. *See* Press Release, U.S. Dep't Justice, Alliance One International Inc. and Universal Corporation Resolve Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010) [hereinafter Alliance One and Universal Press Release], *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html; *see also* Press Release, SEC, SEC Files Anti-Bribery Charges Against Two Global Tobacco Companies (Aug. 6, 2010) [hereinafter SEC Anti-Bribery Press Release], *available at* http://www.sec.gov.litigation/litreleases/ 2010/lr21618.htm. In 2010, both the SEC and the DOJ issued press releases and enforcement actions against two unrelated U.S. companies, Alliance One and Universal Corporation, each mentioning the other agency's aid and cooperation. *See* Alliance One and Universal Press Release, *supra*; SEC Anti-Bribery Press Release, *supra*. Both companies self-reported FCPA violations in Asia in connection with their tobacco businesses and both signed NPAs. *See* Alliance One NPA, *supra* note 233; Universal Corp. NPA, *supra* note 260.

265. *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1239 (2006–2007) (bemoaning the "subjective judgment" that pervades FCPA enforcement and arguing

compliance program is, perhaps, the only method to prevent FCPA violations,[266] recent DPAs and NPAs for FCPA violations provide the most detailed examples of model compliance programs endorsed by the DOJ.[267]

Recent DPAs and NPAs provide an upgraded framework for FCPA compliance that goes beyond the basic paradigm set forth in the USSG and OECD guidance.[268] As discussed above, such agreements now frequently require companies to adopt internal controls.[269] In the FCPA context, such internal controls must be tailored to prevent FCPA violations.[270] For example, agreements now specify internal accounting controls to encourage compliance with FCPA books and records provisions.[271] DPAs also map out anti-corruption policies a company must develop and implement, usually including guidelines specifically for gifts, hospitality, entertainment, travel, facilitation payments, and charitable donations.[272]

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that "the government *owes* consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues").

266. FOREIGN CORRUPT PRACTICES ACT COMPLIANCE ISSUES: LEADING LAWYERS ON RESPONDING TO RECENT FCPA ENFORCEMENT ACTIONS, MAINTAINING AN EFFECTIVE COMPLIANCE PROGRAM, AND NAVIGATING RISK IN EMERGING MARKETS (INSIDE THE MINDS) (Thompson Reuters/Aspatore 2010).

267. Press Release, Troutman Sanders, FCPA "Best Practices" Guide (Nov. 11, 2010), *available at* http://www.troutmansanders.com/fcpa-best-practices-guide-11-11-2010.

268. *Compare* Panalpina DPA, *supra* note 233, *with* USSG § 8B2.1 (2010), and *with* GOOD PRACTICE GUIDANCE, *supra* note 168 (demonstrating a more detailed and delineated plan than the general guidelines set forth in the USSG and OECD). Even with the increased emphasis on FCPA compliance programs, fines have continued to grow over the last several years. *See* Christopher M. Matthews, *FCPA Fines Are Now More Than Double The Estimated Gain, Analysis Shows*, JUST ANTI-CORRUPTION (Dec. 17, 2010), http://www.mainjustice.com/justanticorruption/2010/12/17/fcpa-fines-are-now-more-than-double-the-estimated-gain-from-bribing-analysis-shows/. Since 2007, penalties per dollar gained from violating the FCPA have increased 1,800%, from $0.11 per dollar gained in 2007 to $2.14 per dollar gained in 2010. *Id.* Despite the dramatic increase in fines, deferred prosecution and non-prosecution agreements stress that the fine amounts remain below the low range fines suggested in the USSG. *See*, *e.g.*, Panalpina DPA, *supra* note 233.

269. *Id.*

270. *Id.*

271. *See*, *e.g.*, Panalpina DPA, *supra* note 233, at C-4.

272. *Id.* at C-3.

Because many FCPA violations involve third-party business partners,[273] recent DPAs seek to include potential third parties in the compliance process. For example, all five DPA agreements for FCPA violations entered into in November 2010 provide detailed guidance for implementing compliance requirements "pertaining to the retention and oversight of all agents and business partners."[274] Such requirements often include mandatory due-diligence actions to be performed before a company enters into a relationship with a third party.[275] Some DPAs even require companies to seek reciprocal commitments to compliance from third parties, advocating for contractual language allowing for termination of third-party relationships in the event of non-compliance.[276] In the strictest compliance measure with respect to third parties yet, one recent DPA commended a company who reported FCPA violations for taking the "extraordinary remedial step of terminating use of third-party sales and marketing agents" altogether.[277]

The most recent DPAs and NPAs reflect a trend toward company self-reporting.[278] However, when monitors are employed as remedial compliance measures for FCPA violations, the person selected must have demonstrated experience with the

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273. *See* FOREIGN CORRUPT PRACTICES ACT COMPLIANCE ISSUES, *supra* note 266.

