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A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes

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Comment

A CRITICAL ANALYSIS OF THE PROPOSED SENTENCING GUIDELINES FOR ORGANIZATIONS CONVICTED OF ENVIRONMENTAL CRIMES

I. INTRODUCTION

In February 1992, the United States Sentencing Commission (Sentencing Commission) appointed an Advisory Working Group on Environmental Sanctions (Advisory Group) to help it draft Sentencing Guidelines for organizations convicted of environmental offenses. On March 5, 1993, the Advisory Group released a Working Draft (First Draft) of recommended sentencing guidelines. After a May 10, 1993 public hearing on the First Draft, the Advisory Group began preparing its final draft recommendations. On November 16, 1993, the Advisory Group forwarded its final draft of the Proposed Guidelines for Organizations Con-


2. Memorandum Attached to Working Draft Recommendations, Mar. 5, 1993 [hereinafter First Draft]. Specifically, the Advisory Group was appointed to "assist the Sentencing Commission in defining a package of effective sanctions for organizations convicted of federal environmental crimes." Id.

3. Id. The Advisory Group noted that the First Draft was not a finished product but rather "a discussion draft released as a vehicle for stimulating public comment on issues related to sanctions for organizations convicted of federal environmental crimes." Id.

4. See id. (instructing Working Group to meet after scheduled May 10, 1993 public hearing "to debate the terms of any final draft it votes to approve and forward it to the Sentencing Commission").
The Sentencing Commission is currently considering the Proposed Guidelines, public comments on them and any alternative proposals. After a review period, the Sentencing Commission may accept or reject, in whole or in part, the Proposed Guidelines. If the Sentencing Commission accepts the Proposed Guidelines it will submit them to Congress. Once submitted to Congress, the Proposed Guidelines will be subject to a 180-day public comment period. After this comment period, assuming Congress has not intervened in the meantime, the Proposed Guidelines will take effect and become Chapter Nine of the Sentencing Guidelines.

This Comment analyzes the Proposed Guidelines as released by the Advisory Group. Section II begins with a brief contextual history of the Sentencing Guidelines and concludes with a brief examination of underlying organizational sentencing issues. Section III analyzes how the Proposed Guidelines' provisions will work, if enacted. Section IV then compares certain provisions in the Proposed Guidelines with their counterparts both in the First Draft and in the existing Federal Sentencing Guidelines for organizations (Organizational Guidelines). Further-
more, Section IV also analyzes the extent to which the Proposed Guidelines will meet the basic statutory goals of the Sentencing Guidelines.  

Finally, in Section V, this Comment concludes that the Proposed Guidelines are generally workable and consistent with statutory goals, but argues that the Sentencing Commission should make several significant changes to the Proposed Guidelines before submitting them to Congress.

II. BACKGROUND

A. A Brief History of the Sentencing Guidelines

In 1984, Congress, by enacting the Sentencing Reform Act (SRA), established the Sentencing Commission. Congress created the Commission to further the following statutory sentencing goals: (1) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment; (2) to adequately deter criminal conduct; (3) to protect the public from future criminal conduct; (4) to provide defendants with effective educational training, vocational training, medical care, or other correctional treatments; (5) to provide sentencing certainty and fairness; (6) to avoid sentencing disparities among similarly situated defendants; and (7) to permit individualized sentencing when warranted.

15. For a discussion of how well the Proposed Guidelines meet the basic statutory goals of the Sentencing Guidelines, see infra notes 190-236 and accompanying text.

16. For a discussion of the workability and consistency of the Proposed Guidelines with the statutory goals, see infra notes 190-236 and accompanying text. For recommended changes to the Proposed Guidelines, see infra notes 209-14 and 226-36 and accompanying text.


19. Id. § 3553(a)(2)(B). For a discussion of how well the Proposed Guidelines meet this statutory goal, see infra notes 202-08 and accompanying text.

20. Id. § 3553(a)(2)(C). For a discussion of how well the Proposed Guidelines meet this statutory goal, see infra notes 202-08 and accompanying text.

21. Id. § 3553(a)(2)(D). For a discussion of how well the Proposed Guidelines meet this statutory goal, see infra notes 209-14 and accompanying text.


23. Id. For a discussion of how well the Proposed Guidelines meet this statutory goal, see infra notes 231-36 and accompanying text.

24. Id. Individualized sentences are warranted when a case involves "mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." Id. For a discussion of how well the Proposed Guidelines meet this statutory goal, see infra notes 231-36 and accompanying text.
Three years after Congress gave the Sentencing Commission its mandate, the first Sentencing Guidelines for individuals took effect.\textsuperscript{25} Initially, the federal courts were divided over whether the SRA, the Sentencing Commission and the Sentencing Guidelines were constitutional.\textsuperscript{26} In 1989, however, the United States Supreme Court, in \textit{Mistretta v. United States},\textsuperscript{27} upheld the constitutionality of the SRA and, thus the Sentencing Commission and Sentencing Guidelines.\textsuperscript{28} Specifically, the Supreme Court rejected the claim that Congress’ delegation of sentencing powers to the Sentencing Commission violated the doctrine of separation of powers.\textsuperscript{29} After the Supreme Court decided \textit{Mistretta}, Congress enacted Sentencing Guidelines for individuals convicted of environmental crimes.\textsuperscript{30}

Next, the Sentencing Commission turned its efforts to developing guidelines for crimes committed by organizations. These Organizational Guidelines took effect on November 1, 1991.\textsuperscript{31} The Organizational Guidelines apply to all organizations\textsuperscript{32} convicted of a felony or a Class A


\textsuperscript{27} 488 U.S. 361 (1989).

