Gauging Organizational Exposure to Environmental Criminal Liability: A Comparison of the Proposed Environmental Sentencing Guidelines to the Organizational Guidelines and the Department of Justice's Revised Principles of Federal Prosecution of Business Organizations

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I. INTRODUCTION

A. The Importance of the Proposed Environmental Sentencing Guidelines for Organizations

Understanding the United States Sentencing Commission's Draft Environmental Sentencing Guidelines[2] ("proposed guidelines") is important for a host of reasons.

First, although these guidelines have not been formally adopted,[3] they nonetheless provide a methodology for evaluating a business organization's exposure to criminal liability for conduct that impacts the environment. The general fine provisions set forth in the existing organizational sentencing guidelines ("organizational guidelines"), which are contained in Chapter 8 of the Guidelines Manual, do not apply to the environmental offense conduct described in Chapter 2, part Q.[4] The Sentencing Commission instructs courts to determine fines in this excluded area by reference to traditional criteria contained in the general sentencing provisions of Title 18 of the United States Code.[5] By setting forth a detailed range of fines[6] for organizations convicted of environmental crimes, the proposed guidelines provide invaluable insight for criminal defense attorneys who handle investigations and enforcement actions, whether brought by the Environmental Protection Agency ("EPA"), the Department of Justice ("DOJ"), or state and local environmental officials.[7] Obviously, the guidelines are important because they may eventually be adopted, at which point they would become mandatory for federal courts unless the particular circumstances of a case merited a deviation from them, something that the Justice Department claims should be a "rare occurrence."[8] Moreover, while judges still have essentially unfettered control of sentencing in the area of environmental crime, they might follow the guidelines where they offer the most comprehensive framework available.[9]

Second, given its detailed guidance on of how to craft a successful environmental compliance program, the guidelines are a must-read for compliance officers and attorneys who counsel small to large organizations that are subject to environmental statutes and regulations.[10]

Third, a new unprecedented focus on corporate accountability signifies that the sentencing guidelines have heightened applicability outside the traditional context of white-collar defense. The recent legacy of corporate scandals has

stimulated the public's appetite for federal prosecution of wayward corporations and their directors and officers. This is most apparent in the explosion of statutes promoting corporate liability, most notably the Sarbanes-Oxley Act,[11] and the Feeney Amendments to the PROTECT Act.[12] It is also apparent in the DOJ's own internal policies. Deputy Attorney General Larry Thompson's January, 2003 memorandum revising the principles of corporate prosecution,[13] made explicit the DOJ's more aggressive posture toward corporate crime. Thompson noted the need for "increased emphasis on and scrutiny of a corporation or organization's cooperation," and described the department's opinion that"[t]oo often business organizations, while purporting to cooperate with a Department Investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation."[14] The proposed guidelines are important for in-house counsel as well. These individuals, in whom corporate directors and officers have come to confide and trust, but who serve the corporate "entity,"[15] have complex fiduciary duties that cannot be attended to without a keen understanding of the substantive laws affecting their clients' industries. The guidelines form a key part of the overall "risk management" puzzle.

B. Comparative Analytical Approach

We will use a comparative approach to explain how the proposed guidelines overlap with and diverge from the existing organizational guidelines and the DOJ's revised *Principles of Federal Prosecution of Business Organizations* (a.k.a. the Thompson Memo).

Discussing the proposed guidelines in the context of the Thompson Memo serves two important purposes. First, where charging and sentencing principles are the same, one should not disregard the latter, whether or not they have been formally adopted. Even the most skeptical members of the defense bar must acknowledge that, while they may have every reason to believe that federal judges will cautiously guard their sentencing discretion (particularly in the wake of the PROTECT Act), judges might be less inclined to formulate a disposition when the guidelines provide a simple matrix tailored to environmental offenses.

Second, and perhaps more importantly, by contrasting the factors that influence prosecutorial leniency with the available environmental sentencing guidance, one can obtain a more nuanced, multi-layered view of liability. This is especially important in today's universe of limited prosecutorial discretion. Indeed, according to the United States Attorneys' Manual, which sets policy for federal prosecutors and controls over all DOJ policy statements (except those directly emanating from the Attorney General), prosecutors *must* charge a defendant with the most serious offense that is consistent with the nature of his conduct for which a conviction may be obtained.[16] Ideally, attorneys representing organizations should consider all elements of exposure, including the likelihood of an investigation, the potential for indictments against the corporation and/or individual employees, and the likely fines, restitution and/or incarceration of individuals that may result from prosecution.

Comparing the proposed environmental guidelines with the existing organizational guidelines serves several important purposes as well. First, by analyzing critical differences in how fines are calculated under the proposed guidelines as compared with the organizational guidelines, attorneys should come away with a better understanding of both. Second, since effective compliance programs constitute the single most important mitigating factor under the proposed environmental guidelines and the organizational guidelines, an analysis of the compliance criteria contained in both will give organizations a clearer sense of how their programs should be designed and managed.

In considering these three important documents, lawyers may get a more practical sense of whether a federal prosecutor will press charges against a corporation or small business and of their chances for reduced fines and leniency.

II. What Are the Proposed Environmental Sentencing Guidelines?

A. Applicability

The proposed guidelines, like the organizational guidelines in Chapter Eight of the Sentencing Guidelines,[17] apply to *organizations* and not individuals.[18] In evaluating potential liability for environmental crimes for officers, directors and other individuals employed by an organization, one should review Chapter Two, Part Q of the guidelines.

B. Status

The guidelines were first proposed in March 1993. They were revised after extensive feedback from the public; and a second version was published by the Sentencing Commission in 1993.[19] The proposed guidelines were drafted by an Advisory Working group composed of members of the defense bar, academics, judges, business representatives and members of public interest groups.[20] They were meant to be inserted into the existing Sentencing Guidelines as Chapter Nine. However, the Sentencing Commission never approved the proposal. Despite the DOJ's increased focus on environmental crime, there are no signs that the Commission plans to reconsider the proposed environmental guidelines anytime soon. The Commission is continuously revising the Sentencing Guidelines, as reflected in recent report of the Ad Hoc Advisory Group on the Organizational Guidelines (whose proposed amendments to Chapter Eight were just recently published in the Federal Register for comment).[21] Yet, there has been no movement on the proposed environmental guidelines.

The proposed guidelines contains four major substantive portions which address: (1) how to calculate fines for environmental offenses, (2) aggravating and mitigating factors in sentencing, (3) effective compliance programs, and (4) probation. This paper addresses each of the first three topics.[22]

C. A Different Approach to Fines: A Comparison with the Organizational Guidelines

Fines are determined under the proposed guidelines by obtaining a numerical figure based upon the seriousness of the crime or crimes committed,[23] the so-called "primary offense level," and adjusting that figure upward or downward based on aggravating or mitigating factors (just as courts do in the case of run-of-the-mill crimes like larceny or assault). The sum, or net offense level, corresponds to a percentage of the maximum statutory fine for each criminal count of which the defendant is charged.