274. *See* Panalpina DPA, *supra* note 233, at C-6; Shell Nigeria DPA, *supra* note 243, at C-7; Tidewater DPA, *supra* note 165, at C-6; Transocean DPA, *supra* note 183, at C-6; Pride Int'l DPA, *supra* note 141, at C-3.

275. *See*, *e.g.*, Panalpina DPA, *supra* note 233, at C-6. In addition to the guidance in the DPAs, standard FCPA language in agent contracts might include some or all of the following elements: the requirement of periodic certification; anti-corruption representatives and undertakings, with audit and termination rights, in all third-party representative agreements; statements concerning compliance with all laws, including FCPA provisions and anti-boycott caveats; representations and warranties regarding ownership and participation in business activities; method of payment and location of accounts; nature of compensation; nature of deliverables and periodic written reporting requirements; restrictions on use of sub-agents; audit or access rights; no assignment of rights or subcontracting provisions; unilateral rights to terminate for misconduct or FCPA violations; prohibitions on offshore payments. *Id*. at Attachment C.

276. *See*, *e.g.*, Panalpina DPA, *supra* note 233, at C-7.

277. Deferred Prosecution Agreement at 7, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 27, 2010) [hereinafter Alcatel-Lucent DPA].

278. *See* RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT, *supra* note 263, at 8–9.

FCPA.[279] Prior experience should include designing or reviewing FCPA-specific policies, in addition to experience with general corporate compliance policies and internal control procedures.[280]

The FCPA DPAs and NPAs underscore that compliance remains a critical charging consideration in the FCPA, as in other corporate criminal cases. These DPAs and NPAs highlight that compliance is not only a critical charging consideration but an important sentencing consideration as well, as demonstrated by the hypothetical Organizational Guideline calculation discussed above.[281]

E. The Corporate Monitor As A Compliance Mechanism

1. Background on Corporate Monitors

Perhaps the most significant indication that compliance has become a critical charging consideration is the DOJ's use of monitors to resolve corporate investigations.[282] Indeed, DPAs and NPAs frequently call for a monitor as a compliance mechanism used by the DOJ to ensure that a company upholds its promise to make compliance-related reforms under a prosecution agreement.[283]

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279. Alliance One NPA, *supra* note 233; Deferred Prosecution Agreement at 9, United States v. Daimler AG, No. 10-CR-063-RJL (U.S. Dist. Col. Mar. 24, 2010) [hereinafter Daimler DPA].

280. *See* Alliance One NPA, *supra* note 233, appendix C, at 1; Daimler DPA, *supra* note 279, at 9.

281. *See* Christopher M. Matthews, *SFO Director: No "Safe Harbor" Under New U.K. Bribery Law*, JUST ANTI-CORRUPTION (Oct. 20, 2010), http://www.mainjustice.com/justanticorruption/2010/ 10/20/sfo-director-no-safe-harbor-under-new-u-k-bribery-law/.

282. *See* Memorandum from Craig S. Morford, Acting Deputy Attorney General, to the Heads of Department Components and United States Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008) [hereinafter Morford Memo], *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf (describing the selection and use of monitors in DPAs and NPAs with corporations), *see also* Memorandum from Gary G. Grindler, Acting Deputy Attorney General, to the Heads of Department Components and United States Attorneys on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution (May 25, 2010) [hereinafter Grindler Memo], *available at* http://www.justice.gov/dag/dag-memo-guidance-monitors.pdf.

283. *Id.*; *see also*, *e.g.*, Panalpina DPA, *supra* note 233, at C-4.

