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

BY:

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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

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*The views set forth in this article represent those of the authors only.

[1] *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 898–99 (Jan. 21, 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 "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").

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.

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, and collective knowledge, which enables prosecutors to aggregate knowledge of a crime to prove corporate criminal liability.[4] 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.[5]

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[2] *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 495–96 (1909) ("While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, . . . and to give them 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), *cert. denied*, 320 U.S. 788 (1943); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1846), *cert. denied*, 154 F.2d 798 (1946).

[4] *See United States v. Bank of England*, 821 F.2d 844, 856 (1st Cir. 1987), *cert. denied* 484 U.S. 943 (1987) (upholding trial court's collective knowledge jury instruction—corporation is considered to have acquired the collective knowledge of employees); *Continental 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).

[5] *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); *but compare United States v. Science Applications Int'l Corp ("SAIC")*, ________ (D.C. Cir. Dec 3,

In response to these trends, corporate compliance programs have become increasingly vital tools in helping companies detect and prevent unlawful conduct by employees. 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.

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.[6] 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 Sentencing Guidelines (USSG). Under the Organizational Guidelines, an adequate compliance program can result in up to a thirty percent reduction off of a corporation's advisory guideline fine range, as discussed below.[7] This may translate into a multi-million dollar discount in USSG calculated fines.[8]

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.[9] Even regulators abroad have begun to emphasize compliance

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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).

[6] United States Attorneys' Manual, 9-28.000, *available at* http://www.justice/gov/usao/eousa/foia_reading_room/usam [hereinafter USAM].

[7] U.S. Sentencing Guidelines Manual §8C2.5, http://www.ussc.gov/Guidelines/2010_guidelines/ToC_PDF.cfm [hereinafter USSG].

[8] See *infra* Part IV (Calculating a Corporate Sentence under Chapter Eight).

[9] The SEC considers thirteen factors—known as the Seaboard factors—in determining whether to give a company credit for self-policing and self-reporting. One of these factors specifically mentions compliance programs and explains that when bringing an enforcement action against a company

programs. Most notably, the UK Bribery Act, which will take effect in April 2011, contains a strict liability provision for companies that fail to prevent bribery.[10] Compliance is the only defense recognized under the Bribery Act.

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. Companies have begun to reassess, formalize, and improve what have historically been only informal or general codes of conduct. 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 United States 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).[11] Before the USSG, Congress was responsible for setting maximum sentences and

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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* Securities and Exchange Commission, "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," Release No. 44969 (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499 (setting out thirteen Seaboard factors); *see also* Economic Sanctions Enforcement Guidelines, 31 CFR 501, App. A, http://edocket.access.gpo.gov/cfr_2010/julqtr/pdf/31cfr501AppA.pdf (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).

[10] *See* UK Bribery Act, *available at* http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3694937.

[11] Sentencing Reform Act of 1984, P.L. No. 98-473, 98 Stat. 1987.

judges had broad discretion to impose sentences below the statutory maximums.[12] The result was an unpredictable sentencing scheme further complicated by a parole commission empowered to dictate how much of the sentence an offender would actually serve in prison.[13]

This sentencing system produced widely disparate sentences that varied arbitrarily by sentencing judge. For example, if a defendant was charged with conspiracy under 18 U.S.C. § 371, which calls for a maximum term of imprisonment of five years, a federal judge could impose a sentence ranging anywhere from mere probation to five years imprisonment. 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.

To remedy the unfairness in the pre-USSG system, Congress sought to promote uniformity and honesty in sentencing.[14] To this end, the USSG were intended to promote certainty by eliminating sentencing disparities for defendants with similar criminal records or comparable criminal conduct.[15] The USSG took effect on November 1, 1987, but did not focus on corporate defendants or corporate compliance programs until the Organizational Guidelines were implemented in 1991.[16] The USSG became advisory in 2005, after the Supreme Court's decision in *United States v. Booker*.[17]

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[12] *Mistretta v. United States,* 488 U.S. 361 (1989).

[13] USSG, Ch. 1, Part A, Section 1.3 (noting that this system often resulted in prisoners serving only a third of their sentences before becoming eligible for release on parole).

[14] USSG Ch. 1, Part A, Section 3 (Policy Statement).

[15] The Sentencing Reform Act, which established the USSG, "reject[ed] imprisonment as a means of promoting rehabilitation" and instead embraced the idea that "punishment should serve retributive, educational, deterrent, and incapacitive goals." *See* "An Overview of the United States Sentencing Commission" at 1, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_ Overview_20101122.pdf (providing a brief history of the Federal Sentencing Guidelines).

[16] The guidelines are structured as follows: Chapter 1: History of Guidelines and Application Principles. Chapter 2: Offense Levels for Different Crimes. Chapter 3: Adjustments for Role in Offense/Responsibility/Number and

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.[18] 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.[19] If the sentencing judge failed to follow the USSG, this was reversible error.[20]

Application of the USSG for individuals before and after *Booker* is straightforward. The USSG calculate an individual defendant's sentence by taking into account two primary factors: (1) a defendant's conduct and (2) a defendant's criminal history.

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

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Type of Counts/Victim Related/Obstruction of Justice. Chapter 4: Defendant's Criminal History. Chapter 5: Calculating Sentence. Chapter 6: Sentencing Procedures/Plea Agreements. Chapter 7: Violations of Probation/Supervised Release Terms. Chapter 8: Corporate Sentencing/Organizational Guidelines (implemented in 1991).

[17] *United States v. Booker*, 543 U.S. 220, 245 (2005).

[18] USSG, Ch. 1, Part A(4)(b).

[19] *Id.*

[20] *In re Solomon*, 465 F.3d 114, 121, n.2 (3rd 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).

the offense of conviction.[21] For example, the offense level for bank robbery is calculated under USSG §2B1.1, the guideline for robbery, extortion, and blackmail.[22] Once this base offense level is determined, any adjustments for specific offense characteristics are applied. 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.[23]

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.[24] 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.[25]

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. The USSG contain different categories for a defendant's criminal history ranging from no criminal history (Category I) to extensive criminal history (Category VI). 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. If a defendant's criminal history is underrepresented or overstated using this point system, the USSG allow the court to depart and use a higher or lower guideline range to accurately reflect the

[21] USSG §1B1.1(a)(1).
[22] USSG, Appendix A.
[23] USSG §1B1.1(a)(2).
[24] For example, the USSG ensure that a leader of a criminal enterprise receives a greater sentence than other participants. USSG §1B1.1(a)(3) (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").
[25] USSG Ch. 5, Part A (Sentencing Table).

defendant's conduct.[26] As illustrated by Table I, the guideline sentence is the range reflected in the cell that corresponds to a defendant's criminal history and offense conduct.[27]

Table I: USSG Sentencing Table

		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)**
	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
Zone A	**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
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	**10**	6-12	8-14	10-16	15-21	21-27	24-30
	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 C							
	13	12-18	15-21	18-24	24-30	30-37	33-41
Zone D	**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
	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

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[26] USSG, Ch. 1, Part A(4)(b) (discussing the USSC's policy on departures); *see also* USSG §2L2.1, application note 7 ("There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted.").

[27] USSG §5B1.1 (providing for when the imposition of probation is appropriate).