Despite some basic similarities, the proposed guidelines' fine calculus differs substantially from that of the organizational guidelines. Ironically, where the proposed environmental guidelines permit courts to come up with fairly precise dollar values for certain categories of harms, fraud or other economic crimes that may involve fairly exact losses are punished by reference to a fine range. Under the organizational guidelines, the base offense level is initially converted into a "base fine" under Section 8C2.4. Mitigating and aggravating factors are weighed to generate a "culpability score" under Section 8C2.5 which corresponds to a minimum and maximum multiplier under Section 8C2.6. Once the multipliers are obtained, they are multiplied by the base fine and the sentencing judge is left with a range from which to select a fine depending upon a host of policy factors.[24]

In brief, the organizational guidelines provide us with a range of possible fines through a multiplication-driven process whereas the environmental guidelines, through a simple process of addition and subtraction, can be used to obtain specific fine amounts for which a defendant may be liable. In this sense, they may be much easier for defendants to understand and utilize than the organizational guidelines.

III. Gauging Organizational Exposure Using the Proposed Guidelines

A. What Kind of Environmental Harm?: Identifying a Primary Offense Level

First, as with the organizational guidelines,[25] one determines the primary offense level using the individual sentencing criteria for environmental crimes contained in Chapter Two, Part Q (entitled "Offenses Involving The Environment"), which looks to so-called "offense conduct."[26] As the Introductory Commentary to the chapter of the organizational guidelines dealing with offense conduct notes, "[e]ach offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward."[27]

Base offense levels range anywhere from six to twenty-four, with the highest score corresponding to a crime involving knowing endangerment[28] based on mishandling of toxic or hazardous substances; and the lowest corresponding to a negligent mishandling or recordkeeping-type violation. For sentencing purposes, there are five main categories of environmental offenses in which the numerous substantive federal statutory environmental crimes all fall:[29]

- 2Q1.1: Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants (24)
- 2Q1.2: Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials In Commerce (8)
- 2Q1.3: Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification (6)
- 2Q1.4: Tampering or Attempted Tampering with Public Water System; Threatening to Tamper with a Public Water System (16-22)
- 2Q2.1. Offenses Involving Fish, Wildlife, and Plants (6)

These numbers are then adjusted upward or downward depending upon the existence of specific offense characteristics. Specific offense characteristics should not be confused with the aggravating or mitigating factors (which are discussed below). Although they are very similar to the aggravating and mitigating factors, we might think of the former as describing the kind, rather than the degree, of criminal conduct. Common specific offense characteristics are:[30]

- Resulted in ongoing, continuous or repetitive discharge, release or emission (6)
- Otherwise involved discharge of hazardous or toxic substance or pesticide (4)
- Resulted in disruption of public utilities or evacuation of community or cleanup required a substantial expenditure (4)
- Involved transport, treatment storage or disposal without a permit or in violation of a permit (4)
- If recordkeeping offense reflected effort to conceal a substantive environmental offense, use offense level for substantive offense

Offense levels for crimes that result in death or serious injury, or create a substantial risk of death or serious injury, can be adjusted in two different ways. The heightened risk might be treated as a specific offense characteristic and the primary offense level increased by a fixed amount (for example, nine levels for a mishandling of toxic substances violation under Section 2Q1.2 and eleven levels for a mishandling or other environmental pollutants violation under Section 2Q1.3). Alternatively, if death or bodily resulted, Chapter 2 is clear[31] that an upward departure from the guidelines may be warranted under Chapter 5, Part K.[32]

B. How Much Harm?: Aggravating and Mitigating Factors Under the Guidelines

Primary offense levels are adjusted upward or downward depending on the existence of certain mitigating and aggravating factors, which are

referred to as "culpability factors."[33] The culpability factors underscore the relevance of these proposed guidelines for defense attorneys and in-house counsel in that they track closely with both contemporary Department of Justice policies on prosecution of corporations and the organizational guidelines.

1. Aggravating Factors

The following mitigating factors can result in a substantial increase in the offense level:

Management Involvement: The top aggravating sentencing factor under the proposed guidelines is whether persons of substantial authority (i.e. "substantial authority personnel")[34] "participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior ... would occur."[35] Such involvement may result in a six-level increase in the offense level.[36] Substantial authority personnel includes both managerial employees and others who are not necessarily part of management but exercise "substantial discretion when acting within the scope of their authority."[37] They are different from "high-level personnel," which comprises individuals who help to shape company policy, such as directors, officers and division or unit heads and persons with substantial ownership interest in an organization,[38] although involvement of high-level personnel in an environmental crime may trigger the six-level increase.

These employee classifications derive from the organizational guidelines.[39] Involvement in or tolerance of criminal activity also leads to the greatest increase in the culpability score under the organizational guidelines. They call for a one- to five-level increase in the culpability score depending on the size of the organization and whether substantial authority personnel or high-level personnel are involved in the crime.[40]

This top aggravating factor also corresponds roughly to the first[41] DOJ criterion in whether to charge a corporation (i.e. after initial consideration of the nature of the offense): "the pervasiveness of wrongdoing in the corporation, including the complicity in, or coordination of, the wrongdoing by corporate management."[42]

Where the proposed environmental guidelines are fairly unclear about the threshold for finding complicity among employees, leaving us only with general categories, the Thompson Memo makes clear that the key is to balance the seriousness of the environmental harm against the amount of high-level involvement. To wit, a fairly minor infraction (e.g. misreporting without any harm caused by discharge) might not result in prosecution unless there was high-level corporate involvement whereas truly serious environmental damage could lead to prosecution whether or not directors or officers were involved.[43]

To summarize, in cases in which actual environmental damage is negligible, the government's ability to obtain evidence of high level involvement or knowledge may play a significant role in its analysis of whether to prosecute.

Past Compliance History:[44] Under the proposed sentencing guidelines, the impact of past criminal conduct upon sentencing depends upon how recently it occurred and whether it involved the same facility. If "any part" of the offense of which the defendant has been convicted took place less than five years following another state or federal criminal environmental adjudication, a two- to four-level increase results.[45] A five-level increase results if the past criminal adjudication involved the same facility at issue in the current conviction.[46]

An organization's civil compliance history within the last five years is also a factor. A one-level increase results where a company's civil enforcement record in the last five years reveals a "disregard ... of its environmental regulatory responsibilities," whereas a two-level increase results where its civil enforcement record involves similar misconduct to that of which it has been convicted.[47]

An organization's enforcement history is also the second culpability factor under the organizational guidelines,[48] although they consider an organization's civil and criminal history dating back a full ten years. A one-level increase occurs

under the guidelines where the current offense was committed less than ten years after a criminal adjudication based on similar misconduct or a civil/administrative adjudication based on two or more separate instances of similar misconduct.[49] A two level increase results if the aforementioned adjudications took place within five years of the current offense.[50]

The DOJ's second consideration in whether to prosecute a company, likewise, is the company's "history of similar conduct," although the DOJ criteria sweep more broadly than the proposed guidelines.[51] Previous environmental enforcement actions are relevant to charging decisions *regardless* of when they occurred. Like the proposed guidelines and the organizational guidelines, the Thompson Memo is explicit that non-criminal conduct should be considered, including "non-criminal guidance, warnings, or sanctions."[52] But unlike the proposed guidelines and the organizational guidelines, the Thompson Memo does not assign different weights to prior civil and criminal misconduct.