The Organizational Guidelines and the U.S. Probation Office laid the foundation for these compliance monitors.[284] Companies convicted of crimes cannot go to federal prison, but may be put on probation and monitored by the U.S. Probation Office.[285] The probation officer monitors whether the company adheres to the conditions of probation and reports any violations back to the federal judge who sentenced the company.[286] The Organizational Guidelines note that conditions of probation may include requiring the company to develop an effective compliance and ethics program and to make periodic submissions to the court on the success of implementing such a program.[287] Unlike the probation officer who reports to the sentencing judge, the monitor reports to the DOJ. And unlike the probation officer, who is a public servant paid by the Administrative Office of U.S. Courts, corporate monitors are paid by the corporation.[288] Like DPAs and NPAs, monitors preceded the corporate charging guidance found in the USAM.

Beginning in 1993, with the Prudential DPA, the DOJ relied on monitors to supervise compliance changes mandated by prosecution agreements. Use of the corporate monitor reaffirms the critical role compliance plays in federal charging and sentencing. When substantial business reforms are incorporated into a DPA or an NPA, a monitor is intended to provide the oversight that would normally be provided by the probation office or the court if the entity was prosecuted and convicted.[289] It is, therefore, unsurprising that as prosecution agreements containing negotiated business reforms and compliance programs increased, so did monitors, at least initially.

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284. *See* Finder & McConnell, *supra* note 108, at 5 (explaining how the Organizational Guidelines' recognition that organizations require special treatment "laid the groundwork for the explicit DOJ prosecutorial policy that considered both the impact of cooperation and a compliance monitor in corporate charging decisions.").

285. *See* USSG § 8D1.4(b)(3)-(4) (2010).

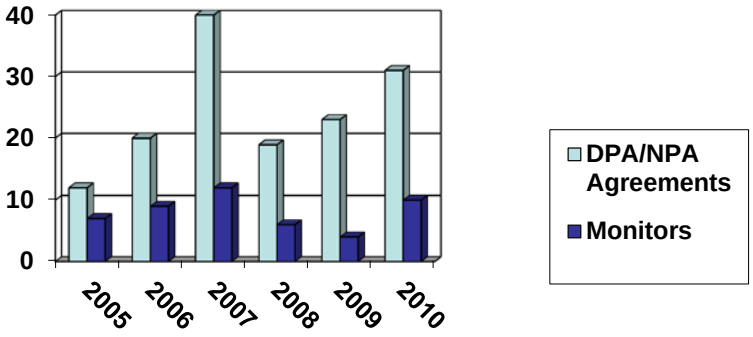
286. *See* USSG §§ 7B1.2, 8D1.4 (2010).

287. USSG § 8D1.4(b)(1) (2010).

288. *See* Grindler Memo, *supra* note 282.

289. Allen Pan, *In Defense of Behavioral Compliance Programs, in* PRACTICING LAW INSTITUTE: CORPORATE LAW AND PRACTICE COURSE HANDBOOK 607, 632 (2010).

Monitors in Proportion to DPA/NPA Agreements[290]



2. The 2008 Morford Memo

The use of monitors, especially the selection of monitors, has generated significant controversy because of the compensation received by monitors and the potential conflicts of interest that arise within the monitor selection process.[291] In 2008, the DOJ implemented a new policy dealing with the selection of corporate monitors in DPAs and NPAs.[292] This guidance, set out in the

290. This chart covers public non-antitrust NPAs and DPAs entered into with the DOJ before January 2011. If we could not obtain and review the actual agreement, it is not included. With respect to methodology, we consider a monitor to be any person or group that is required to report to the DOJ (which could include outside compliance counsel retained by the company or an external auditor).

291. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2009), *available at* http://www.gao.gov/products/GAO-09-636T (reporting on the perceived favoritism in the DOJ's selection of monitors); *see also* Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, *available at* http://www.nytimes.com/2008/01/10/washington/10justice.html (publicizing the controversy generated after the DOJ awarded former Attorney General John Ashcroft an 18-month contract with an estimated worth of $28 to $52 million, to act as monitor for Zimmer Holdings); *see also* Deferred Prosecution Agreement at 6, United States v. Bristol-Myers Squibb Co., Cr. No. 2:05-mj-06076 (D.N.J. June 13, 2005) (requiring Bristol Myers to endow an ethics chair at Seton Hall University, the DOJ prosecutor's alma mater, as part of the DPA settlement).

292. CRIMINAL RESOURCE MANUAL § 163 (2010), *available at* http://www.justice.gov/usao/ eousa/foia_reading_room/usam/title9/crm00163.htm.