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.[28] 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.[29] Regardless of whether a single defendant is charged with one transaction or all ten, the USSG look at the actual damage caused and treat the loss as $1 million.[30] 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.[31] This development is important because it limits

[28] *See* USSG, Ch. 1, Part A, Section 4(a) (comparing and contrasting real offense and charge offense sentencing).
[29] USSG Ch. 1, Part A, Section 4(a).
[30] USSG Ch. 1, Part A, Section 4 (Policy Statement).
[31] USSG Ch. 1, Part A, Section 4(a) (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

the significance of which charges federal prosecutors choose to file. 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. When the DOJ issued the Thornburgh Memo in 1989 commanding prosecutors to file the most serious readily provable charges, this policy complemented the USSG framework, which captures the relevant conduct irrespective of which charges were filed.

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). 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. 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.[32]

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an indictment). Under the grouping rules, a defendant gets more punishment for committing more crimes (depending on seriousness), but the USSG avoid double counting because if two crimes are related to one another, they are considered together. 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. 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). Mandatory minimum sentences can be controversial because, absent a § 3553(e) filing, they prevent courts from departing downward below the mandatory minimum. 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 (2002).

[32] 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).

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.[33] Both the prosecution and the defendant have a chance to object to the information in the PSR and the applicable guideline range.[34] At the sentencing hearing, the sentencing judge makes the final decision on facts in the PSR by treating undisputed information as findings of fact and ruling on the other objections.[35] Pre-*Booker*, the judge then applied the USSG range.

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*.[36] *Booker* did away with the mandatory nature of the sentencing

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[33] 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, Att'y Gen., 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).

[34] FED. R. CRIM P. 32(e) requires the U.S. Probation Office to disclose the PSR thirty-five days before sentencing. Both the defendant and the DOJ have 14 days after receiving the PSR to lodge objections. 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.

[35] 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 (5th Cir. 2001).

[36] *United States v. Booker*, 543 U.S. 220, 245 (2005). During Booker's trial, the jury was presented with evidence that Booker was found in possession of

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.[37] As a remedy, the Supreme Court excised the language in the federal criminal code that made the USSG binding.[38] Post-*Booker*, the USSG are merely advisory.[39] Sentencing judges must calculate the sentencing guideline range based on information in the PSR but may depart if the case warrants departure under a

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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. The Supreme Court found that "the provision of the federal sentencing statute that makes the USSG mandatory, 18 U.S.C. § 3553(b)(1), incompatible" with the Sixth Amendment requirement that juries, not judges, find facts relevant to sentencing. *Id.*

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

[38] *Id.* at 248. 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 disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." *Id.* at 265.

[39] *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").

series of factors set forth in 18 U.S.C. § 3553(a) that would make the case different from the typical guideline case.[40]

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 § 3553(a). Prosecutors and defense attorneys are free to argue that the guideline range is inappropriate under the § 3553(a) factors and that the sentencing judge should impose a greater or lesser sentence.[41] An appeal of a sentencing judge's decision to vary from the USSG using the factors in § 3553(a) is reviewed only for reasonableness.[42] As long as the sentencing judge properly calculated the guidelines and noted the factors in § 3553(a), any challenge to a variance from the USSG is unlikely to succeed.[43]

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[40] 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.

[41] In 2010, Attorney General Eric Holder directed federal prosecutors to obtain supervisory approval before requesting variances under § 3553(a). Memorandum from Eric Holder, Att'y Gen., U.S. Dep't of Justice to All Federal Prosecutors on Department Policy on Charging and Sentencing at 3 (May 19, 2010) *available at* http://edca.typepad.com/files/holder-memo-re-charging-and-sentencing-decisions-1.pdf [hereinafter 2010 Holder Memo] (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").

[42] *Rita v. United States*, 551 U.S. 338, 341 (2007).

[43] Another obstacle the DOJ faces in appealing a variance from the USSG using § 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

Under the advisory guideline system currently in place, the USSG remain a critical consideration for judges.[44] 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.[45]

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

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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).

[44] 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 Commission's "Sourcebook of Federal Sentencing Statistics" Tables 32A, 32B, 31B, and 31C (2009), http://www.ussc.gov/Data_and_ Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm

[45] *Id.* 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 v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable USSG range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

defendants.[46] The principles 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. Federal prosecutors must consider these general federal charging principles for all criminal cases.[47] 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.

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.[48] The original "Principles of Federal Prosecution" were very general. 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 prosecution in another jurisdiction; and the adequacy of any non-criminal alternatives to

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[46] *See* "Overview of Federal Criminal Cases Fiscal Year 2009," USSC, *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.

[47] The charging principles at USAM 9-27.000 provide that federal prosecutors should prosecute only those cases where a federal interest is involved. *See* U.S. Attorneys' Manual tit. 9-27.230 (2002) (providing a list of factors to be considered in determining whether a federal interest exists).

[48] Attorney General Benjamin R. Civiletti issued the DOJ's hundred-page "Prosecutor's Handbook on Sentencing Guidelines" on November 1, 1987, the same day that the USSG went into effect. Two days later, then-Assistant Attorney General of the DOJ's Criminal Division, Stephen Trott, issued a parallel policy statement. *See* U.S. Dept' of Justice, Principles of Federal Prosecution (1980), now expanded and contained in §§ 9-27.001-.760 of the U.S. Dep't of Justice, U.S. Attorneys' Manual (2007), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

prosecution.[49] 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."[50]

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). The Thornburgh Memo directed federal prosecutors to charge the "most serious, readily provable offense."[51] 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.[52] 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 §5K1.1 were satisfied.[53] But the Thornburgh Memo

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[49] *Id.*

[50] *See* Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, New York Law Journal (June 10, 2010).

[51] Memorandum from Richard Thornburgh, Att'y Gen., to Federal Prosecutors (Mar. 13, 1989), reprinted in 6 Fed. Sent. R. 347 (1994) [hereinafter Thornburgh Memo]. 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.*

[52] *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.

[53] Section 5K1.1 permits a court to depart from the USSG if the defendant provides substantial assistance to the authorities. The court is to determine whether substantial assistance exists by examining a number of factors,

was clear that the initial charges must be those that resulted in the highest guidelines range (the most serious, readily provable offense).[54] On September 22, 2003, Attorney General John Ashcroft issued a new federal charging memo that echoed Thornburgh's stance of filing the most serious, readily provable charges, with certain narrow exceptions.[55] 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).[56]

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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 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. USSG §5K1.1(a)(1)-(5). 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. 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 § 3553(a) after the guidelines are recalculated based on the DOJ's 5K1.1 motion.

[54] *See* Thornburgh Memo, *supra* note 51 ("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 33 (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.").

[55] 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 33.

[56] 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. The Thornburgh Memo refined the plea-bargaining standard, instructing that a defendant should generally be required to plead guilty to the most serious

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

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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. 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 charge was no longer readily provable; (4) to secure a defendant's cooperation; or (5) in rare cases with supervisory approval. 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. *See* Ashcroft Memo, *supra* note 33, 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.").

[57] *See* Thornburgh Memo, *supra* note 51 ("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 33, at Section I.A. (providing that "charges should not be filed simply to exert leverage to induce a plea").

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.[58] 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. Notwithstanding a widespread recognition that corporate defendants were different than 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.[59] Recognizing that what 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

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[58] *See* Proceedings of the Second Symposium on Crime and Punishment in the United States, "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation" at 25 (Sept. 7-8, 1995) *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").

[59] *See* "Supplementary Report on Sentencing Guidelines for Organizations," U.S. Sentencing Commission (August 30, 1991), *available at* 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).

compliance program.[60] 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.[61]

The 1991 Organizational Guidelines made clear that an effective compliance program means a program that has been reasonably designed, implemented, and enforced so that it will be effective in preventing and detecting criminal conduct. 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.[62] The seven criteria

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[60] USSG §8A1.2, Application Note 3(k).
[61] USSC §8B2.1(b).
[62] USSC §8B2.1(a).