The Thompson Memo encourages prosecutors to disregard the corporate structure, by factoring the conduct of subsidiaries and affiliates into whether a corporation should be charged. The proposed guidelines seem to provide a more reasonable, measured approach, treating a subsidiary as part of the organization only where it is not "separately managed" by "independent management."[53] The organizational guidelines, likewise, indicate that the prior civil and criminal conduct of a "separately managed line of business"[54] is only relevant to the organization's prior history if it is involved in the current offense.[55]

Violation of An Order: Under the proposed guidelines, a one- to three-level increase in the offense level results if the environmental crime violated an administrative order, a judicial order, a condition of probation, a cease and desist order, or when the violation occurs following a notice of violation for the same offense conduct.[56] The organizational guidelines call for a one-point increase in the culpability score if the organization violated a condition of probation and a two-point increase if it violated a judicial order or a condition of probation by engaging in similar misconduct.[57] The Thompson Memo does not specifically address violations of judicial orders or probation as a factor in prosecutorial leniency.

Concealment: A three-level increase results under the proposed guidelines where any employee or agent of the company *knowingly* tries to conceal violations or obstructs any investigation.[58] A five-level increase results if the person falls within the category of substantial authority personnel. In terms of both prosecution and sentencing, concealment may be viewed as the antagonist of cooperation and self-reporting, which is a key mitigating factor under the proposed environmental guidelines. The organizational guidelines, likewise, call for a three-level increase a defendant's culpability score for obstruction of justice, which includes instances where an 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..." (emphasis added).[59]

Concealment and obstruction of justice fall within the ambit of "Cooperation and Voluntary Disclosure," which is the third factor guiding prosecutorial decision making under the Thompson Memo.[60] The Memo calls on prosecutors to consider "whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction)."[61] Unlike courts, prosecutors will weigh obstructive behavior by an organization regardless of whether it was "knowing" or "willful." The Memo warns prosecutors to be on the lookout for broad assertions of corporate representation of employees or former employees, directions by counsel to employees not to cooperate and failure to promptly disclose known illegal conduct, among other things.[62]

Absence of Compliance Program or Other Organized Effort: A four-level increase results under the proposed guidelines where an organization had no compliance program in place prior to the charged offense or, alternatively, "had such a program in form only and had substantially failed

to implement such a program."[63] A compliance program, strictly speaking, is not necessary where an organization can show an "organized effort" to achieve compliance, which the commentary to the guidelines describes as "a genuine organized effort to monitor, verify and bring about compliance with environmental requirements."[64] Although the proposed guidelines set forth several factors for environmental compliance as a mitigating factor in another subsection, there is no requirement that a defendant corporation comply with these factors to avoid increased liability under this subsection.[65]

By contrast, while the organizational guidelines also reward organizations that have effective compliance programs with a significant reduction in their culpability score, unlike the proposed guidelines, they *do not* treat the absence of such a program as an aggravating factor.[66] Indeed, this difference between the proposed guidelines and the organizational guidelines implicates an important part of the debate over whether the proposed guidelines are too stringent, which we take up below in the discussion of compliance as a mitigating factor. Suffice it to say that, as one article put it, the proposed guidelines created a "sweeter carrot" and a "larger stick" than the organizational guidelines. Not only would effective compliance programs result in a greater reduction in fines under the proposed environmental guidelines than was available for other kinds of corporate crime under the existing organizational guidelines, but failure to implement any such program could also result in a substantial fine increase.[67]

The October 7, 2003 Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines specifically considered whether the organizational guidelines should be amended to provide for increased culpability scores for organizations that fail to adopt effective compliance programs.[68] The Group concluded that such an amendment would disproportionately impact small companies and thus was undesirable. First, it pointed out that of the 1089 cases in which sentencing occurred under the organizational guidelines between 1991 and 1999, only three defendants qualified for compliance credit. Second, it noted that few small companies have an awareness of the compliance incentives in the guidelines, let alone the resources to set up such programs. Moreover, the DOJ specifically told the Ad Hoc Group that it opposed increasing culpability scores for organizations that fail to adopt effective compliance programs.[69]

2. Mitigating Factors

Commitment to Environmental Compliance: An effective compliance program is the single most important mitigating factor in sentencing under both the proposed environmental guidelines and the existing organizational guidelines. Such programs can lead to a significant reduction in fines.

A three- to eight-level reduction may be obtained under the proposed guidelines where an organization proves that prior to the charged offense it demonstrated a bona fide commitment to compliance in light of the size and nature of its business, including "detection and deterrence of criminal conduct by its employees and agents."[70] Participation, ratification or willful blindness of high-level individuals to offenses raises a rebuttable presumption that the organization lacked the requisite commitment.[71]

Substance is critical here. To obtain such a reduction, an organization must demonstrate that it has "substantially satisfied" seven highly-specific criteria contained in subsection 9D1.1(a) of the proposed guidelines, which is reproduced below.

(a) Minimum Factors Demonstrating a Commitment to Environmental Compliance

(1) Line Management Attention to Compliance. In the day-to-day operations of the organization, line managers, including executive and operating officers at all levels, direct their attention, through the management mechanisms utilized throughout the organization (e.g. objective setting, progress reports,

operating performance reviews, departmental meetings), to measuring, maintaining and improving the organization's compliance with environmental laws and regulations. Line managers routinely review environmental monitoring and auditing reports, direct the resolution of identified compliance issues, and ensure application of the resources and mechanisms necessary to carry out a substantial commitment.

(2) Integration of Environmental Policies, Standards and Procedures. The organization has adopted, and communicated to employees and agents, policies, standards and procedures necessary to achieve environmental compliance, including a requirement that employees report any suspected violation to appropriate officials within the organization, and that a record will be kept by the organization of any such reports. To the maximum extent possible given the nature of its business, the organization has analyzed the work functions (e.g., through standard operating procedures) assigned to its employees and agents so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization.

(3) Auditing, Monitoring, Reporting and Tracking Systems. The organization has designed and implemented, with sufficient authority, personnel and other resources, the systems and programs that are necessary for: (i) frequent auditing (with appropriate independence from line management) and inspection (including random, and, when necessary, surprise audits and inspections) of its principal operations and all pollution control facilities to assess, in detail, their compliance with all applicable environmental requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate, follow-up countermeasures with respect to all significant incidents of non-compliance; (ii) continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations and pollution control facilities that are either subject to significant environmental regulation, or where the nature and history of such operations or facilities suggests a significant potential for non-compliance, (iii) internal reporting (e.g. hotlines), without fear of retribution, of potential non-compliance to those responsible for investigating and correcting such incidents, (iv) tracking the status of responses to identified compliance issues to enable expeditious, effective, and documented resolution of environmental compliance issues by line management; and (v) redundant, independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows, or has reason to believe, that employees or agents may have, in the past, concealed non-compliance through falsification or other means, and in those operations, facilities, or processes where the organization reasonably believes such potential exists.