Morford Memo, sought to assuage some of the uncertainties and concerns surrounding the selection and appointment of monitors, as well as to clarify a monitor's duties.[293]

The Morford Memo streamlined the monitor selection process by requiring the DOJ to establish a selection committee and review several qualified candidates before awarding a monitor contract.[294] The Morford Memo also underscored the importance of a monitor's impartiality, reiterating that a monitor is to serve as "an independent third-party, not an employee of the corporation or of the Government."[295] Finally, the Morford Memo emphasized that a monitor's role is not intended to be punitive.[296] Instead, a monitor's role centers around evaluating whether a corporation has adopted and effectively implemented compliance programs with the goal of preventing recidivism.[297] In 2010, the DOJ provided additional guidance, set out in the Grindler Memo, to address concerns over inadequate dispute resolution procedures for disagreements

293. *See* Morford Memo, *supra* note 282 (noting that "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter . . . [I]n a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.").

294. The new policy outlined in the Morford Memo mandates that DOJ components (including U.S. Attorney's Offices) establish a selection committee and review a panel of qualified candidates before selecting a monitor as part of a DPA or NPA. Morford Memo, *supra* note 282. The committee should include: (1) the ethics officer of the office, (2) the Criminal Chief or DOJ Section Chief, and (3) an experienced prosecutor. Morford Memo, *supra* note 282, at 4. Ideally, the committee must consider at least three qualified candidates. The amount of DOJ input will vary depending upon the agreed upon selection process. In every case, the Deputy Attorney General will have the final say on the monitor.

295. The Morford Memo provides that the duration of the monitorship varies depending on the agreement. The duration will depend on a list of non-exhaustive factors, including: "(1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences." Morford Memo, *supra* note 282, at 7.

296. *Id*. (emphasizing that a monitor's primary responsibility is compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals).

297. *Id*.

between monitors and companies.[298] The Grindler Memo added a tenth principle to those outlined under Morford, requiring monitorship agreements to address the role of the DOJ in resolving disagreements between the corporation and the monitor.[299]

The 2008 reforms to the DOJ's policy allayed many of the concerns surrounding the selection process. However, some commentators have questioned whether a monitor is truly effective as a remedial compliance measure.[300] Critics, pointing to recent corporate implosions *despite* the presence of monitors, posit that monitors may not actually be an effective guard against corporate misconduct.[301] Recent compliance failures by "too-big-to-fail" companies like BP, AIG, Lehman Brothers, and GlaxoSmithKline only fuel the suspicion that stricter monitoring does not actually change corporate behavior.[302]

3. Recent Monitor Trends

Recent DPAs and NPAs that impose monitorships on companies now tend to emphasize that a monitor must possess expertise in the area in which a company's violation occurred.[303] The selection criteria for monitors in some agreements, for

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298. Grindler Memo, *supra* note 282.

299. The Grindler Memo suggests that when a monitor makes a recommendation that a company considers unduly burdensome, the company should have the option to propose, in writing, an alternative procedure to achieve the same objective. *Id.* Additionally, the Grindler Memo requires federal prosecutors to include language in monitorship agreements to clarify that a company first should raise its concerns with the U.S. Attorney's Office or DOJ component handling the case. *Id.* This language emphasizes that the DOJ is not a party to the agreement between the company and the monitor and therefore is precluded from arbitrating contractual disputes between the parties. *Id.*

300. David Hechler, *Have We Learned Anything?*, CORPORATE COUNSEL (Oct. 1, 2010), http:// www.law.com/jsp/cc/PubArticleCC.jsp? id=1202471815927.

301. *See id.* (declaring "[m]onitors alone are worthless" because "[a] monitor without the expertise to understand a company's operations, and the power to force it to comply with rules, is of no more value to a firm than a toothless guard dog that's forgotten how to bark.").

302. *See* Sue Reisinger, *Half-Baked Justice? Corporate Prosecutions Are All Over the Map*, CORPORATE COUNSEL (Dec. 23, 2010), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id= 1202476577987.