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. Companies now had a framework that set forth a floor for an effective compliance program. At the same time, the Organizational Guidelines 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. And 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.[63]

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. In 1992, the Ethics & Compliance Officer Association was formed with seven officers.[64] Today the organization has thousands of members who devote their careers to counseling companies on compliance issues.[65] 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.

In 1995, the USSC began to track whether corporations sentenced under the Organizational Guidelines had effective compliance programs.[66] 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 DPAs and NPAs. 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.

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[63] *See infra* Part IV (Calculating a Corporate Sentence under Chapter Eight).
[64] *See* http://www.theecoa.org/iMIS15/ECOAPublic/ (describing the founding and history of the ECOA).
[65] *Id.*
[66] *See* http://www.ussc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/organizsp.htm.

Table II: Companies with Effective Compliance Programs By Year[67]

	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.

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 Ashcroft) and calculating a corporate defendant's sentencing guidelines before filing charges.

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.[68] The 1999 Holder Memo officially recognized what had become

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[67] USSC Annual Sourcebooks (1996-2009), *available at* http://www.ussc.gov/Data_and_Statistics/archives.cfm.

[68] Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice to Component Heads and U.S. Attorneys on Bringing Criminal Charges

obvious to federal prosecutors and judges: corporate charging and sentencing decisions involve distinct variables from those at play in the charging of individuals. 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. These factors were to be considered in addition to the general charging considerations applicable to individuals.

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.[69]

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.[70] Only one addressed cooperation.[71]

Against Corporations (June 16, 1999), http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.htm [hereinafter 1999 Holder Memo]; *see also* Lawrence D. Finder and Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, at 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").

[69] 1999 Holder Memo, *supra* note 68.

[70] *See* USAM 9-28.500; USAM 9-28.800; and USAM 9-28.900.

[71] The 1999 Holder Memo stated that cooperation was one factor to be considered in deciding whether to prosecute a corporation. In assessing cooperation, prosecutors could weigh "the completeness of [a corporation's] disclosure including, if necessary, a waiver of the attorney-client and work

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. First, in the factor that addressed evaluating the pervasiveness of corporate 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.[72] Second, prosecutors were urged to examine the effectiveness of a corporation's compliance program as a stand-alone consideration. Finally, the third cooperation-related factor instructed prosecutors to consider any efforts taken by a company to implement a remedial compliance program after a violation occurred.[73]

A key concept in the 1999 Holder Memo was the idea that companies should not have "paper program[s]." 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. 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."[74] The 1999 Holder Memo instructed that "the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness

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product protections." 1999 Holder Memo, *supra* note 68. 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, *Devolution of Authority*, *supra* note 68, at 17 ("Consistent with the Thompson Memo, the central theme of a pre-trial agreement is cooperation with the government.")

[72] *See* USAM 9-28.500.

[73] *See* USAM 9-28.800, 9-28.900.

[74] 1999 Holder Memo, *supra* note 68.

in preventing and detecting wrongdoing by employees and whether management is enforcing the program."[75] 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.

In 2003, Deputy Attorney General Larry Thompson issued a memorandum (Thompson Memo) that provided federal prosecutors with revised guidance on corporate charging.[76] 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.[77] Notably, the Thompson

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[75] *Id.*

[76] *See* Colin P. Parks, *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, *Devolution of Authority*, *supra* note 68, 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).

[77] Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components on Principles of Federal Prosecution of Bus. Orgs. (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo]. 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. 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 Attorneys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memo]. The McNulty Memo was abandoned in 2008 and replaced

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 deferred (DPA) and non-prosecution (NPA) agreements.[78] 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. Although the DOJ would later 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.[79]

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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. Companies, however, remain free to voluntarily waive both the attorney client and work-product privileges.

[78] 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." *See* Thompson Memo, *supra* note 77.

[79] *See supra* note 77. *See also* "Principles of Federal Prosecution of Business Organizations," Memorandum from Deputy Attorney General Mark R. Filip to Heads of Department Components and United States Attorneys (Aug. 28, 2008) [hereinafter Filip Memo] (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, 145 (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

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.[80] But the basic theme has remained constant since 1989: prosecutors are to base any charging decisions on an analysis of the USSG. Since 1991, this analysis for corporations has included compliance as a key consideration under the Organizational Guidelines—allowing for up to 30% off of a corporate fine calculation. Since 1999, the charging analysis has also included a framework where at least a third of the charging principles address compliance.

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.[81] 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.

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

Memo, Thompson Memo, McNulty Memo). Now the corporate charging principles in 9-28.000 are referenced simply as USAM 9-28.000.

[80] 2010 Holder Memo, *supra* note 41 (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.

[81] USAM 9-27.000, 9-28.000.

fines under the USSG.[82] Calculating a hypothetical USSG range quickly reveals the significant benefits organizations may receive for an effective compliance programs—benefits that are considered both at the charging and sentencing stages.

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. For instance, if the company's offense conduct was bribery under the FCPA, the base offense level is determined using §2C1.1.[83]

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.[84] 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.[85]

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

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[82] If the organization's primary purpose was to engage in criminal activity, the USSG require a fine sufficient to divest the company of all of its assets. §8C1.1

[83] USSG §2C1.1.

[84] USSG §2C1.1(a)(2).

[85] USSG §2C1.1(b)(2).

(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 §2C1.1 would be 36.[86]

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

The second step requires the application of the offense level from §2C1.1 to a base fine table set forth in the Organizational Guidelines.[87] In

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

[87] The fine guidelines under the Organizational Guidelines apply so long as the underlying count is one referenced in §8C2.1. The guidelines applicable to the counts most commonly charged in connection with FCPA violations (§§ 2C1.1, 2B1.1, 2B4.1) are included in §8C2.1. Once it is determined that the Organizational Guidelines apply, the base fine calculation analysis begins with USSG §8C2.4. Section 8C2.4 provides that the base fine is the greatest amount of (1) the base amount set out in the Offense Level Fine Table (found in §8C2.4(d)) or (2) the pecuniary gain to the organization or (3) the pecuniary loss caused by the organization. Importantly, §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 §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.*, §§ 2C1.1(d)(1), 2B4.1(c)(1) (both including the special instruction for organizational fines).

our hypothetical, this would result in a base fine level of $50 million (which is greater than the fine provided for in the offense level fine table in §8C2.4). 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.[88]

§8C2.4. Base Fine

(a)The base fine is the greatest of:

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. *See, e.g.*, Deferred Prosecution Agreement, United States v. Technip S.A. (June 28, 2010) [hereinafter Technip DPA] (calculating a $199 million fine based on the value of the benefit received under §8C2.4 and §2C1.1(d)(1)(B)); *compare* Deferred Prosecution Agreement, United States v. Pride International, Inc. (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). *See also* Deferred Prosecution Agreement, United States v. Aibel Group Limited (Jan. 4, 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).

[88] 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 §8C2.4(a).

(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.

(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 the organization, the level of cooperation (if any), and whether the company had an effective compliance program in place. This calculation begins with a base number of five under USSG §8C2.5.[89] In our example, assuming the company had over 1,000 employees, but failed to self-report the violative conduct, refused to cooperate with the investigation, and lacked an adequate compliance program, the multiplier number would be 9.[90]

§8C2.5. **<u>Culpability Score</u>**

(a)Start with **5** points and apply subsections (b) through (g) below.

(b)<u>Involvement in or Tolerance of Criminal Activity</u>

If more than one applies, use the greatest:

[89] USSG §8C2.5(a).

[90] 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).