(4) Regulatory Expertise, Training and Evaluation: The organization has developed and implemented, consistent with the size and nature of its business, systems that are designed and adequate to: (i) maintain up-to-date, sufficiently detailed understanding of all applicable environmental requirements by those employees and agents whose responsibilities require such knowledge; (ii) train, evaluate and document the training and evaluation of all employees and agents of

> the organization both upon entry into a new position in the organization and on a refresher basis, as to the applicable environmental requirements, policies, standards (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards; and (iii) evaluate employees and agents sufficiently to avoid delegating significant discretionary authority or unsupervised responsibility to persons with a propensity to engage in illegal activities
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> (5) Incentives for Compliance. The organization has implemented a system of incentives, appropriate to its size and the nature of its business, to provide rewards (including as appropriate, financial rewards) and recognition of employees and agents for their contributions to environmental excellence. In designing and implementing sales or production programs, the organization has ensured that these programs are not inconsistent with the environmental compliance programs.
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> (6) Disciplinary Procedures. In response to infractions, the organization has consistently and visibly enforced the organization's environmental policies, standards and procedures through appropriate disciplinary mechanisms, including, as appropriate, termination, demotion, suspension, reassignment, retraining, probation and reporting individuals' conduct to law enforcement authorities.
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> (7) Continuing Evaluation and Enforcement. The organization has implemented a process for measuring the status and trends of its effort to achieve environmental excellence, and for making improvements or adjustments, as appropriate, in response to those measures and to any incidents of non-compliance. If appropriate to the size and nature of the organization, this should include a periodic, external evaluation of the organization's overall programmatic compliance effort, as reflected in those factors.[72]

Small organizations are required to demonstrate the same "degree of commitment" to environmental compliance as large corporations, even though the proposed guidelines indicate that less formality or dedicated resources are required in this context.[73]

By design, these seven compliance factors are far more specific than the seven compliance factors set forth in the organizational guidelines. Professor John C. Coffee, a member of the Advisory Group on Environmental Sanctions wrote that:

> the proposed environmental guidelines represent a severe critique of the existing organizational guidelines, particularly with regard to the current guidelines' easily manipulated credit for corporate compliance plans ... most of the Advisory Panel that drafted the new guidelines was skeptical of both the organizational premises upon which the existing guidelines rest and the likelihood that adoption of such compliance plans would have significant beneficial effect upon corporate behavior.[74]

Some members of the Advisory Group on Environmental Sanctions opposed the compliance criteria contained in the proposed environmental guidelines as a result of their specificity. First, they claimed that the program set an unrealistic "Cadillac" or "gold" standard for compliance.[75] Second, they argued that requiring "substantial satisfaction" of each of the listed criteria was excessive and that credit should be available to defendants who could demonstrate a good faith effort at compliance. Third, the program allegedly contained too many command and

control requirements, cutting against established management approaches that "establish objectives and leave it to the entity to fashion a program that effectively achieves those objectives."[76]

However, despite the objections of some members of the Advisory Group on Environmental Sanctions, the organizational guidelines do provide organizations with additional guidance on the steps they can take to ensure that they receive credit for effective compliance.

As a general matter, to receive credit for effective compliance under the organizational guidelines, an organization must have "exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."[77] Application Note 3(k) of the organizational guidelines then list seven minimum criteria that an organization must meet to satisfy the "due diligence" requirement.

§ 8A1.2. Application Instructions–Organizations

Application Notes:

(k) An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

(2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical matter what is required.

(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement, however, the form of discipline that will be

appropriate will be case specific.

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its program to prevent and detect violations of law.

The Ad Hoc Advisory Group on the Organizational Guidelines' October 2003 report proposed an overhaul of the organizational guidelines' compliance criteria.[78] First, to reflect the importance of compliance programs, the Group proposed that the definition of an "effective program" be removed from the Introductory Commentary and codified as a new, separate guideline (Section 8B2.1). Second, based on its opinion that true compliance requires not merely "conduct restrictions and information gathering activities aimed at preventing and detecting violations of law," but "positive actions which demonstrate that law compliance is a key value within an organization,"[79] the Group proposed that the guidelines specifically require organizations to "promote an organizational culture that encourages a commitment to compliance with the law."[80]

Third, and most important, the Group proposed changes to six of the seven minimum compliance criteria listed above. The Group proposed changing the first criterion, which calls for standards and procedures to facilitate the detection of "criminal conduct," so that the procedures target "violations of law" in the broadest sense (including regulatory and civil infractions).[81]

The Group objected to the second criterion, which requires that organizations assign responsibility for compliance programs to specific individuals within high-level personnel, on the grounds that it was "not minimally sufficient to identify the responsibilities of organizational actors for compliance."[82] Pointing to the recent spate of corporate scandals involving high-level malfeasance, the Group underlined the need for even higher-level involvement in compliance activities as well as the need for candid and open communication between top company and compliance executives. The new amended criterion requires that "organizational leadership ... be knowledgeable about the content and operation of the program to prevent and detect violations of law" and that "the organization's governing authority ... exercise reasonable oversight with respect to the implementation and effectiveness of the program..."[83] The new term "governing authority" refers to either the board of directors or, if there is none, the highest governing body of an organization,[84] whereas "organizational leadership" embraces both "high-level" and "substantial authority personnel."[85] Moreover, the new third criterion is explicit that the specific individual within high-level personnel who is responsible for compliance must have direct access to senior organizational management.[86]

The third compliance criterion of the organizational guidelines, which currently requires organizations to use due care not to delegate substantial authority to persons whom it knew or should have known "had a propensity to engage in illegal activities,"[87] has been widely criticized as the "most inscrutable" aspect of the definition of an effective compliance program.[88] The Advisory Group emphasized that the steps involved in identifying which individuals within a given company might be prone to illegal conduct could expose an employer to liability for defamation, violation of state and federal antidiscrimination statutes and privacy laws, among other things.[89] The criterion was changed to state that organizations must use "reasonable efforts not to include within the substantial authority personnel of the organization any individual whom [it] knew, or should have known," had a "history of engaging in violations of law" or other conduct inconsistent with an effective compliance program.[90] The key difference between the old and the new criterion is that the highly vague and ambiguous term "propensity" has been replaced with the term "history."

The fourth criterion, which addresses communication of compliance standards to employees and agents, was changed to reflect the Advisory

Group's view that effective training programs and dissemination of publications describing standards are mandatory elements of a program, rather than mere examples of one.[91] Likewise, the fifth criterion was changed to reflect that monitoring, auditing and evaluation programs are essential, rather than optional, parts of effective compliance.[92] Consistent with the current trend favoring increased protection of so-called "whistleblowers,"[93] criterion five was adapted to require that organization's maintain a reporting system that specifically provides for "anonymous reporting."[94]

Criterion six, which addresses organizational accountability and enforcement of compliance standards, was changed slightly based on the Advisory Group's sense that organizations must not only discipline unacceptable conduct, but must also create positive incentives for compliance.[95] The text of the revised criterion states that an organization's program must be enforced consistently "through appropriate incentives to perform in accordance with such a program *and* disciplinary measures for engaging in violations of law..."[96] No substantive changes were proposed to the seventh criterion, which requires an organization to respond to detected violations of law and make appropriate modifications to its program to prevent similar conduct.

While the proposed guidelines are still more specific than the organizational guidelines as they are tailored to environmental compliance, the foregoing proposed amendments to the organizational guidelines are currently being considered by the Sentencing Commission and may soon become law. Hence, compliance programs should be constructed with these new criteria in mind.

The Ad Hoc Advisory Group's report affirms the importance of involving top executives and board members in compliance operations and ensuring that compliance officers have open channels of communication with decision makers within a company or firm. It reinforces that certain elements of a compliance program once thought to be discretionary, such as training and regular reporting mechanisms, may soon be mandatory. Finally, it affirms that companies will be rewarded for a proactive, incentive-based approach to compliance.