\textsuperscript{28} \textit{Id.} at 371-412. The defendant in \textit{Mistretta} pleaded guilty to one count of conspiracy and agreement to distribute cocaine and was sentenced under the Sentencing Guidelines to 18 months imprisonment followed by three years of supervised release. \textit{Id.} at 370-71. The defendant appealed, arguing that the Sentencing Guidelines were unconstitutional because “the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines.” \textit{Id.} at 370.

\textsuperscript{29} \textit{Id.} at 412. Additionally, the defendant in \textit{Mistretta} unsuccessfully argued that Congress violated the nondelegation doctrine by delegating legislative powers to the judicial branch. \textit{Id.} at 371-79. Under the nondelegation doctrine, Congress is prohibited from delegating its legislative powers to another branch of the federal government. \textit{See id.} at 372 (citing \textit{Field v. Clark}, 143 U.S. 649, 692 (1892) (defining nondelegation doctrine)).

\textsuperscript{30} 18 U.S.C. app. § 2Q1.1 [hereinafter U.S.S.G. § 2Q1.1] These guidelines were enacted on November 1, 1989 and by their terms, do not apply to organizations. \textit{Id.}


\textsuperscript{32} U.S.S.G., \textit{supra} note 25, § 8A1.1. An organization is defined as “a person other than an individual” for purposes of the Organizational Guidelines. \textit{Id.} at application n.1 (citing 18 U.S.C. § 18). The Proposed Guidelines use an identical definition. For the definition of “organization” under the Proposed Guidelines, \textit{see infra} note 66 and accompanying text.
misdemeanor. Thus, organizations convicted of environmental felonies or Class A misdemeanors are currently subject to the Organizational Guidelines’ provisions regarding restitution, remedial orders, community service, notification of victims and organizational probation. However, the Organizational Guidelines’ provisions regarding fines specifically exclude environmental offenses. Although the Organizational Guidelines give no explicit reason for this exclusion, the Sentencing Commission determined that environmental crimes are different from other organizational crimes. Four main factors contributed to this determination.

33. U.S.S.G., supra note 25, § 8A1.1. The Organizational Guidelines are "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." Id. § 8 introductory commentary (emphasis added). The Organizational Guidelines do not govern the sentencing of agents; rather, individual agents of organizations are sentenced in accordance with guidelines in the full seven chapters of the Sentencing Guidelines. Id. §§ 1-7.

34. Id. § 8B1.1. Courts must order restitution either when statutorily authorized under 18 U.S.C. §§ 3663-3664, or as a condition of probation, unless either the organization has already made full restitution, or if, on balance, it would be too burdensome to determine an appropriate restitution amount. Id.

35. Id. § 8B1.2. Under the Organizational Guidelines, remedial orders supplement probationary restitution. Id. § 8B1.2(a). Courts may also require organizations to "create a trust fund sufficient to address [the reasonably estimated] expected [future] harm." Id. § 8B1.2(b).

36. Id. § 8B1.3. This section is not mandatory, but courts may order probationary community service "where such community service is reasonably designed to repair the harm caused by the offense." Id. The commentary to this section indicates that community service is "an indirect monetary sanction" because organizations have to pay for their employees to perform these services. Id. § 8B1.3 commentary.

37. Id. § 8B1.4 (applying U.S.S.G., supra note 25, § 5F1.4, which provides that "[t]he court may order the defendant to pay the cost of giving notice to victims"). This cost may be deducted from any fine if the court decides that imposing both a fine and requiring notice to victims is too burdensome. Id. § 5F1.4.

38. Id. § 8D. If the Proposed Guidelines are enacted, organizational probation will be determined in accordance with them. See Proposed U.S.S.G., supra note 1, § 9F.

39. See U.S.S.G., supra note 25, § 8C2.1 background commentary. Fines for organizational environmental offenses are left to the statutory provisions defining offenses and allowable sentences. See id. § 8C2.10.


41. See id. at 256-58 (stating four factors that lead to conclusion that environmental crimes are sufficiently different from other organizational crimes to leave former out of provisions of Organizational Guidelines).
First, loss calculations are more difficult to make when environmental offenses have been committed, especially if the offense causes damages that are not ascertainable for clean-up purposes. Second, environmental statutes are more likely to involve weakened intent requirements, such as negligence or even strict liability. Third, environmental offenses are more likely to be "subject to overlapping enforcement schemes and collateral sanctions." Finally, at the time, public and commentator opinions were divided over how much weight to give environmental concerns as opposed to business concerns. All four of these factors most likely led the Sentencing Commission to conclude that environmental crimes are different enough from other organizational crimes to exclude the former from the fine provisions of the Organizational Guidelines.

B. Increased Environmental Enforcement

While the debate over the propriety and scope of sentencing guidelines for organizations convicted of environmental crimes continued, the general enforcement of environmental statutes and regulations continued to increase. Motivated in part by the public's concern with environmental issues, the federal government has steadily increased its environmental prosecutions since 1982. Further, sentences for violations of environmental statutes are more severe than those for other organizational offenses. For a discussion of loss calculations under the Organizational Guidelines, see infra note 169 and accompanying text. For a discussion of loss calculations under the Proposed Guidelines, see infra notes 181-84 and accompanying text.

42. For a discussion of loss calculations under the Organizational Guidelines, see infra note 169 and accompanying text. For a discussion of loss calculations under the Proposed Guidelines, see infra notes 181-84 and accompanying text.