303. *See*, *e.g.*, Alliance One NPA, *supra* note 233; Daimler DPA, *supra* note 279.

example in the Alliance One NPA and Daimler DPA in 2010, required a monitor to have "demonstrated expertise with respect to the FCPA,"[304] and "experience designing and/or reviewing corporate compliance policies, procedures and internal controls, including FCPA-specific policies."[305] The Alcatel-Lucent DPA from December 2010 adds the newest twist to the monitor's role.[306] The DPA appointed a French national as monitor and assigned him the dual role of ensuring Alcatel-Lucent's compliance with the FCPA *and* with France's blocking statute.[307]

Since 2007, the use of monitors has declined significantly (see chart above). To replace the monitor function, the DOJ has increased emphasis on a company's obligation to self-report. DPAs and NPAs from late 2010 reflect this trend by formalizing a company's self-reporting obligation.[308] Indeed, many DPAs and NPAs now include a separate attachment outlining a company's compliance reporting obligation.[309] Monitors were often required to make an initial report, followed by subsequent—typically two or three—follow-up reports for the duration of the monitorship.[310] Recently, companies have assumed similar obligations: submitting an initial report detailing leadoff remediation efforts succeeded by two to three follow-up reports.[311] Nevertheless, in appropriate cases, monitors remain a critical compliance tool for companies that

304. Alliance One NPA, *supra* note 233, at app. C.

305. Daimler DPA, *supra* note 279, at 9.

306. *See* Lucinda Low & Brittany Prelogar, *International Law Advisory – French Companies Prepare to Pay Hundreds of Millions to U.S. Authorities in Foreign Corruption Matters*, FIN. FRAUD L. REP., Nov./Dec. 2010, *available at* http://www.steptoe.com/publications-7001.html (describing the use of a French compliance monitor).

307. Expanding on a similar agreement with Technip reached earlier in 2010, the Alcatel-Lucent DPA contemplates that the French monitor will report first to French authorities, who will in turn report to the DOJ should the company commit any future violations. *See* Alcatel-Lucent DPA, *supra* note 277; *see also* Technip DPA, *supra* note 141.

308. *See* Alcatel-Lucent DPA, *supra* note 277, at att. C.

309. *Id*.

310. *Id*. at att. D.

311. Panalpina DPA, *supra* note 233, at att. D; Transocean DPA, *supra* note 183, at att. D.; Tidewater DPA, *supra* note 165, at att. D.

have avoided a criminal conviction notwithstanding violations of federal criminal law.

VIII. CONCLUSION

According to a 2009 study by the Government Accountability Office (GAO) on DPAs and NPAs, of seventeen company officials surveyed about negotiations with the DOJ, only ten were aware that federal prosecutors base decisions to enter into DPAs or NPAs on the factors, such as compliance, set out in the Organizational Guidelines.[312] Of those ten company representatives, only six had actually tried to influence prosecutors' charging decisions based on the USSG factors.[313] Notwithstanding the GAO's findings, as the DOJ's charging policy has continued to complement the USSG framework, compliance has become a key DOJ charging consideration. From the inception of the USSG, to the Thornburgh Memo and 1991 Organizational Guidelines and later the 1999 Holder Memo and the subsequent iterations now set forth in 9-28.000, corporate charging and sentencing have continued to recognize the importance of compliance. For companies to adequately address compliance, they must consult not only the Organizational Guidelines and the OECD guidance, but the more detailed, and often overlooked, compliance analysis set forth in DPAs and NPAs.[314]

DPAs and NPAs are the result of federal prosecutors applying the three out of nine charging factors that address compliance in 9-28.000 and evaluating the Organizational Guidelines with compliance significantly affecting the corporate fine analysis.[315] Indeed, numerous DPAs and NPAs illustrate the prominent role remedial compliance measures play in these

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312. *Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements: Testimony Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability), *available at* http://www.gao.gov/new. items/d09636t.pdf.

313. *Id.*

314. Finder, McConnell, & Mitchell, *supra* note 182, at 32.

315. *See* GAO-10-110, *supra* note 208, at 9-10 (setting forth the nine factors and how to determine whether to use a DPA, NPA, or engage in criminal prosecution).

agreements. Over 90% of the DPAs and NPAs entered into in 2010 contained compliance features,[316] an almost 40% increase since 2005 when little more than half of DPAs and NPAs referenced compliance measures.[317] These DPAs and NPAs map out model compliance programs by looking backwards to past compliance failures.[318] These model programs are important because they provide a framework for a company to develop a compliance program that will effectively mitigate legal consequences and liabilities.[319] But the focus of compliance has undergone an important shift, from prevention of illegalities to promotion of an ethical corporate culture. Compliance as a reformative or putative element is a critical factor in obtaining leniency in charging and sentencing. However, the true challenge for the next decade will be shifting corporate culture to embrace compliance as a prophylactic measure, as an opportunity to enhance corporate governance and compliance practices so that a company never has to worry whether it can successfully negotiate a DPA or NPA to stave off prosecution.