(1)If --

(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. In our example, this would yield a minimum multiplier of 1.8 and a maximum multiplier of 3.6.[91] 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. 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.[92]

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.[93] 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).[94] 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.

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

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

[92] 15 U.S.C. § 78dd-2(g)(1)(A).

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

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

original score of 9.[95] 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.[96]

§8C2.6. Minimum and Maximum Multipliers

Using the culpability score from §8C2.5 (Culpability 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.[97] But it is clear from the guideline

[95] USSG §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.

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

[97] *See, e.g.,* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 127–28 (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, e.g.,* Robert

calculations for our hypothetical FCPA violating entity 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.[98] 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 §8C2.5(f)(3). Following the

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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).

[98] 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. The USSG allow a company time to perform an internal investigation and reward a company's initiative in self-reporting with lower guideline ranges at sentencing. 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.

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 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.[99]

The amendment defines "direct reporting obligations" to require a direct communication line with a company's board of directors.[100] 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.[101] This revision took effect in November 2010.

Not only does this revision provide an avenue for corporations facing criminal fines to receive the 30% discount for an effective compliance program, but it invites prosecutors making a charging decision to scrutinize the reporting line for the chief compliance officer (CCO). After this amendment, not only should the CCO have a communication line to the board of directors, but the CCO should report to the board no less than annually about the effectiveness of the compliance program.

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.[102] This reporting line overlaps with existing §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 . . .

[99] USSG §8C2.5(f)(3)(A)–(C).
[100] USSG §8C2.5, application note 11.
[101] *Id.*
[102] *See, e.g.,* Deferred Prosecution Agreement, United States v. Tidewater Marine International, Inc. (Nov. 4, 2010) [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").

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.[103] 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.

VI. OECD Guidance

While the USSC was mulling over the CCO reporting line changes to the Organizational Guidelines, the Organisation for Economic Co-Operation and Development (OECD) released its "Good Practice Guidance on Internal Controls, Ethics and Compliance" in March 2010. This OECD framework provides companies with best practices guidance on how to combat bribery.[104] 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."[105] Although

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[103] USSG §8B2.1(b)(2)(C). 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." Additionally, the USSC chose not to incorporate one of the proposed amendments to the commentary for §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." The USSC also rejected proposed language endorsing the independent monitor as a tool to be used to asses a company's rehabilitation efforts while on probation following a conviction. 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* Jay Martin and Ryan D. McConnell, "How Revised Sentencing Guidelines Impact CCOs," Compliance Week (May 4, 2010).

[104] *See* OECD Good Practice Guidance, *available at* http://www.oecd.org/dataoecd/5/ 51/44884389.pdf.

[105] *See* OECD Newsroom "OECD calls on businesses to step up their fight against bribery" *available at*

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.

The OECD guidance sets out twelve elements a company should consider to ensure effective compliance programs. 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 effectiveness of a compliance program.[106]

Although the DOJ has not adopted guidelines for compliance programs as explicit as those set out in the OECD guidance, the DOJ has implicitly approved of the OECD formula for an effective compliance program. The former deputy chief of the DOJ fraud section, the DOJ component that has supervisory authority over FCPA cases under the USAM,[107] lauded the OECD guidance as a helpful guide to companies

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http://www.oecd.org/document/41/0,3343,en_2649_34487
_44697385_1_1_1_1,00.html

[106] http://www.oecd.org/dataoecd/5/51/44884389.pdf.

[107] USAM 9-47.110 (delegating supervisory authority of FCPA investigations to the Fraud Section of the DOJ's Criminal Division and requiring that "[a]ny information relating to a possible violation of the FCPA [] be brought immediately to the attention of the Fraud Section").

dealing with FCPA compliance issues.[108] Additionally, recent DPAs and NPAs, discussed below, have language that tracks the OECD guidance.

VII. Key Concepts in Corporate Compliance/Using Compliance Programs Effectively

A. An Overview of Deferred and Non-Prosecution Agreements

After the Organizational Guidelines went into effect in 1991, federal prosecutors evaluated 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.

In 1993, in the wake of the Organizational Guidelines' implementation, prosecutors began to break from the binary choice of indict or decline and instead entered into agreements with corporate targets that resolved corporate criminal cases without a conviction.[109] 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.

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 conditions in the agreement. Conditions typically include business and compliance reforms, cooperation, a substantial fine, and a promise to refrain from future illegal conduct. 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

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[108] *See* Mike Koehler, "Benchmarking FCPA Compliance," Corporate Compliance Insights (Mar. 3, 2010), http://www.corporatecomplianceinsights.com /2010/benchmarking-fcpa-compliance/

[109] *See* Remarks of Denis McInerney, Chief of the Fraud Section, Criminal Division, U.S. Dep't of Justice, "Corporate Criminal Liability—Taking Stock After The First 100 Years" (on file with authors).

agreements.[110] DPAs and NPAs have similar formats. DPAs are typically filed with a court and contain paragraph numbers and a case style similar to a plea agreement. 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). Both NPAs and DPAs must be signed by the DOJ and the company under investigation.

DPAs and NPAs typically last from one to five years—the range of probation for a company convicted of a federal crime and sentenced to probation by a federal judge. Instead of the U.S. Probation Office watching over the company and reporting back to the sentencing judge, the DOJ performs this function, often with the assistance of a monitor. 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 and other evidence to the DOJ), and (6) agrees that company employees will not contradict the terms of the agreement.

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 the company to have breached the agreement and proceeds with a criminal prosecution using the factual basis the company has agreed is admissible in court.[111] The substantive result under both DPAs and NPAs is the same: a significant monetary penalty—typically in the millions of dollars—but no criminal conviction for the company.

B. Compliance and Deferred and Non-Prosecution Agreements

[110] *See* Memorandum from Craig Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, note 2 (March 7, 2008), *available at* http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[111] Finder & McConnell, *Devolution of Authority*, *supra* note 68, 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").

Three key compliance concepts flow from the Organizational Guidelines and OECD guidance: detection, prevention, and response. 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 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 that conforms to the Organizational Guidelines. These agreements provide companies wishing 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[112]

2005	2006	2007	2008	2009	2010
Adelphia	**AIG**	**ABT**	**AB Volvo**	**AGCO Corp.**	**ABB Ltd.**
AEP Services	Bank Atlantic	**Akzo Nobel**	**AGA Medical**	**Beazer Homes USA**	**ABN Amro Bank**
Bank of NY	BAWAG	**Alabama Contract Sales**	**American Italian**	**Columbia Farms**	**Alcatel-Lucent**
Bristol Myers	**Boeing**	Am. Express Bank Int'l	**Pasta**	**Credit Suisse AG**	**Alliance One Int'l**
Friedman's	Endocare	**Appalachian Oil Co.**	Biovail Pharm.	**Fisher Sand &**	**Barclays Bank**
Inc.	FirstEnergy Nuclear	**Baker Hughes**	**ESI**	**Gravel**	Ceramic Protection
Hilfiger	**HealthSouth**	**Biomet**	**Faro Tech.**	Halliburton	**CVS**
KPMG	**HVB**	**Blue Cross & Blue**	**Fiat**	**Helmerich & Payne**	**Daimler**
MCI	**Intermune**	**Shield RI**	Fine Host	**Lloyds ISB Bank**	**Daimler China**
Micrus Corp.	**Medicis**	**BP**	**Flowserve**	McSha Properties	**Deutsche Bank**
Monsanto	**Mellon Bank**	Chevron	**IFCO Systems**	**NeuroMetrix**	**Exactech**
Orthoscript	MRA Holdings	Collins & Aikman Corp.	**Jackson Country**	**Novo Nordisk**	**General Reinsurance**

[112] 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.