43. Nagel & Swenson, supra note 40, at 256 (providing air emission violations as example).

44. Id. at 256-57. Nagel and Swenson offer the Refuse Act as an example under which "it is a crime to discharge any refuse matter into a navigable water of the United States . . . without a permit." Id. (citing Refuse Act, 33 U.S.C. § 407 (1988)). The Refuse Act is a strict liability statute. See United States v. American Cyanamid Co., 354 F. Supp. 1202, 1205 (S.D.N.Y.), aff'd, 480 F.2d 1132 (2d Cir. 1973) (holding that scienter is not required to prove violation of Refuse Act). For a discussion of the impact of scienter requirements (or the lack thereof) on sentencing under the Proposed Guidelines, see infra notes 224-25 and accompanying text.

45. Nagel & Swenson, supra note 40, at 258. As an example, Nagel and Swenson suggest that state and local governments are more likely to be involved in the prosecution of environmental crimes than other organizational crimes. Id.

46. Id. Nagel and Swenson characterize environmental and business concerns as polar extremes and point out that the differing viewpoints are held much more strongly than they would be, for example, in the context of tax or fraud violations. Id.

47. See, e.g., Jerry Seper, Environmental Crime Indictments Rise 33 Percent Over Previous Year, Wash. Times, Nov. 16, 1990, at A3 (indicating 33% increase in environmental indictments between fiscal years 1989 and 1990).

48. See id. Agencies responsible for environmental enforcement have seen an increase in resources as well. Laura M. Litvan, The Growing Ranks of Enviro-Cops, Nation's Bus., June, 1994, at 29. Environmental enforcement agents grew in number from 47 in 1989 to 123 in 1994. Id. In addition, funding for the Environmental Protection Agency's environmental crime section has increased 400% since 1989, while the total agency budget has increased by only 29%. Id.
mental laws have become more severe, due in part to the enactment of environmental Sentencing Guidelines for individual offenses. At the same time, organizations make up a significant percentage of environmental offense defendants. Accordingly, while the Advisory Group was concerned with increased environmental enforcement, it was nevertheless mindful of underlying organizational liability issues.

C. Underlying Organizational Liability Issues

Since the Supreme Court's decision in New York Central & Hudson River Railroad Co. v. United States, organizations have been held vicariously liable for the federal criminal offenses of its employees and agents acting within the scope of their employment or agency. Further, vicarious liability may be imposed even when the employee acts contrary to his or her organization's policies. This principle raises the concern that organizations may be unfairly punished for acts in which their management did not actively (through commission) or passively (through knowledge of the act) participate.

49. See Mark A. Cohen, Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes, 82 J. CRiM. L. & CRIMINOLOGY 1054, 1078-79 (1992) (noting that median total criminal sanction for organizations rose from $35,725 before enactment of 1984 Fine Act to $63,859 after enactment, and likewise mean total criminal sanction for organizations rose from $108,786 to $443,882 during the same time frame). Cohen found that, during this period of time, organizations convicted of environmental offenses were sentenced to smaller fines than antitrust and other organizational offenders, but that when restitution and other sanctions were included in the computations, the mean and median "total" sanctions of the two groups were comparable. Id. at 1079.

50. See id. at 1074-75 (noting that between 1983 and 1990, corporations made up 32% of all Justice Department prosecutions for environmental crimes). In 1992, corporations made up a whopping 61% of cases initiated by the U.S. Environmental Protection Agency. Litvan, supra note 48, at 30. However, this figure plummeted to 25% in 1993. Id. at 30-31.


52. Id. at 491-92. Vicarious liability is defined as "liability, where the defendant, generally one conducting a business, is made liable, though without personal fault, for the bad conduct of someone else, generally his employee." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.9, at 250 (2d ed. 1986).

In New York Central & Hudson River R.R., a railroad company was convicted for rebates that its assistant traffic manager offered and paid to sugar companies. Id. at 489. Under the Elkins Act, any "act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case . . . be deemed to be the act, omission or failure of such carrier . . . ." Id. at 491-92 (quoting 32 Stat. 847(1)).

53. See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (holding hotel liable for illegal threats of purchasing agent acting in course and scope of employment despite fact that purchasing agent was acting contrary to company policy and specific instructions of manager and assistant manager of hotel), cert. denied, 409 U.S. 1125 (1973).

Vicarious liability is even more significant in the area of environmental offenses because many environmental statutes are "general intent" statutes. Under such statutes, a defendant is convicted if a violative act is "intentional and not the result of accident or mistake." At least one federal court of appeals has interpreted "general intent" statutes to mean that high-level management does not have to know that an employee actually committed an unlawful act to be held criminally responsible. Furthermore, many environmental statutes explicitly impose strict liability, which means that an organization may be held vicariously liable for conduct of an employee who has no criminal intent whatsoever.

Another basic organizational liability issue is how to punish organizations. The Advisory Group faced two competing approaches to organizational punishment: the "optimal penalties" approach and the "economic gain plus cost" approach. Under the "optimal penalties" approach, courts base fines on the amount of harm caused by an offense and the probability of convicting the organization. The policy behind this approach is deterrence; as a result, merely placing organizations on probation is strongly discouraged.

Under the "economic gain plus cost" approach, an entity's fine is determined by considering the economic gain to the entity generated by the offense and the economic cost or harm caused by the entity as a result of the offense. The foundation of this approach is a concern for just punishment and deterrence. Unlike the "optimal penalties" approach, however, "economic gain plus cost" determinations permit the imposition of probation.