The Ad Hoc Advisory Group's proposed amendments also track closely with the DOJ's current focus on corporate compliance. One of the principal reasons for the DOJ's revision of its principles on corporate prosecution was renewed skepticism regarding the legitimacy of corporate compliance programs. The Thompson Memo urges prosecutors to inquire whether "corporate governance mechanisms ... are truly effective rather than mere paper programs."[97] Accordingly, the section of the Memo addressing compliance programs, which it treats as the fourth factor in leniency, values substance over form when it comes to compliance. As the Memo states, "[t]he department has no formal guidelines for corporate compliance programs ... [t]he fundamental questions any prosecutor should ask are: 'Is the corporation's compliance program well designed.' and 'Does the corporation's compliance program work?'"[98]

The Thompson Memo focuses upon broad questions as to whether the corporation has a compliance program at all, and whether there are effective training, auditing and reporting mechanisms in place within the company.

The DOJ principles are stricter than the proposed environmental guidelines only in the area of director- and officer-level accountability. The Thompson Memo echoes the concerns expressed by the Ad Hoc Advisory Group on the Organizational Guidelines regarding the need for top-level management to be involved in compliance. Where the proposed guidelines merely inquire into whether executives at all levels "direct their attention" to compliance issues,[99] the Thompson Memo asks whether "directors [are] provided with information sufficient to enable the exercise of independent judgment" and whether directors and management are given "timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law."[100]

If an organization's compliance program comports with both the proposed environmental guidelines and the Ad Hoc Advisory Group on the Organizational Guidelines proposed new

guideline on effective compliance programs (i.e. Section 8B2.1), it may be better-positioned to obtain leniency from the DOJ at the prosecution, plea bargaining and/or sentencing stages.

Cooperation and Self-Reporting: The second greatest reduction under the proposed guidelines, three- to six-levels, may be obtained via cooperation and self-reporting. The second mitigating factor under the guidelines is whether the organization, "(a) *prior to* an imminent threat of disclosure or investigation, and (b) within a reasonably prompt time after becoming aware of an offense," reported the offense to appropriate governmental authorities, "fully cooperated in the investigation" and demonstrated recognition of its responsibility.[101] A four-level reduction results where an organization pleads guilty before the government was put to "substantial effort or expense" in preparing its case, "fully cooperated with the prosecution," and "took all reasonable steps to assess responsibility within the organization and prevent recurrence."[102] A two-level reduction results where the organization does all of these things but fails to disclose the names and identities of individuals within the corporation who it has actual or constructive knowledge were involved in illegal conduct. Full cooperation is defined as disclosure of "all pertinent information known to or ascertainable by [the organization] that would assist law enforcement personnel."[103]

The challenge for a defense attorney, of course, is to gauge the extent to which waiver of the self-evaluation, work product and attorney-client privileges may be required down the road in exchange for leniency (either in terms of non-prosecution, a plea agreement or a reduction in sentencing).

This is more complicated than it might appear at first. The Commentary to the subsection on cooperation in the proposed guidelines is clear that "pertinent information" does not encompass waiver of privilege or identification of responsible parties, noting that before applying a three- to six-level mitigation, "the court must determine that the organization has fully cooperated with the exception of supplying the names of individuals or privileged information."[104] Yet, the DOJ is much less clear about whether it will require waiver of privileges in exchange for prosecutorial leniency.

Cooperation and voluntary disclosure, as the DOJ calls it, is the third factor in whether to charge an organization, preceding compliance programs. The Thompson Memo, however, is far more exacting as to what precisely "cooperation" entails, offering defendants a better sense of the many risks that come with helping the government investigate their businesses. In determining whether a corporation deserves credit for cooperation, a prosecutor may, "if necessary," weigh waiver of privileges both with respect to internal investigations and communications between corporate employees, officers and directors, on the one hand, and counsel, on the other hand. Waiver is reportedly never mandatory.[105]

The recent report of the Ad Hoc Advisory Group on the Organizational Guidelines, also addressed the role of waiver of privileges in leniency, noting a sharp difference of opinion between the defense bar and the Department of Justice regarding the extent to which waivers may be required for cooperation credit from the DOJ.[106] Many members of the defense bar have argued that the organizational guidelines should be amended to explicitly state that waivers are not needed for a downward departure based upon substantial assistance, whereas the DOJ called any such amendment unnecessary since there is no express policy requiring waiver of privileges.[107]

Moreover, whereas the proposed environmental guidelines allow a two-level reduction where an organization pleads guilty and "cooperated with the prosecution in all relevant respects except by failing to disclose the names and identities of responsible individuals known to it,"[108] the Thompson Memo strongly implies that leniency will be denied if organizations fail to hand over the names of the wrongdoers. The memo states that "the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty."[109]

A defendant or target of an investigation must weigh the benefits of cooperation with the government, including the possibility of obtaining leniency (whether in the form of nonprosecution,

a plea bargain or a reduced sentence) against the serious risks that such cooperation entails, including potentially devastating exposure to criminal, civil and class-action litigation that can result from waiver of privileges. The question remains whether a company can meaningfully assess the benefits of cooperation and voluntary disclosure when it cannot know whether waiver of self-evaluation, work-product and attorney-client privileges may be required down the road.

C. Bottom Line Liability: Calculating Fines Under the Proposed Guidelines

The Basic Fine Calculation

Once one identifies the primary offense level for each offense and aggravating and mitigating factors are taken into account, a fine for each criminal count may be determined under the proposed environmental guidelines by reference to the Offense Level Fine Table contained in Part E of the proposed guidelines.[110] The defendant must pay a percentage of the maximum statutory fine for each count depending upon the final offense level. For example, for a count with a net offense level ranging from zero to six, a defendant organization would pay ten percent of the maximum statutory fine. The defendant would pay one hundred percent of the maximum statutory fine when the net offense level was twenty-four or higher. The Offense Level Fine Table is attached at Appendix A.

Multiple Criminal Counts

Departing from the Sentencing Guidelines' standard method for grouping multiple criminal counts, the proposed guidelines generally require courts to issue a sentence for each offense of which a defendant is convicted. The proposed guidelines approach to fines bears little resemblance to Chapter 3, Part D of the current Sentencing Guidelines, which states that where offenses charged in multiple-count indictments are closely intertwined, only the more serious offense should be charged unless the other counts "represent additional conduct that is not accounted for by the guidelines."[111] The purpose of this grouping procedure is to prevent multiple punishment for the substantially similar offense conduct. The Commission claims in the Introductory Commentary to Chapter 3 that this practice is justified because the "combined" offense level still reflects the additional criminal counts for which the defendant is never separately sentenced. To wit, the conduct is reflected in sentencing enhancements that result from the specific offense characteristics of the combined offense level.

The Advisory Group on Environmental Sanctions, which was responsible for drafting the proposed environmental guidelines, claimed that such grouping is not appropriate for environmental offenses committed by organizations because it could "understate the harm that environmental crimes can cause."[112] Presumably the group meant that meaningful valuation of environmental harms, such as destruction of habitat or loss of a water source, would be impossible. Although, applying a hypothetical offered by Chapter 3, according to which a defendant who commits an assault causing bodily injury during a bank robbery is sentenced only for the robbery count and not for the assault count,[113] one could argue that meaningful valuation of assault or other non-economic harms is equally implausible.