Univ. Med & Dentistry NJ	**Operations Mgmt. Int'l** **Prudential** **Roger Williams Med. Cntr.** Royal Ahold **Schnitzer Steel** **Statoil** Western Geco LLC Williams Power	**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.**	**Club** **Lawson Products** **Milberg** **Parkway Village** **Penn Traffic** **Republic Services** **Sigue** **WABTEC** **Willbros**	Optimal Group Party Gaming Plc Petrocelli **Pilgrims Pride** **Quest Diagnostics** **Sirchie Acquisition** **Spectranetics** **Trace America** **Trammo Petroleum** **UBS AG** **UT Starcom** **Wellcare Health Plans**	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.[113] 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 was the first use of a DPA to resolve a corporate criminal case, but it was the first public and transparent example of a federal prosecutor using compliance as a consideration in whether to file criminal charges. 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.[114]

The following year, in 1994, back on the East Coast, the United States Attorney's Office in Manhattan reached a DPA with Prudential Securities

[113] 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.
[114] Armour DPA, *supra* note 113.

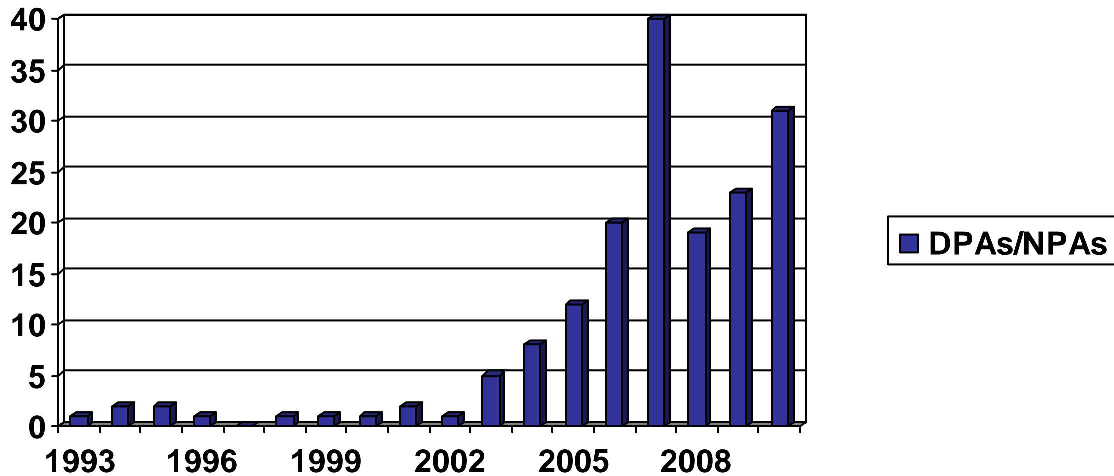
for securities fraud. The Prudential DPA pointed to compliance as a principle reason for the favorable disposition of the case without a conviction for Prudential.[115] A letter written by Prudential's outside counsel and attached to the DPA argued that Prudential should not be charged with a crime based on its substantial compliance modifications. 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." 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 with 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 review 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. These enhancements were consistent with the seven principles set forth in the Organizational Guidelines. Prudential also appointed a compliance committee within the board of directors and established regional compliance officers for Prudential's eight regions. 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.

After the indictment and implosion of Arthur Andersen in 2002 and resulting loss of 30,000 jobs, the prevalence of these agreements spiked as the DOJ increasingly turned to DPAs and NPAs as a way to limit the collateral consequences of corporate indictments and convictions.

[115] Letter from Mary Jo White, U.S. Att'y for S.D.N.Y., to Scott W. Muller & Carey R. Dunne, Prudential Counsel (Oct. 27, 1994).

Spike in DPAs and NPAs Post-Arthur Andersen



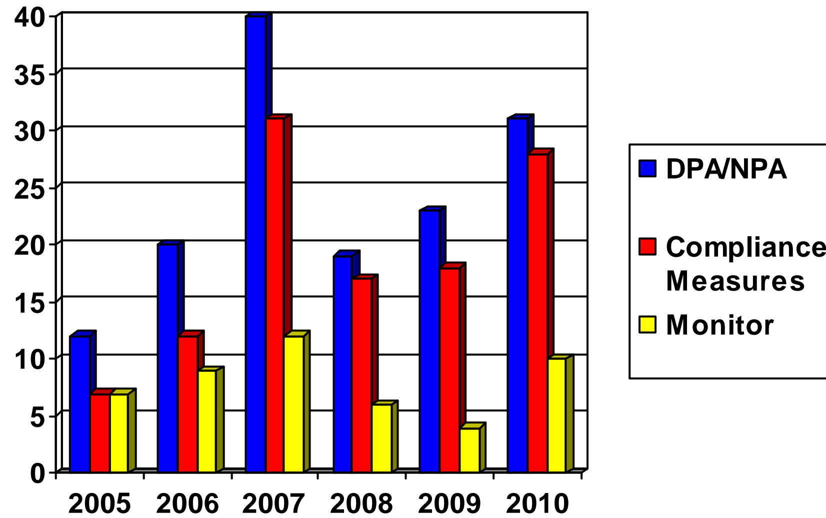
C. The Emergence of Compliance as the Central Feature in DPAs/NPAs

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 into 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. While earlier agreements merely mentioned the development of a compliance program in passing, more recent agreements provide detailed compliance frameworks. These detailed compliance revisions highlight the importance of compliance as a charging and sentencing consideration and as a key ingredient for a company under criminal investigation to receiving 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 for preventing future compliance-related failures.

Increase in Remedial Compliance Measures in DPAs and NPAs[116]



In the past couple of years, the number of DPAs and NPAs declined slightly following the record high of forty agreements in 2007. However, 2010 brought a notable rise in the number of DPAs and NPAs from 2008 and 2009.[117] In 2008 and 2009 there were nineteen and twenty-three

[116] 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.

[117] 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.* Deferred Prosecution Agreement, U.S.-FirstEnergy Nuclear Operating Co. (N.D. Ohio Jan. 19, 2006) (environmental crimes and false statements); MRA Holdings ("Girls Gone Wild"), Deferred Prosecution Agreement, United States v. MRA Holdings, No. 5:06CR79/RS (N.D. Fla. Sept. 12, 2006); Non-Prosecution Agreement, Pilgrim's Pride Inc. (Dec. 2009) (unlawful employment of aliens); Non-Prosecution Agreement, Party Gaming Plc (April 2009) (illegal internet gambling).

agreements, respectively. In 2010, the number of DPAs and NPAs rose to thirty-one.[118]

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. 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).

In 2007, the presence of remedial compliance measures began to increase as thirty-one out of forty agreements contained compliance-related reforms. The years 2008, 2009, and 2010 suggest that the emphasis on compliance-related business reforms in DPAs and NPAs is only growing stronger.[119]

In 2008, 89.47% of DPAs and NPAs contained compliance requirements (seventeen out of nineteen agreements). 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.[120] 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. Specifically, this corporate charging policy

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[118] It has been reported that BL Trading entered into a deferred prosecution agreement in December 2010, but the agreement has not yet been filed with the court and is therefore not included in our statistics.