55. See Intent, Knowledge Key to Prosecution of Corporate Officers, DOJ Official Says, BNA NATIONAL ENVIRONMENT DAILY, Aug. 12, 1993, at 1 (discussing definition given by Charles A. DeMonaco, assistant chief of Environmental Crimes Section of Justice Department).

56. See United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) (imputing "willfulness" or "negligence" of employee to high level manager because of manager's "position of responsibility").


58. See Nagel & Swenson, supra note 40, at 217-26 (discussing "optimal penalties" approach in context of deliberations over Organizational Guidelines).

59. See id. at 210 (finding "optimal penalties" approach squarely fits within "deterrence paradigm").

60. Id. at 220. The "pure optimal penalties approach" took the position that organizational probation "was never an appropriate sanction." Id.

61. See id. at 233 (noting that both economic gain to organization and economic loss caused by organization are considerations under Organizational Guidelines).

62. Nagel & Swenson, supra note 40, at 234. "With a structure basis for focusing the fine guidelines on just punishment and deterrence, the real question for the Commission became not whether, but how to build just punishment and deterrence principles into the fine guidelines." Id.

63. See id. (discussing the imposition of probation).
Ultimately, the Advisory Group adopted the “economic gain plus cost” approach for the Proposed Guidelines, but synthesized aspects of the “optimal penalties” approach into the final theory. For example, the Proposed Guidelines’ emphasis on deterrence, which is the foundation of the “optimal penalties” approach, demonstrates the synthesis of the two approaches. This general characterization of the Proposed Guidelines approach does not, however, adequately describe how the Proposed Guidelines will be used by courts to determine penalties, if enacted. Such a description is presented in the following section.

III. HOW THE PROPOSED GUIDELINES WILL WORK

Assuming that the Proposed Guidelines are enacted by Congress, they will become Chapter Nine of the Sentencing Guidelines and apply to all “organizations” convicted of environmental violations. The Proposed Guidelines provide district courts with a step-by-step process to determine appropriate sentences for these organizations. First, a court must determine whether to fine the organization. This determination is based upon the nature of the organization, the nature of the offense, the presence of aggravating and mitigating factors, as well as the ability of the organization to pay the fine. Second, a court must determine

64. Proposed U.S.S.G., supra note 1, § 9E1.2(d). A similar approach was used in the Organizational Guidelines. See U.S.S.G., supra note 25, § 8C2.4 (stating gain or cost relevant to base fine, not gain plus cost).

65. For a discussion of deterrence under the Proposed Guidelines, see infra notes 202-08 and accompanying text.

66. Proposed U.S.S.G., supra note 1, § 9A1.1. Under the Guidelines, an “organization” is defined as “a person other than an individual.” Id. § 9A1.1 commentary (citing 18 U.S.C. § 18 (1988)). These organizations include “corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.” Id.

67. Id. § 9A1.2 (prescribing determinations to be made under the Proposed Guidelines).

68. Id. § 9A1.2(a) (presenting steps to determine whether to fine organization).

69. Id. § 9A1.2(a)(1); see also id. § 9B1.1 (presenting section on determining Fine-Criminal Purpose Organizations). For a discussion on the sentencing of criminal purpose organizations, see infra notes 74-77 and accompanying text.

70. Id. § 9A1.2(a)(2); see also id. § 9B2.1 (determining primary offense level). For a discussion of the determination of the offense level for non-criminal purpose organizations, see infra notes 78-84 and accompanying text.

71. Id. § 9A1.2(b); see also id. §§ 9C1.1-2 (determining application of aggravating and mitigating factors in sentencing); id. § 9D (determining mitigation based on organization’s previous environmental compliance). For a discussion of aggravating and mitigating factors, see infra notes 85-108 and accompanying text. For a discussion of mitigation due to an organization’s previous environmental compliance, see infra notes 95-108 and accompanying text.

72. Id. § 9A1.2(c)(2); see also id. § 9E1.2 (describing general limitations designed to ensure that organization can pay fine). For a discussion of these general limitations, see infra notes 113-22 and accompanying text.
whether to put the organization on probation.\textsuperscript{73} The following sections discuss in detail how a court will make such determinations.

\section*{A. Fines}

1. \textit{"Criminal Purpose Organizations"}

First the court must determine if the organization is a "criminal purpose organization."\textsuperscript{74} If the court finds that the organization "operated primarily for a criminal purpose or primarily by criminal means,"\textsuperscript{75} then it must fine the organization as a "criminal purpose organization." The amount of the fine must be "sufficient to divest the organization of all of its net assets."\textsuperscript{76} However, this fine cannot be greater than the statutory maximum for the offense.\textsuperscript{77}

2. \textit{All Other Organizations}

For all other organizations, the court must follow a step-by-step process in determining whether to impose a fine.\textsuperscript{78} Initially, the court must determine the primary offense level, then consider the effect of any applicable aggravating and mitigating factors on the offense level and finally calculate the resulting fine, subject to other limitations.\textsuperscript{79} These determinations are briefly discussed in the next section.