Fine Limitations

To avoid unduly harsh outcomes, however, the proposed environmental guidelines also gave judges significant discretion to reduce fines. Where multiple counts all pertain to a single course of ongoing conduct (such as a continuing discharge) and do not involve "independent volitional acts," a court can reduce the fines so long as the judge is satisfied that the resulting fine ultimately "reflects the seriousness of the offense."[114] On the other hand, mitigation may not lead to fine reduction of more than fifty percent in the final offense level.[115] In no event may the fine be less than the defendant's economic gain plus the costs of prosecution.[116] Similarly, the court *must* reduce a fine that would impair the defendant's ability to make restitution to the victim.[117]

A court *may* impose a fine below the level required under the proposed guidelines if it determines that: (1) imposition of the fine would essentially ruin the defendant's business due to its inability to pay the fine (even on a reasonable installment schedule), (2) the defendant is not a

"criminal purpose organization" as defined in Section 8C1.1 of the existing organizational guidelines; and (3) the defendant has not engaged in "a sustained pattern of serious environmental violations."[118]

Whether or not they provide a sufficient counterweight to the proposed guidelines' anti-grouping approach, these limitations comport with the organizational guidelines' preference for broad fine ranges as opposed to a strict per se approach to sentencing.

Fines Measured By Gains And Losses

While it is important to analyze potential fines using the tables contained in the proposed environmental guidelines, defendants and targets of environmental investigations should also remember that the most serious exposure in major white collar prosecutions usually stems from the ill-gotten gains or losses resulting from the defendant's conduct. Under Section 8C2.4 of the organizational guidelines, for example, the base fine is the *greatest* of the pecuniary gain or loss resulting from the offense, or the amount corresponding to the offense level.[119] In many large corporate criminal prosecutions, the losses to victims and/or ill-gotten gains far exceed the maximum fines under the fine table.

Moreover, Section 3571 of Title 18 of the United States Code provides that where an offense results in pecuniary gain to the defendant or in pecuniary loss to a third party, a federal judge may also impose an fine equivalent to *twice* the amount of the loss or gain.[120] In sum, a fine issued pursuant to Section 3571 may be significantly higher in an environmental case than the maximum fine under the proposed guidelines.

D. Conclusion

Enforcement of our national environmental statutes is a top priority for federal prosecutors, and the DOJ has committed more energy and resources to prosecuting environmental offenses than at any time in history. Attorney General John Ashcroft and Head of the Environmental and Natural Resources Division Tom Sansonetti recently announced that for Fiscal Year 2003, the DOJ collected an all-time record $203 million in civil penalties in environmental cases.[121] This is in contrast with an average of $75 million per year for the preceding three years.

As Sansonetti indicated, these civil penalties serve as strong evidence of the DOJ's commitment to environmental prosecution:

> The Division will continue to move aggressively against individuals, partnerships and companies that seek to avoid the cost of environmental compliance and thereby gain an economic advantage over their competitors that do comply. We shall seek penalties that force the non-complier both to revert the economic benefit reaped by non-compliance and to pay a stiff penalty to serve as a deterrent for others.

Likewise, the number of cases prosecuted by the DOJ's Environmental Crimes Section continues to increase. Although data is hard to come by, in 2002 the Environmental Crimes Section of the DOJ brought some sixty-nine indictments and obtained jail time in twenty-two instances.[122]

The defense bar, compliance officers and in-house attorneys all should have a rudimentary understanding not only of the substantive law governing their clients' industries, but of the concrete risks that come with breaking these laws. The DOJ's *Principles of Federal Prosecution of Business Organizations* can help lawyers to see more clearly which cases will be a priority for law enforcement, which are susceptible to plea bargaining or civil settlement and whether leniency can likely be obtained on the basis of an organizations history of good behavior or compliance.

The proposed environmental guidelines, while fleshing out many of these same factors in federal prosecutorial decision making, may also give defendants a sense of their liability should they be prosecuted, and further clarify incentives for cooperation and voluntary disclosure to the government. Moreover, because the compliance criteria contained in the proposed guidelines are stricter than those contained in the existing organizational guidelines, complying with them might increase an organization's chances to obtain leniency at both the investigation, prosecution, plea-bargaining and sentencing stages.

ENDNOTES

1. Marcellus McRae is a partner in the Los Angeles Office of Gibson, Dunn & Crutcher LLP and is the Co-Chair of the firm's Business Crimes and Investigations Practice Group. Mr. McRae is also a member of the firm's Litigation and Labor and Employment Practice Groups. Matthew Taggart is an associate in the Los Angeles Office of Gibson, Dunn & Crutcher LLP and practices in the firm's Business Crimes and Labor & Employment Practice Groups.

2. United States Sentencing Commission, *Draft Environmental Sentencing Guidelines* [*hereinafter* "Proposed Guidelines"] (proposed Nov. 1993).

3. Gary Lincenberg has pointed out that the Sentencing Commission had several reasons for excluding environmental offenses from the fine provisions contained in the organizational sentencing guidelines, *see infra* note 6. First, the fine criteria contained in the organizational guidelines focus upon the financial losses caused by a defendant. Lincenberg notes that environmental losses are more complex and may be "perceived to include aesthetic, public safety, or other non-monetary concerns." Gary S. Lincenberg, *Sentencing of Environmental Crimes*, *in* THE ENVIRONMENTAL CRIMES CASE 112, 113 (Gary S. Lincenberg & David S. Krakoff, eds., 1999). Second, the Commission was unsure of how to set a maximum ceiling for fines where federal criminal environmental laws reflected Congress's clear intent that penalties increase with each passing day that the environmental damage continues. *See id.*

4. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.1, commentary at 463 (2003) [*hereinafter* "USSG"] (*available at* http://www.ussc.gov/2002/guid.htm). Other important categories of cases, such as food and drug and export control violations are also not covered by the organizational guidelines' fine provisions. *See id.*

5. *See id.* § 8C2.10 ("For any count or counts not covered under § 8C2.1 (Applicability of Fine Guidelines), the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572.").

6. Two of the three substantive parts of the organizational guidelines do apply to environmental offenses. *See id.* § 8A1.1, Application Note 2. The Commentary is clear that while the sections of chapter 8 relating to fine calculations apply only to specified offenses, "[t]he other provisions of this chapter apply to the sentencing of all organizations for all felony and Class A misdemeanor offenses." Part B, entitled "Remedying the Harm from Criminal Conduct," addresses restitution, remedial orders and community service. *See id.* § 8B1.1. The Sentencing commission is clear that all convicted organizations must remedy any harm caused by the offense, including the "full amount of the victim's loss." *See id.* § 8B1.1 ("Restitution—Organizations"). Part D, entitled "Organizational Probation," specifies that probation will be required when immediate payment of fines is excused or where an organization with fifty or more employees at the time of sentencing does not have an effective compliance program in place. *See id.* § 8D1.1 ("Imposition of Probation—Organizations").

7. Enforcement of environmental laws is a relatively decentralized process. Many states, including New Jersey and California, have had criminal environmental statutes on the books for decades, even before the EPA began hiring criminal investigators in the 1980s. Moreover, states continue to share enforcement responsibility for key federal environmental statutes like the Clean Water Act. *See* 42 U.S.C. §§ 1251-1387 (2003).

8. The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) is mandatory and binding upon federal judges although a sentencing court may depart from the guidelines and issue a sentence outside prescribed ranges where "there exists an aggravating or

mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *See* 18 U.S.C. § 3553 (b)(1) (2003). The current Justice Department, for its part, has made clear its view that so-called downward departures from the sentencing guidelines should be a "rare occurrence," except where the government has petitioned a court for such a reduction based upon substantial assistance from a defendant or pursuant to early-disposition or fast-track programs. *See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals 3 (July 28, 2003) [*hereinafter* "Ashcroft Memo"].