The challenge for boards and CCOs is to view the enhanced standards in recent DPAs and NPAs not merely as a new host of legal requirements, but as an opportunity to evolve best practices and galvanize ethical corporate culture. A company that has a strong compliance program will not only minimize the likelihood of criminal liability but will likely reap positive impacts on the business front as well. A good reputation for consistent, ethical, and compliant operating procedures opens up tremendous opportunities for business growth and

316. *Remedial Compliance Programs*, *supra* note 212.

317. *Id*.

318. *See* Jacqueline C. Wolff & Kate Greenwood, *Compliance Tips from Deferred Prosecution and Agreements: Turning Lemons into Lemonade*, 13 L.J. NEWSL. 8 (2006), *available at* http://www.cov.com/files/Publication/b9a52779-7e8f-4e32-abe8-6023dee79be9/Presentation/ PublicationAttachment/3fd42ab4-9ef6-4b1d-9602-675b299d70cb/oid40984.pdf (explaining how it is difficult for corporations to determine whether their compliance program is effective and how DPAs and NPAs are a useful resource because they provide corporations with "guidance as to what types of reforms would be best employed by which types of businesses," and citing to several examples).

319. *See id*. (discussing how companies can "use DPAS entered into by others to their advantage" and by using them in formulating their own compliance programs they can avoid being "subject to prosecution").

profitability.[320] For example, a company's good reputation may allow it to secure government approvals more quickly. Companies with reputations for ethical business practices and good corporate governance tend to have higher stock prices and more satisfied employees.[321] In these and many other regards, a company's decision to act legally and ethically can serve as a catalyst for success.

Companies face increasing challenges on the compliance front. Many companies are confronting a down economic climate, reduced financial resources, and corrupt regimes abroad.[322] Just as the DOJ has announced record numbers of FCPA prosecutions underway, additional legal traps from the UK Bribery Act and the Dodd-Frank Act will force many companies to deflect compliance challenges on all sides.[323] However, recent

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320. *See Ethics and Compliance Risk Management: Improving Business Performance and Fostering a Strong Ethical Culture Through a Sustainable Process*, LRN (2007), http://www.ethics.org/files/u5/LRNRiskManagement.pdf (explaining that the threat of legal action and reputational damage has led many companies to pursue ethics and compliance management and consequent profits and opportunities it provides); *see also* Robert C. McMurrian & Erika Matulich, *Building Customer Value and Profitability with Business Ethics*, 4 J. BUS. & ECON. RES. 11 (2006), *available at* http://www.franklinbankdoesnotcare.com/business_ethics.pdf (discussing the positive correlation between a reputation for business ethics and profitability and competitive advantage for business); *see generally* Y. Abramov & Kenneth W. Johnson, *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, GOOD GOVERNANCE PROGRAM (2004), *available at* http://trade.gov/goodgovernance/adobe/bem_manual.pdf (discussing the benefits and importance of maintain a high level of business ethics).

321. *See* ECONOMIST INTELLIGENCE UNIT, THE IMPORTANCE OF CORPORATE RESPONSIBILITY 2 (2005), *available at* http://graphics.eiu.com/files/ad_pdfs/eiuOracle_CorporateResponsibility_WP. pdf (referencing studies showing that corporate responsibility can help the bottom line and lead to better staff morale).

322. *See* Senator Patrick Leahy, Remarks at the World Bank International Corruption Hunters Alliance (Dec. 7, 2010), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,, contentMDK:22784360~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607,00. html (referencing increased public corruption in donor and developing countries paired with an unprecedented, global economic crisis).

323. *See* Rex Homme, *Does the Bribery Act Make the U.K. the New Sheriff in Town?*, CORPORATE COUNSEL (Jan. 28, 2011), http://www.law.com/jsp/cc/PubArticleCC.jsp?id= 1202479595125 (questioning the effect of The Bribery Act of 2010 and if its implementation elevates the role of U.K.

DPAs and NPAs, together with the Organizational Guidelines, OECD guidance, and the DOJ's policy on corporate charging, provide all the tools a company needs to develop an effective compliance program. This enhanced compliance framework allows companies to learn from past corporate shortcomings and to internalize compliance as part of ethical corporate culture so that they may forestall future compliance failures.

enforcement when compared to the United States).