\begin{itemize}
\item \textsuperscript{73} Id. § 9A1.2(d); see also id. § 9F (defining mandatory and permissive uses of organizational probation and appropriate conditions of probation). For a discussion of the sentence of organizational probation, see infra notes 123-40 and accompanying text.
\item \textsuperscript{74} Proposed U.S.S.G., supra note 1, § 9B1.1 (presenting section entitled "Determining the Fine-Criminal Purpose Organizations").
\item \textsuperscript{75} Id. The court makes this determination by examining "the nature and circumstances of the offense and the history and characteristics of the organization." Id.
\item \textsuperscript{76} Id. § 9B1.1. The net assets of a "criminal purpose organization" are "the assets remaining after payments of all legitimate claims against assets by known innocent bona fide creditors." Id. § 9B1.1 application note.
\item \textsuperscript{77} Id. § 9B1.1. Under the Proposed Guidelines, the statutory maximum is determined with reference to 18 U.S.C. § 3571(c), which is entitled "Fines for Organizations." Id. § 9E1.2, application note 2 (determining fines with reference to statutory maximum allowed by 18 U.S.C. § 3571(c)). The statutory maximum is the \textit{greatest} of (1) the amount specified in the law defining the substantive offense, (2) twice the pecuniary gain or loss from the offense or (3) a default amount according to the offense class, e.g. $500,000 for a felony. 18 U.S.C. § 3571(c),(d) (1988).
\item \textsuperscript{78} Proposed U.S.S.G., supra note 1, § 9B2.1 (outlining process to determine fine for non-criminal purpose organization).
\item \textsuperscript{79} For a discussion of the primary offense level determination and aggravating and mitigating adjustment factors, see infra notes 80-122 and accompanying text.
\end{itemize}
a. Primary Offense Level

Under the Proposed Guidelines, all environmental offenses fall into one of six categories. Each category, except for one, has a “base offense level,” which is a number indicating the relative seriousness of the offenses in that category. Some categories contain additional “specific offense characteristics” which, if present, increase the base offense level.

For example, if the offense falls under the category of “Mishandling of Hazardous or Toxic Substances: Recordkeeping, Tampering, and Falsification,” then the base offense level is eight. However, if the specific offense characteristic, defined as “result[ing] in a substantial likelihood of death or serious bodily injury,” is present, then the base offense level increases by nine. The resulting new offense level is seventeen.

b. Aggravating Factors

The primary offense level, adjusted for any specific offense characteristics, must then be increased if the court finds that aggravating circumstances are present. Under the Proposed Guidelines, management involvement in the offense, an organization’s past civil and criminal en-

80. Proposed U.S.S.G., supra note 1, § 9B2.1(b). The categories range from “Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides, or Other Pollutants” to “Simple Recordkeeping and Reporting” offenses. Id. The commentary lists statutory provisions defining substantive offenses, but the list is not exclusive, as it refers to other statutory provisions listed in the Statutory Index (U.S.S.G., supra note 25, App. A). Id.

81. See Proposed U.S.S.G., supra note 1, § 9B2.1(b) (establishing base offense levels). In determining the base offense levels for different crimes, the Sentencing Commission used empirical data and statutory language that indicated distinctions between crimes. See U.S.S.G., supra note 25, 1A introductory commentary n.3. The Advisory Group left the base offense level for the Wildlife Violations category blank. Proposed U.S.S.G., supra note 1, § 9B2.1(b)(5)(A). The enacted Guidelines will have to fill in the base offense level for this category in order to make fine determinations.


83. Id. § 9B2.1(b)(2)(A).
84. Id. § 9B2.1(b)(2)(B)(ii).
85. Id. § 9C1.1.
86. Id. § 9C1.1(a). Involvement by “substantial authority personnel” is more serious (an offense level increase of six) than involvement by other supervisory personnel (increase of one to four levels). Id. “Substantial authority personnel” are those employees who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel, individuals who exercise substantial authority . . . and any other individuals who, although not a part of an organization’s management, nevertheless exercise substantial discretion when acting within the scope of their authority . . . .

Id. § 9A1.2 commentary n.2(k). The court must determine whether an employee meets this definition on a case-by-case basis. Id. § 9C1.1 commentary. However,
environmental record,\textsuperscript{87} violation of an order,\textsuperscript{88} concealment of the offense\textsuperscript{89} and the absence of an environmental compliance program are all specifically listed as aggravating circumstances.\textsuperscript{90}

c. Mitigating Factors

Next, the court must reduce the adjusted offense level if it determines that mitigating factors are present.\textsuperscript{91} The Proposed Guidelines specify three mitigating factors: cooperation with authorities and self-reporting of violations,\textsuperscript{92} remedial assistance to victims beyond that which is legally re-
quired from demonstration of a "Commitment to Environmental Compliance." Of these mitigating factors, "Commitment to Environmental Compliance" is the most significant and controversial one. To have a "Commitment to Environmental Compliance," an organization must be able to demonstrate the following seven factors: (1) daily attention to compliance with environmental laws and regulations by line management; (2) integration of environmental policies, standards and procedures in the daily routine of its employees; (3) auditing, monitoring, reporting and tracking systems that assess and improve environmental compliance; (4) programs to update, train and evaluate employees regarding environmental compliance; (5) appropriate rewards provided to employees and agents for compliance with environmental policies; (6) appropriate discipline of employees for violations; and (7) continuing evaluation and improvement in compliance areas. An organization may also try to obtain additional mitigation, up to the maximum allowed, by demonstrating innovative and effective approaches to compliance not covered by the required factors. However, in these cases, the organization bears a difficult burden in proving that such approaches contribute to compliance.