9. Aside from the concerns alluded to in footnote 3, *supra*, many may object to the Sentencing Commission issuing guidance in an area in which judicial sentencing practices continue to develop. After all, the guidelines were meant to reflect prevailing national sentencing practices in order to bring rationality and certainty to the process (except where Congress dictated that prevailing practices were unacceptable and deviation was required). As the introductory section of the guidelines points out, prior to promulgating the Guidelines in 1987, the Commission reviewed data drawn from 10,000 presentence investigations, reviewed crimes as distinguished in substantive criminal statutes, and looked to the United States Parole Commission's guidelines and resulting statistics and other data to distill "which distinctions are important in present practice." *See* USSG, *supra* note 4, § 1A1.3 (2003). Since most criminal environmental statutes have only been on the books for thirty years or so, *see supra* note 29, and enforcement and investigative capabilities have developed very slowly, a persuasive claim can be made that it is to early for the Commission to draw any empirical conclusions about environmental sentencing practices. If there is no mature prevailing practice yet, then allowing the Commission to dictate sentencing rather than judges might be characterized as an inappropriate delegation of power. *Cf.* Mistretta v. United States, 109 S.Ct. 647 (1989) (affirming constitutionality of the United States Sentencing Commission under separation of powers principle and non-delegation doctrine).

10. Although the organizational guidelines contain criteria for an "effective compliance program," the environmental guidelines contain detailed discussion on how to craft an environmental program. *See* discussion, *infra,* at 16-20.

11. *See* The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2003), among other things, made it illegal to fire or otherwise discriminate against an employee for providing information or assisting an investigation regarding what the employee "reasonably believes" is a securities violation. *See* 18 U.S.C. § 1514A(a)(1) (2003). In expanding whistleblower protection, the Act also makes it a crime to knowingly or intentionally interfere with a person's employment or "livelihood" in retaliation for providing truthful information to law enforcement relating to the possible commission of any federal offense. *See* 18 U.S.C. § 1513(e) (2003).

12. *See* Pub. L. No. 108-21, 117 Stat. 650 (2003). These last-minute additions to the Child Abduction Prevention Act, contained in Section 401, severely restricted the ability of federal judges to deviate from the federal sentencing guidelines and raised the standard of review of appeals involving sentencing reductions from a "due deference" to a de novo standard. *See id.* These changes also led Attorney General John Ashcroft to significantly revise the U.S. Attorney's Manual to call for greater scrutiny of judges who grant sentencing reductions with any regularity. *See* Ashcroft Memo, *supra* note 8, at 4.

13. *See* Memorandum from Deputy Attorney General Larry Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003)

[*hereinafter* "Thompson Memo"] (*available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

14. *Id.* at 1.

15. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (2003) (setting forth the "entity approach" to corporate representation).

16. *See* UNITED STATES ATTORNEYS MANUAL, § 9-27.300 [*hereinafter* USAM] ("Selecting Charges—Charging Most Serious Offenses").

> once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. If mandatory minimum sentences are also involved, their effect must be considered, keeping in mind the fact that a mandatory minimum is statutory and generally overrules a guideline. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines.

17. *See* USSG, *supra* note 4, ch.8.

18. *See* Proposed Guidelines, *supra* note 2, § 9A1.1. "Organization" broadly encompasses everything from partnerships and traditional corporations to unions, trusts and pension funds. *See* 18 U.S.C. § 18 (2003).

19. *See id.*

20. *See id.*

21. *See* United States Sentencing Commission, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003) [*hereinafter* "Ad Hoc Advisory Group Report"] (*available at* http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm).

22. Since the probation criteria contained in Part B of the organizational guidelines apply to environmental offenses, *see supra* note 6, analysis of the probation-related proposals in the proposed guidelines has negligible value in gauging an organization's exposure.

23. *See* USSG, *supra* note 4, § 8C2.1-4. When a court finds that an organization was operated *primarily for a criminal purpose* or *by criminal means*, both the organizational guidelines and the proposed environmental guidelines mandate a fine sufficient to divest the organization of all of its net assets. *Compare id.* § 8C1.1 *with* Proposed Guidelines, *supra* note 2, § 9B1.1 ("Determining the Fine—Criminal Purpose Organizations"). An example of "criminal purpose" under the organizational guidelines is "an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance." *Id.* § 8C1.1 commentary at 462. An example of "criminal means" is "a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste." *Id.*

24. *See* USSG, *supra* note 4, § 8C2.8 ("Determining the Fine Within the Range").

25. *See id.* § 8C2.3 ("Offense Level").

26. *See* Proposed Guidelines, *supra* note 2, § 9B.2.1.

27. *See* USSG, *supra* note 4, ch. 2 commentary at 43.

28. "Knowing endangerment" is defined as "knowledge that the violation placed another person in imminent danger of death or serious bodily injury." *See id.* § 2Q1.1 commentary at 265.

29. The main federal environmental statutes countenancing criminal liability are The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2003), the Federal Water Pollution Control Act (known as the Clean Water Act), 33 U.S.C. §§ 1251-1387 (2003), The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2003), The Clean Air Act, 42 U.S.C. §§ 7401-7561q (2003), The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2003), and The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2003).

30. While several offenses have specific offense characteristics in common, the characteristics vary depending upon the offense. Counsel should use the Sentencing Manual to verify which characteristics apply to which crimes.

31. *See* § 2Q1.1 Application Note 1.

32. Consistent with the language of 18 U.S.C. § 3553(b), *see supra* note 5, under Chapter 5 a sentencing court can impose a sentence outside the established range of the guidelines where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than that described." *See* USSG, *supra* note 4, § 5K2.0 ("Grounds for Departure (Policy Statement)"). *See, e.g.,* § 5K2.1 ("If death resulted, the court may increase the sentence above the authorized guideline range.").

33. *See* Proposed Guidelines, *supra* note 2, § 9C1.1-2.

34. *Id.* § 9C1.1, cmt.1, makes clear that although the determination of an employee's status should be made on a case-by-case basis, "for the purposes of environmental sanctions, plant managers and senior environmental compliance personnel" fall into this category.

35. *Id.*

36. *See id.*

37. *See* § 9A1.1 Application Note 2(k).

38. *Id.* Application Note 2(e).

39. *See* USSG, *supra* note 4, § 8A1.2 Application Note 3(b)-(c).

40. *See* § 8C2.5(b) ("Involvement in or Tolerance of Criminal Activity").

41. The Thompson Memo notes that the nine factors which it directs prosecutors to consider in "conducting an investigation, determining whether to bring charges and negotiate plea agreements" are not exhaustive and that a "a prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment." *See* Thompson Memo at 3-4. These other factors are contained in Section 9-27.220 of the United States Attorneys' Manual, and include such basic things as sufficiency of the evidence and the likelihood of success at trial. *See* USAM, *supra* note 16, §9-27.220.

42. *See* Thompson Memo, *supra* note 13, at 3.

43. *Id.* at 5.

44. The proposed guidelines treat an organization's criminal compliance history and its civil compliance history as separate and independent aggravating factors. We consolidated them here for ease of exposition. *See* Proposed Guidelines, *supra* note 2, § 9C1.1.(b)-(c).