[119] 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. 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. *See* Non-Prosecution Agreement between Carter's Inc. and the U.S. Securities and Exchange Commission (Nov. 2010); *see also* SEC Press Release 2010-252, "SEC Charges Former Carter's Executive With Fraud and Insider Trading," *available at* http://www.sec.gov/news/press/2010/2010-252.htm

[120] *See* McNulty Memo, *supra* note 77.

now provides that "[non]-prosecution and deferred prosecution agreements . . . occupy an important middle ground between declining prosecution and obtaining a conviction of a corporation."[121] 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."[122]

In 2009, the number of DPAs and NPAs containing compliance features remained high, at 78.26% (eighteen out of twenty-three agreements). Additionally in 2009, the DOJ moved the corporate charging principles found in the McNulty Memo into USAM 9-28.000—the section immediately following the general federal charging principles. 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.[123] Indeed, three of the nine corporate charging principles in the USAM now focus on compliance programs. Additionally, USAM 9-28.800 specifically instructs prosecutors to ask the following questions:

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

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[121] 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 ("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.").

[122] *See* McNulty Memo, *supra* note 77. For an exhaustive discussion of how this policy evolved and the applicable USAM provisions cited by the McNulty and Thompson Memos, *see* Finder & McConnell, *Devolution of Authority*, *supra* note 68.

[123] *See* Filip Memo, *supra* note 79 (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).

(2) Is the program being applied earnestly and in good faith?
(3) Does the corporation's compliance program work?[124]

To answer these questions, federal prosecutors are directed to the definition of an effective compliance program found in the Organizational Guidelines.[125] 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, but it is a key 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).

i. 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:

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

(2) a CCO with dedicated resources who reports to the Board or the CEO—not the general counsel (GC), which is different from the USSG's directive that the CCO have a reporting line to the Board;[126]

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[124] USAM 9-28.000.
[125] USSG §8B2.1.
[126] Ben W. Heineman, "Don't Divorce the GC and Compliance Officer," Corporate Counsel Magazine (Jan 2011) (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,

(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.

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.

Compliance Code: A compliance code is now a required feature of almost all DPAs and NPAs. A compliance code must take the form of a "clearly articulated" and "visible" corporate policy against whatever illegal conduct is at issue.[127] 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.[128] 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.[129] 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

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and rigor across the corporation and because the GC is an expert in many areas with compliance as a core concern).

[127] Deferred Prosecution Agreement between ABB Ltd. and the Fraud Section, U.S. Dep't of Justice, Criminal Div. (Sept. 29, 2010), Att. C [hereinafter ABB DPA].

[128] *Id.*

[129] *Id.* *See also* Non-Prosecution Agreement between Alliance One International, Inc. and Fraud Section, U.S. Dep't of Justice, Crim. Div., App. B (Aug. 6, 2010) [hereinafter Alliance One NPA]; Deferred Prosecution Agreement between Panalpina World Transport (Holding) Ltd. and Fraud Section, U.S. Dep't of Justice, Crim. Div., Att. C (Nov. 4, 2010) [hereinafter Panalpina DPA].

aid in the discovery of future wrongdoing. 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.[130] 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.[131] Additionally, recent agreements emphasize that a company is to develop such internal controls *on the basis of a risk assessment*. 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.[132] Thus, DPAs and NPAs contemplate internal controls that are company-specific. This mirrors the approach adopted by the USSG and OECD.

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." Recent agreements reflect this by requiring companies to designate a CCO to oversee the implementation and continued oversight of remedial compliance measures.[133] A compliance officer is usually a

[130] *See* ABB Agreement, *supra* note 127.
[131] *See, e.g.*, Non-Prosecution Agreement between Deutsche Bank AG and the U.S. Dep't of Justice, Tax Division, and the Office of the U.S. Attorney for the Southern District of New York (Dec. 21, 2010), Ex. B [hereinafter Deutsche Bank NPA] (outlining tax-specific policies to review structured transactions and tax-avoidance transactions); *see also* Non-Prosecution Agreement between General Reinsurance and the Fraud Section of the Dep't of Justice, Crim. Div. at 5 (Jan. 18, 2010) [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").
[132] *See, e.g.*, ABB DPA, *supra* note 127.
[133] *Id*.

member of the company's senior management.[134] 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.[135] An effective compliance officer will operate with sufficient autonomy from the company but will simultaneously have the full support of a company's resources.[136] 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.

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. 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. All employees, ranging from directors and officers to, in some cases, business partners, must receive periodic training and annual re-certification.[137] 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.

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.[138] In addition to guidance found in DPAs and NPAs, a company should recognize that any such hotline must solicit sufficient information to conduct investigations. Making such a hotline effective will likely require

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[134] *See, e.g.,* Deferred Prosecution Agreement between Wachovia Bank, N.A. and the Money Laundering Section of the Dep't of Justice, Crim. Div. (Mar. 16, 2010).

[135] *See, e.g.,* Deferred Prosecution Agreement between Shell Nigeria Exploration and Production Co., Ltd. and the Fraud Section, U.S. Dep't of Justice, Crim. Div., Att. C (Nov. 4, 2010) [hereinafter Shell Nigeria DPA].

[136] ABB DPA, *supra* note 127.

[137] *See, e.g.,* Pride Int'l DPA, *supra* note 87, at App. C.

[138] ABB DPA, *supra* note 127, at Att. C.

provisions for two-way communications between the reporter (employee) and the investigator (compliance officer). The CCO should keep records of all reports of suspected violations in a database to track reports and ensure that all potential violations are addressed. Finally, DPAs and NPAs usually give a company the 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.[139]

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 including third-party business partners in the compliance process. These requirements include mandatory due diligence prior to engaging third-party business partners and mechanisms to ensure third-parties are aware of a company's compliance code.[140] 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. This requirement is also found in the 2010 OECD guidance.

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." Agreements reached in late 2010 emphasize the need to critically evaluate the effectiveness of a compliance program through periodic testing.[141] 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 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 make sure the

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[139] *Id.*
[140] *Id.*
[141] *See, e.g.,* Deferred Prosecution Agreement, United States v. Snamprogetti Netherlands B.V. (July 7, 2010) [hereinafter Snamprogetti DPA]; Non-Prosecution Agreement between U.S. Dep't of Justice, Crim. Div., Fraud Section and Universal Corporation (Aug. 3, 2010) [hereinafter Universal Corp. NPA].

compliance program is as comprehensive as possible. Both the OECD and the USSG note that periodic testing is essential to an effective compliance program.

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.[142]

ii. 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).[143] In recent years, the number of FCPA cases brought by the DOJ

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[142] *See, e.g.,* Panalpina DPA, *supra* note 129; Shell Nigeria DPA, *supra* note 135; Tidewater DPA, *supra* note 102.

[143] 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* 15 U.S.C. §§ 78dd-1; *see also* Report of House of Representatives, 95-640, 95th Congress, 1st Session, Sept. 28, 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.

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. The FCPA recognizes an exception for "facilitating" payments. 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.

The FCPA also requires companies whose securities are listed in the United States to comply with its accounting provisions. These accounting

and the SEC has risen dramatically.[144] The FCPA poses unique compliance challenges because internal control deficiencies and failures are often the leading cause of FCPA violations.[145] Because an effective compliance program is the only method to prevent FCPA violations, recent DPAs and NPAs for FCPA violations provide the most detailed examples of model compliance programs endorsed by the DOJ.

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.[146] As discussed above, such agreements now frequently

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provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls. *See* 15 U.S.C. § 78m(b)(2). Willful accounting violations may be punishable as criminal offenses. 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. The SEC will usually seek disgorgement or that the company return the ill gotten gains. *See, e.g.,* Statoil ASA - $10.5 million fine and $10.5 million in disgorgement.