93. Id. § 9C1.2(c).
94. Id. § 9C1.2(a); see also id. § 9D1.1 (setting forth factors that organization must demonstrate to establish commitment to environmental compliance).
95. See id. § 9C1.2(a) (providing for up to eight level reduction in offense level if satisfied).
96. For a discussion of criticisms against the "Commitment to Environmental Compliance" mitigator, see infra notes 201, 216-25 and accompanying text.
97. Proposed U.S.S.G., supra note 1, § 9D1.1(a)(1). Line management includes "executive and operating officers at all levels." Id.
98. Id. § 9D1.1(a)(2). This factor also requires that employees report suspected environmental violations and that the organization keeps records of such reports. Id.
99. Id. § 9D1.1(a)(3). The Proposed Guidelines envision the independent auditing by non-line management personnel, as well as random and surprise audits. Id. § 9D1.1(a)(3)(i). Measures to protect whistleblowers are also required. Id. § 9D1.1(a)(3)(iii).
100. Id. § 9D1.1(a)(4). Training and evaluation of employees must encompass extra-legal requirements such as organizational policy and ethical standards. Id. § 9D1.1(a)(4)(ii).
101. Id. § 9D1.1(a)(5). Other incentive-based sales and production programs must be consistent with environmental compliance programs. Id.
102. Id. § 9D1.1(a)(6). This includes reporting employee and agent violations to law enforcement authorities. Id.
103. Id. § 9D1.1(a)(7). The Proposed Guidelines require an organizational process, such as "a periodic, external evaluation of the organization's overall programmatic compliance effort," to satisfy this factor. Id.
104. Id. § 9D1.1(a)(8). However, the Proposed Guidelines do not define "innovative approaches." Id.
105. Id.
If the organization fails to satisfy substantially any of the above seven factors, then no mitigation credit under this section is awarded. Furthermore, "high-level personnel" involvement in the offense will also create a rebuttable presumption that the organization is not committed to environmental compliance. On the other hand, if all the factors are substantially satisfied, then the mitigation credit further depends on the degree of organizational commitment and on the size and type of the organization.

d. Fine Calculation

After adjusting the offense level for mitigating factors, the court must next determine the appropriate fine level, subject to several limitations.

i. General Calculations and Limitations

The adjusted offense level for each count is placed into an Offense Level Fine Table to determine the maximum statutory fine percentage

106. Id. § 9C1.2(a). The organization must demonstrate that all of the seven factors were present prior to the offense in order to receive mitigation credit. Id. 107. Id. § 9C1.2(a).

"High-level personnel of the organization" are defined as individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director, an executive officer, an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. Id. § 9A1.2 n.2(e).

108. Id. § 9C1.2(a). For example, a very small business manager may be able to use a checklist for an audit, informally train staff and monitor compliance during the course of regular management duties. See id. § 9D1.1 commentary cmt. 3 (noting that "reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require, for example, a full-time audit department, a training staff, an active compliance monitoring staff, and computer systems for tracking the resolution of compliance issues"); see also id. § 9D1.1(a)(4), (5), (7) (explicitly including size and type of organization as factors to consider).

109. Id. § 9E1.1. The Proposed Guidelines set the Offense Level Fine Table as follows:

<table>
<thead>
<tr>
<th>Offense Level</th>
<th>% Max. Stat. Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-6</td>
<td>10</td>
</tr>
<tr>
<td>7</td>
<td>10-20</td>
</tr>
<tr>
<td>8</td>
<td>15-25</td>
</tr>
<tr>
<td>9</td>
<td>20-30</td>
</tr>
<tr>
<td>10</td>
<td>25-35</td>
</tr>
<tr>
<td>11</td>
<td>30-40</td>
</tr>
<tr>
<td>12</td>
<td>30-50</td>
</tr>
<tr>
<td>13</td>
<td>35-55</td>
</tr>
<tr>
<td>14</td>
<td>40-60</td>
</tr>
<tr>
<td>15</td>
<td>45-65</td>
</tr>
<tr>
<td>16</td>
<td>50-70</td>
</tr>
<tr>
<td>17</td>
<td>55-75</td>
</tr>
</tbody>
</table>
range from which the court can choose the fine. Mitigating factors may not reduce the offense level by more than fifty percent. However, it is possible that mitigating factors may reduce the fine amount by more than fifty percent, except in the case of knowing endangerment violations.

The court must then choose the fine from the greater of: (1) the amount as determined by the table, or (2) any economic gain to the corporation, plus the costs directly attributed to the violation. However, the court must reduce the fine, if necessary to protect the ability of the organization to pay restitution to the victims. For example, in certain circumstances, the court may reduce the amount if the fine "would result in the liquidation or cessation of all or a significant part of the business operations of the [organization] due to the [organization's] inability to pay the fine . . . ."

ii. Multiple Count Convictions

Fines for multiple counts are generally cumulative. However, a court may treat multiple counts as a single count for sentencing purposes, if the counts are excessively repetitive and "relat[e] to a course of offense behavior that is ongoing or continuous in nature and does not involve

<table>
<thead>
<tr>
<th>Count</th>
<th>Fine Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>60-80</td>
</tr>
<tr>
<td>19</td>
<td>65-85</td>
</tr>
<tr>
<td>20</td>
<td>70-90</td>
</tr>
<tr>
<td>21</td>
<td>75-95</td>
</tr>
<tr>
<td>22</td>
<td>80-100</td>
</tr>
<tr>
<td>23</td>
<td>85-100</td>
</tr>
<tr>
<td>24 or more</td>
<td>100</td>
</tr>
</tbody>
</table>

Id. The Advisory Group was divided over the appropriate percentage ranges for each offense level. Id. For a discussion of the maximum statutory fine under the Proposed Guidelines, see supra note 77 and accompanying text.