45. *See id.* § 9C1.1(b). The appropriate point range depends on the severity of the prior conduct, whether it occurred at locations under common management, and whether the prior misconduct occurred under a predecessor company. If the conduct took place on the watch of management of an acquired company, the court

will inquire into whether that management has been "substantially changed" by the acquiring company. *See id.*

46. *Id.* § 9C1.1(b).

47. *See id.* § 9C1.1(b)-(c).

48. *See* USSG, *supra* note 4, § 8C2.5(c).

49. *Id.*

50. *Id.*

51. Thompson Memo, *supra* note 13, at 3.

52. *Id.*

53. *See* Proposed Guidelines, *supra* note 2, § 9C1.1(b) cmt. 3.

54. *See* § 8C2.5 Application Note 5. A "separately managed line of business" is defined as a "subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains separate books of account." *Id.*

55. *See id.*

56. The Comment calls for a one level increase for violating an administrative order, two levels for violating a judicial order and three levels where a violation runs afoul of multiple prior orders and "evidences contempt by the defendant." *See id*. The term contempt is not defined.

57. *See* USSG, *supra* note 4, § 8C2.5(d).

58. *See* Proposed Guidelines, *supra* note 2, § 9C1.1(e).

59. USSG, *supra* note 4, § 8C2.5(e).

60. *See* Thompson Memo, *supra* note 13, at 3.

61. *Id.* at 8.

62. *Id.*

63. *See* Proposed Guidelines, *supra* note 2, § 9C1.1(f).

64. *See id.*, cmt. 1.

65. Comment 1 to Section 9C1.1(f) states that in order to avoid a fine increase for failure to maintain a compliance program under this subsection, a defendant "need not include all of the factors required to demonstrate a commitment to environmental compliance pursuant to Section 9C1.2. *See id.*

66. *See* USSG, *supra* note 4, § 8C2.5(f).

67. Paul E. Fiorelli & Cynthia J. Rooney, *The Environmental Sentencing Guidelines For Business Organizations: Are There Murky Waters In Their Future*, 22 B.C. ENVTL. AFF. L. REV. 481, 495 (1995).

68. *See* Ad Hoc Advisory Group Report, *supra* note 21, at 131.

69. *See id.* at 132. However, DOJ representatives did suggest that the Sentencing Commission consider adding commentary to § 8C2.5(f) stating that "failure to have an effective program to prevent and detect violations of law could be weighed against larger organizations as evidence that 'an individual within high-level personnel of the organization ... condoned or was willfully ignorant of the criminal conduct." *Id.* They also favored an increase in the culpability score under the organizational guidelines where "absence of any compliance program will signal a significant deviation from recognized practice." *Id.*

70. *See* Proposed Guidelines, *supra* note 2, § 9C1.2.

71. *Id.*

72. *See* Proposed Guidelines, *supra* note 2, § 9D1.1(a)(1)-(7).

73. *See id.* cmt. 3.

74. John C. Coffee, Jr., *Environmental Crime and Punishment,* N.Y. L.J., 5 (Feb. 3, 1994).

75. Report on Advisory Group Work on Sentencing Guidelines for Organizations Convicted of Environmental Crimes, Dissenting Views By Lloyd S. Guerci and Meredith Hemphill, Jr., 16-17 (Dec. 8, 1993).

76. *Id.*

77. USSG, *supra* note 4, § 8A1.2, Application Note 3(k).

78. *See* Ad Hoc Advisory Group Report, *supra* note 21, at 48.

79. *Id.* at 51.

80. *Id.* at 53, § 8B2.1(a)(2). Although promoting a culture of compliance with the law is framed as a requirement, the Advisory Group stated that the recommendation "will not impose upon organizations anything more than the law requires." *Id.*

81. *See id.* § 8B2.1(b)(1).

82. *Id.* at 57.

83. *Id.* at 59.

84. *See id.*

85. *See* USSG, *supra* note 4, § 8A1.2 Application Note 3(b)-(c).

86. *See id.* § 8B2.1(b)(2) para. 3.

87. *See* USSG, *supra* note 4, § 8A1.2 Application Note 3(k)(3).

88. Ad Hoc Advisory Group Report, *supra* note 21, at 64.

89. *See id.* at 65.

90. *Id.* § 8B2.1(b)(3).

91. *Id.* § 8B2.1(b)(4).

92. *See id.* § 8B2.1(b)(5).

93. *See supra* note 12 (discussing Sarbanes-Oxley Act of 2002).

94. *See* Ad Hoc Advisory Group Report, *supra* note 21, at 83.

95. *See id.* at 86.

96. *Id.* § 8B2.1(b)(6) (emphasis added).

97. *See* Thompson Memo, *supra* note 13, Introduction.

98. *Id.*

99. *See* Proposed Guidelines, *supra* note 2, § 9D1.1(a)(1).

100. *See* Thompson Memo, *supra* note 13, at 10 (citing *In re Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996)).

101. *See* Proposed Guidelines, *supra* note 2, § 9C1.2(b). Note that no credit is obtained merely for compliance with applicable federal reporting requirements. *See id.*

102. *Id.*

103. *See id.* commentary.

104. *Id.*.

105. Thompson Memo, *supra* note 13, at 7.

106. *See* Ad Hoc Advisory Group Report, *supra* note 21, at 99-102.

107. *See id.* at 101-02.

108. Proposed Guidelines, *supra* note 2, § 9C2(b)(3).

109. Thompson Memo at 8.

110. *See* Proposed Guidelines, *supra* note 2, § 9E1.1.

111. *See* USSG, *supra* note 4, ch. 3, pt. D. commentary at 321-22.

112. *See* Proposed Guidelines, *supra* note 2, § 9E1.2 cmt. 1.

113. *See* USSG, *supra* note 4, ch. 3, pt. D. commentary at 321.

114. *See* Proposed Guidelines, *supra* note 2, § 9E1.2. The first count may not be reduced. However, the maximum statutory fine for each subsequent count is reduced by a factor of a fraction consisting of a numerator of one and a denominator equivalent to the number of the count. For example, the fine for the second count would be reduced by one-half.

115. *See id.*. § 9E1.2(b).

116. *See id.* § 9E1.2(c).

117. Remember that the restitution and remediation requirements of Chapter 8 apply to environmental offenses. *See supra* note 6.

118. *See* Proposed Guidelines, *supra* note 2, § 9E1.2.

119. *See* USSG, *supra* note 4, § 8C2.4.

120. *See* 18 U.S.C. § 3571 (2003).

121. *See* Press Release, Justice Department Announces FY2003 Record Year For Recovery of Civil Penalties in Environmental Cases (Dec. 16, 2003) (*available at* www.usdoj.gov/opa/pr/2003/December/03_enrd_694.htm).

122. *See* Stephen P. Solow, Environmental Crime Update: What Is The State of Federal Environmental Law Enforcement?, 2003 A.B.A. Section of Environment, Energy & Resources (March 13, 2003).

Appendix A

Offense Level Fine Table

Offense Level	Percentage Max. Stat. Fine
0-6	10
7	10-20
8	15-25
9	20-30
10	25-35
11	30-40
12	30-50
13	35-55
14	40-60
15	45-65
16	50-70
17	55-75
18	60-80
19	65-85
20	70-90
21	75-95
22	80-100
23	85-100
24 or more	100