[144] Both the DOJ and the SEC enforce the FCPA. The SEC and DOJ have also begun working together to bring joint enforcement actions against unrelated companies. In 2010, for the first time ever, the SEC and the DOJ issued a consolidated press release and consolidated an enforcement action against two unrelated U.S. companies, Alliance One and Universal Corporation. Both companies self-reported FCPA violations in Asia in connection with their tobacco businesses and both signed NPAs. *See* Alliance One NPA, *supra* note 129; Universal Corp. NPA, *supra* note 141.

[145] *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 The Business Lawyer 1233, 1239 (Aug. 2007) (bemoaning the "subjective judgment" that pervades FCPA enforcement and arguing that "the government *owes* consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues").

[146] Even with the increased emphasis on FCPA compliance programs, fines have continued to grow over the last several years. 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. *See*

require companies to adopt internal controls. In the FCPA context, such internal controls must be tailored to prevent FCPA violations. For example, agreements now specify internal accounting controls to encourage compliance with FCPA books and records provisions. DPAs also map out anti-corruption policies a company must develop and implement, usually including policies specific to gifts, hospitality, entertainment, travel, facilitation payments, and charitable donations.[147]

Because many FCPA violations involve third-party business partners, recent DPAs seek to include potential third-parties in the compliance process. For example, four of the 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."[148] Such requirements often include mandatory due-diligence actions to be performed before a company enters into a relationship with a third-party.[149] Some DPAs even require companies

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Christopher M. Matthews, *FCPA Fines Are Now More Than Double The Estimated Gain, Analysis Shows* (Dec. 17, 2010), *available at* http://www.mainjustice.com/justanticorruption/2010/12/17/fcpa-fines-are-now-more-than-double-the-estimated-gain-from-bribing-analysis-shows/ 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.

[147] *See* ABB DPA, *supra* note 127; Alliance One NPA, *supra* note 129; Panalpina DPA, *supra* note 129.

[148] Panalpina DPA, *supra* note 129, at Att. C; Shell Nigeria DPA, *supra* note 135, at Att. C; Tidewater DPA, *supra* note 102; Deferred Prosecution Agreement, United States v. Transocean Inc. (Nov. 4, 2010) [hereinafter Transocean DPA].

[149] 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

to seek reciprocal commitments to compliance from third-parties, advocating for contractual language allowing for termination of third-party relationships for non-compliance.[150] 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.[151]

The most recent DPAs and NPAs reflect a trend toward company self-reporting. However, when monitors are employed as remedial compliance measures for FCPA violations, the person selected must have demonstrated experience with the FCPA.[152] Prior experience should include designing or reviewing FCPA-specific policies in addition to experience with general corporate compliance policies and internal control procedures.

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.[153] Based on these DPAs and NPAs, the USSG, and the OECD guidance, an effective compliance program to combat FCPA violations will include the following elements, tailored to meet the unique compliance concerns of the company:[154]

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subcontracting provisions; unilateral rights to terminate for misconduct or FCPA violations; prohibitions on offshore payments.

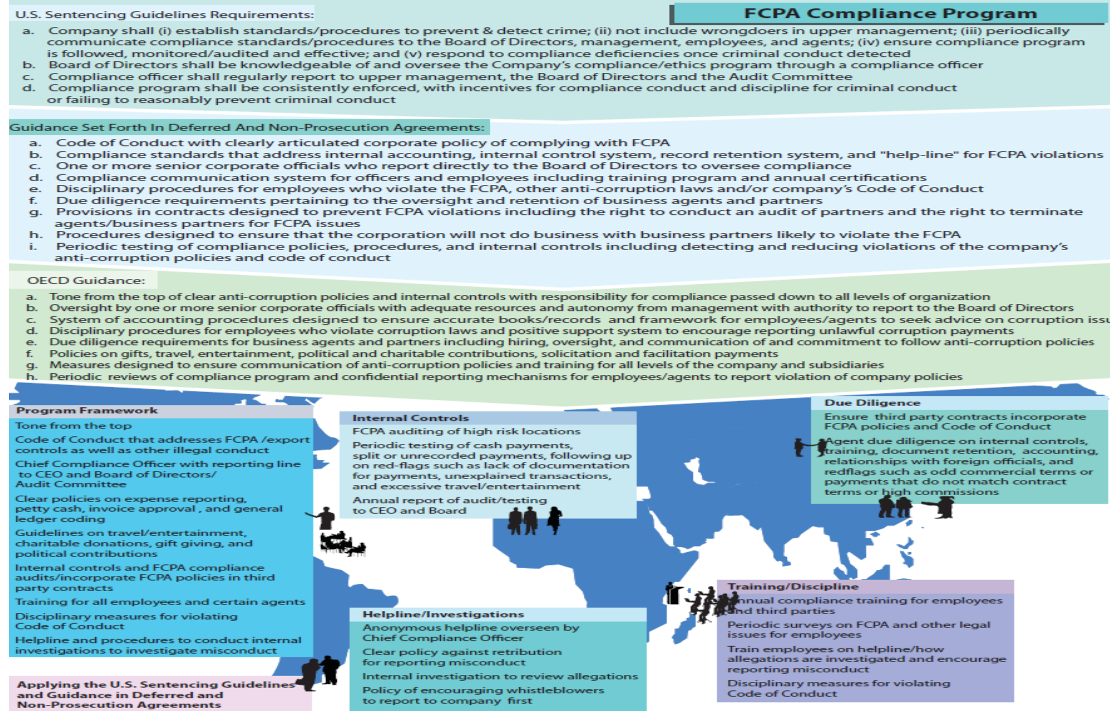
[150] Panalpina DPA, *supra* note 129, at Att. C; Shell Nigeria DPA, *supra* note 135, at Att. C; Tidewater DPA, *supra* note 102; Transocean DPA, *supra* note 148.

[151] Deferred Prosecution Agreement between Alcatel-Lucent, S.A. and the Fraud Section of the U.S. Dep't of Justice, Crim. Div. (Dec. 2010) [hereinafter Alcatel-Lucent DPA].

[152] Alliance One NPA, *supra* note 129; Deferred Prosecution Agreement, United States v. Daimler AG (Mar. 22, 2010) [hereinafter Daimler DPA].

[153] *See supra* Part IV (Calculating a Corporate Sentence under Chapter Eight).

[154] A compliance program designed to prevent FCPA violations may prove ineffective in the future under the UK's new framework for prosecuting bribery offenses. The UK Bribery Act, which will take effect in April 2011,



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differs from the FCPA in several critical ways. In what is perhaps the difference that has received the most media hype, the UK Bribery Act does not recognize the exception for facilitation payments that the FCPA allows. In addition, there is no explicit exception under the UK Bribery Act for bona-fide business expenditures. Instead, compliance is the only defense available under the strict-liability UK Bribery Act. *See* UK Bribery Act, *available at* http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3694937 Because the UK Bribery Act forbids facilitation payments and has no specific carve out for bona-fide business expenditures, some U.S. companies with a presence in the UK are considering re-working their FCPA compliance programs to hold up under the more expansive UK Bribery Act. Lockheed Martin, KBR, Pfizer, Prudential Financial, and International Paper have all announced contemplated changes. *See* "U.K. Bribery Act Prompts Companies to Consider Compliance Changes," *available at* http://www.mainjustice.com/justanticorruption/2010/10/22/u-k-bribery-act-prompts-companies-to-consider-compliance-changes/ Meanwhile, some U.S. commentators have argued that compliance should be recognized as a defense under the FCPA as well so that U.S. businesses are not hurt on an uneven playing field. *See* Andrew Weissmann and Alizandra Smith, *Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*, US Chamber Institute for Legal Reform, at 11-13 (Oct. 2010).

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. 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.