110. Id. § 9E1.2(b).

112. Id. For example, suppose the adjusted offense level before mitigation was 20, the offense was not a knowing endangerment violation and the available mitigation credits totaled 12. The 50% offense level mitigation limitation would reduce the final offense level to 10. This 50% reduction in offense level could result in a 62.5% reduction in the actual fine (from 80% of maximum to 30%). Id. § 9E1.1 (Offense Level Fine Table). Fines for knowing endangerment violations may be reduced by a maximum of 50% of the fine level. Id. § 9E1.2(b).

113. Id. § 9E1.2(c). The Advisory Group was divided over whether costs of the offense should be factored in with economic gain to the organization. Id. For a discussion of the "economic gain plus costs" theory of defining fines, see supra notes 61-65 and accompanying text.

114. Id. § 9E1.2(d). Thus, restitution indirectly takes sentencing priority over the imposition of fines.

115. Id. § 9E1.2(d)(1). The organization may not qualify for this reduction if it is a "criminal purpose organization" or a recidivist. Id. § 9E1.2(d)(2), (3). In all cases, the reduction may not be more than necessary to prevent the liquidation or cessation of operations. Id.

116. Id. § 9E1.2(a). The organization would remain convicted of multiple counts but would be fined as if convicted of a single count, with the fine to be divided proportionately among the repetitive counts. Id.
'independent volitional acts.' For example, negligent discharge of pollutants from a leaky pipe, that lasts for several months and where no manager knew or should have known of the discharge, should not result in cumulative fines for each day of the violation.

Under other circumstances, if the organization violates both environmental and non-environmental statutes and/or regulations, the fines for the offenses "should be" determined separately, using the respective applicable Guidelines. However, for "closely interrelated offenses," the fine is based on whichever offense carries the greater fine and then is adjusted by any specific offense characteristics of the lesser-fined offense. For example, a conspiracy to conceal discharge violations and concealment of a discharge violation in furtherance of the conspiracy are "closely interrelated offenses." Accordingly, the fine is based upon the offense with the heightened fine amount and adjusted using the offense characteristics of the lesser offense.

117. Id. § 9E1.2(a). The Proposed Guidelines do not define "independent volitional acts," but do provide the following example: An organization intentionally dumps pollutants into a river for a "sustained period." Failure to fix this known violation, once known to the organization, should constitute independent volitional acts. Id. § 9E1.2 commentary cmt. 2. The court should also consider clear negligence by an organization in failing to detect the violation. Id.

118. Id. § 9E1.2 commentary cmt. 1. However, the court must make sure the total fine reflects distinct violations, the seriousness of the violations and the organization's culpability. Id. § 9E1.2(a).

119. Id. § 9B2.1(b) commentary n.2.

120. "Closely interrelated offenses" are defined as "[a]ll counts involving substantially the same harm." U.S.S.G., supra note 25, § 3D1.2. Counts involve substantially the same harm if they meet any of the following situations:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss... or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Id. at § 3D1.2(a)-(d).

121. Proposed U.S.S.G., supra note 1, § 9B1.2(b) commentary n.2.

122. See U.S.S.G., supra note 25, § 3D1.2 n.4, ex. 1 (providing similar example for extortion). The two offenses are "closely interrelated" under subsection (b) of § 3D1.2. Id.
B. Probation

1. When Probation is Imposed

After determining the applicable fines, a court may impose a sentence of probation on an organization. However, the Proposed Guidelines require courts to impose probation in any of the following circumstances:

(1) to ensure that the organization will be able to pay the fine imposed;
(2) to implement penalties such as restitution, remedial orders or community service;
(3) when the organization does not have a compliance program;
(4) to reduce the likelihood of future violations;
(5) when the organization engaged in similar misconduct within the last five years;
(6) when the same high-level personnel participated in both the offense and similar misconduct within the last five years;
(7) when the organization is not fined; or
(8) when other sentencing purposes will be furthered.

The term of probation must not be longer than five years, but it must be at least one year if the offense is a felony.

2. Probation Conditions

If the court imposes probation, the Proposed Guidelines provide for both mandatory and permissive conditions, depending on the type of offense and the reason for probation. An example of a mandatory condition is a requirement that an organization shall not commit a crime during probation. Further, if the court imposes probation for a felony, then it must impose at least one of the following conditions: a fine, restitution, remedial orders or community service; or it may impose other conditions.

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123. Id. § 8B1 (providing that court may impose probation as a remedy for criminal conduct).
125. Id. These penalties may be imposed for environmental violations under the existing Organizational Guidelines. For a discussion of the existing Organizational Guidelines, see supra notes 34-38 and accompanying text.
126. Id. § 9F1.1(a)(3). For a discussion of what constitutes a compliance program, see supra notes 97-103 and accompanying text.
127. Id. § 9F1.1(a)(4).
128. Id. § 9F1.1(a)(5). The Advisory Group was divided over whether civil and administrative violations should be considered for purposes of imposing mandatory probation for similar organizational misconduct. Id. For a definition of "similar misconduct," see supra note 87.
129. Id. § 9F1.1(a)(6).
130. Id. § 9F1.1(a)(7).
131. Id. § 9F1.1(a)(8). These other purposes of sentencing are set forth in 18 U.S.C. § 3553(a)(2).
132. Id. § 9F1.2(a)(1), (2). The term of probation should not be longer "than necessary to accomplish the court's specific objective in imposing ... probation." Id. commentary, application note.
133. Id. § 9F1.3(a) (referring to statutory conditions of probation in 18 U.S.C. § 3563(a)(1)).
When a court sentences an organization to probation because it lacks an effective environmental compliance program, or because the court wants to ensure that future violations are unlikely to occur, the court must require the organization to develop a compliance program. The program must be satisfactory both to the court and to the government. Along with that condition, the organization is required to inform its employees, its shareholders and the public of its offense and subsequent compliance program. The organization also must report periodically to the government on its compliance activities and may have to allow the government to review its books, records, facilities and compliance activities.