The Organizational Guidelines and the U.S. Probation Office laid the foundation for these compliance monitors.[155] Companies convicted of crimes cannot go to federal prison, but are typically put on probation and monitored by the U.S. Probation Office. 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. 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.[156] 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. Like DPAs and NPAs, monitors preceded the corporate charging guidance found in the USAM. Beginning in 1993, with the Prudential DPA, the DOJ has 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

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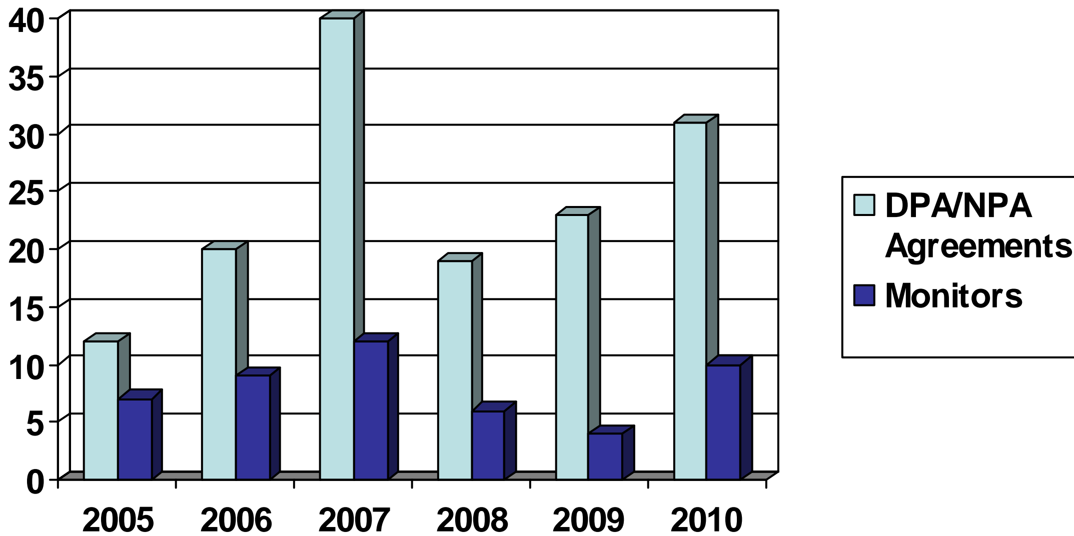
[155] *See* Finder & McConnell, *Devolution of Authority*, *supra* note 68, at 5 (explaining how the Organizational Guidelines' recognition that organizations require special treatment "laid the groundwork for the explicit DOJ prosecutorial policy that considered both the impact of cooperation and a compliance monitor in corporate charging decisions").

[156] USSC §8D1.4

are incorporated into a DPA or an NPA, a monitor is intended to ensure the oversight that would normally be provided by the probation office or the court if the entity was prosecuted and convicted. It is, therefore, unsurprising that as prosecution agreements containing negotiated business reforms and compliance programs increased, so did monitors, at least initially.

Monitors in Proportion to DPA/NPA Agreements[157]



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 with the monitor selection process.[158] In 2008, the DOJ implemented a new policy dealing

[157] 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).

[158] *See* Government Accountability Office Report, GAO-09-636T, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* (June 25, 2009), http://www.gao.gov/products/GAO-09-636T (reporting on the perceived

with the selection of corporate monitors in DPAs and NPAs.[159] This guidance, set out in the Morford Memo, sought to assuage some of the uncertainties surrounding the selection and appointment of monitors as well as to clarify a monitor's duties.[160]

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.[161] The Morford

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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), 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, U.S. Bristol-Myers Squibb Co. (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).

[159] Section 163 of the DOJ Criminal Resources Manual.

[160] *See* Memorandum on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, from Craig Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, note 2 (March 7, 2008), *available at* http://www.usdoj.gov/dag/morford-useofmonitorsmemo -03072008.pdf. [hereinafter Morford Memo]. (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."). *See also* Vikramaditya Khanna and Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*?, 105 MICH. L. REV. 1713, 1723 (2007) (providing an empirical analysis of corporate monitors).

[161] The new policy 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. The committee must include: (1) the ethics officer for the applicable DOJ component, (2) the criminal chief or DOJ component chief, and (3) an experienced prosecutor. 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.

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."[162] Finally, the Morford Memo emphasized that a monitor's role is not intended to be putative. Instead, a monitor's role centers around evaluating whether a corporation has adopted and effectively implemented compliance programs with the goal of preventing recidivism.[163] In 2010, the DOJ provided additional guidance, set out in the Grindler Memo, to address concerns over inadequate dispute resolution procedures for disagreements between monitors and companies.[164] 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.[165]

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[162] 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.

[163] Morford Memo, *supra* note 160.

[164] Memorandum from Gary G. Grindler, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys, Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), *available at* http://www.justice.gov/dag/dag-memo-guidance-monitors.html [hereinafter Grindler Memo].

[165] 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. 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. This language emphasizes that the DOJ is not a party to the agreement between the

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. Critics, pointing to recent corporate implosions *despite* the presence of monitors, posit that monitors may not actually be an effective guard against corporate misconduct.[166] 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.[167]

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. The selection criteria for monitors in some agreements, for example in the Alliance One NPA and Daimler DPA in 2010, required a monitor to have "demonstrated expertise with respect to the FCPA," and "experience designing and/or reviewing corporate compliance policies, procedures and internal controls, including FCPA-specific policies."[168] The Alcatel-Lucent DPA from December 2010 adds the newest twist to the monitor's role. 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.[169]

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company and the monitor and therefore is precluded from arbitrating contractual disputes between the parties. *Id.*

[166] *See* David Hechler, *Have We Learned Anything?*, Corporate Counsel (Oct. 1, 2010), available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202471815927 (declaring that "[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").

[167] *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

[168] *See, e.g.,* Alliance One NPA, *supra* note 129; Daimler DPA, *supra* note 152, at Att. D.

[169] 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

The use of monitors has declined significantly since 2007 (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. Indeed, many DPAs and NPAs now include a separate attachment outlining a company's compliance reporting obligation. 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. Recently, companies have assumed similar obligations: submitting an initial report detailing leadoff remediation efforts succeeded by two to three follow-up reports.[170] Nevertheless, in appropriate cases, monitors remain a critical compliance tool for companies that have avoided a criminal conviction notwithstanding violations of federal criminal law.

IX. 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 set out in the Organizational Guidelines, such as compliance.[171] Of those ten company representatives, only six had actually tried to influence prosecutors' charging decisions based on the USSG factors.[172] 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

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company commit any future violations. *See* Alcatel-Lucent DPA, *supra* note 151 ; *see also* Technip DPA, *supra* note 87.

[170] Panalpina DPA, *supra* note 129, at Att. D; Transocean DPA, *supra* note 148, at Att. D.; Tidewater DPA, *supra* note 102, at Att. D.

[171] United States Gov't Accountability Office, GAO-09-636T, Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements at 10 (June 25, 2009).

[172] *Id.*

Organizational Guidelines and the OECD guidance, but the more detailed, and often overlooked, compliance analysis set forth in DPAs and NPAs.

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. Indeed, numerous DPAs and NPAs illustrate the prominent role remedial compliance measures play in these agreements. Over 90% of the DPAs and NPAs entered into in 2010 contained compliance features, an almost 40% increase since 2005 when little more than half of DPAs and NPAs referenced compliance measures. These DPAs and NPAs map out model compliance programs by looking backward to past compliance failures. 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. 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. But the true challenge for the next decade will be to shift 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 can reap the 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 profitability. 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. 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 business regimes abroad. 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. However, recent 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 to forestall future compliance failures.