In addition to the preceding conditions of probation, the Proposed Guidelines permit other probationary conditions. A court has discretion to impose any probationary conditions that "(1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing." This discretion could include requiring the publication of the offense.

IV. CRITICAL ANALYSIS

A. Comparison to the First Draft

The most significant change in the Proposed Guidelines from the First Draft is the change in the basic fine structure and method of computation. First, the two drafts differ as to the proper method of calculating the base fine. The First Draft defined the base fine (before aggravation and mitigation) as the greater of: (1) the determined percentage of the maximum statutory fine; or (2) "economic gain plus cost." Under the

134. Id. § 9F1.3(b) (referring to 18 U.S.C. § 3563(a)(2), (b)). The court imposes the alternative statutory conditions only if it finds that a fine, restitution, or community service is unreasonable due to "extraordinary circumstances." Id.

135. Id. § 9F1.3(d). This is one of the most severely criticized aspects of the Proposed Guidelines. For a discussion of the criticisms, see infra notes 201, 216-225 and accompanying text.

136. Id. § 9F1.3(d)(1), (2), (4). If the proposed program is unsatisfactory, the court may use experts (at the organization’s expense) to develop a satisfactory program. Id. § 9F1.3(d)(3).

137. Id. § 9F1.3(d)(5).

138. Id. § 9F1.3(d)(6), (7).

139. Id. § 9F1.3(c). For example, the court may require the organization to report all of its financial transactions and records if necessary to ensure that monetary penalties are paid. Id. § 9F1.3(e)(1)-(3).

140. Id. § 9F1.4 policy statement.

141. See First Draft, supra note 2, Step I(a) (presenting calculations for initial baseline determinations).
Proposed Guidelines, the final fine is the greater of these two amounts.\footnote{142} Thus, aggravating and mitigating factors would have applied to fines based on "economic gain plus cost" under the First Draft,\footnote{143} but under the Proposed Guidelines such factors apply only to the offense levels, not to "economic gain plus cost" determinations.\footnote{144}

Second, the two drafts quantify offense levels, along with aggravators and mitigators differently. Instead of using numerical offense levels for specific offense types as in the Proposed Guidelines, the First Draft established base percentage ranges for fines.\footnote{145} For example, knowing endangerment offenses resulted in a base percentage of 90 to 100\% of the maximum statutory fine.\footnote{146} Under the Proposed Guidelines, such offenses result in a base offense level of twenty-four, which then is used to determine the fine percentage.\footnote{147} However, either approach results in approximately the same fine amount, absent any aggravating or mitigating circumstances.\footnote{148}

Similar to the computation of percentage ranges for offenses, the First Draft specified aggravating and mitigating factors in terms of percentages.\footnote{149} Under the First Draft, aggravating factors could have increased the base fine to greater than the statutory maximum.\footnote{150} This result is not possible under the Proposed Guidelines because they set the upper limit of the base fine as the statutory maximum.\footnote{151}

\footnote{142} Proposed U.S.S.G., supra note 1, § 9E1.2(c). This fine is subject to other limitations, however. For a discussion of the limitations on fines, see supra notes 113-22 and accompanying text.

\footnote{143} See First Draft, supra note 2, Steps II and III (demonstrating how aggravating and mitigating factors cause adjustments in base fine).

\footnote{144} See Proposed U.S.S.G., supra note 1, § 9C (requiring that aggravating and mitigating factors adjust offense level, not fine based on "economic gain plus cost").

\footnote{145} First Draft, supra note 2, Step I(a)(2) (Base Fine Table). No offense types in the First Draft, included specific offense characteristics, unlike certain categories under the Proposed Guidelines. Id. For a discussion of specific offense characteristics in the Proposed Guidelines, see supra notes 80-84 and accompanying text.

\footnote{146} Id. Step I(a)(2)(a) (presenting base percentage range for knowing endangerment offenses).

\footnote{147} See Proposed U.S.S.G., supra note 1, § 9B2.1(b)(1)(A) (knowing endangerment offenses result in base offense level of 24).

\footnote{148} Under the Proposed Guidelines, a knowing endangerment offense (base offense level-24), without aggravating or mitigating circumstances, results in a fine of 100\% of the statutory maximum. Id. § 9E1.1 (Offense Level Fine Table). For more discussion on determining the fine amount, see supra notes 74-122 and accompanying text.

\footnote{149} First Draft, supra note 2, Step II. The First Draft did not, however, contain specific percentage ranges for any aggravating or mitigating factor. Id.

\footnote{150} See id. (showing how aggravating factors increase base fine with no theoretical limit in either this Step or elsewhere in First Draft, even if base fine was determined from "economic gain plus cost").

\footnote{151} See Proposed U.S.S.G., supra note 1, §§ 9C, 9E1.1 (aggravating factors increase offense level, but Offense Level Fine Table creates 100\% ceiling on per-
Third, the First Draft limited the effect of mitigating factors differently than the Proposed Guidelines. Under the First Draft, mitigating factors could not have reduced the fine below "the greater of (a) fifty percent [50%] of the Base Fine . . . or (b) the economic gain from the offense . . . ." With the Proposed Guidelines, mitigating factors reduce the offense level, but not the base fine, and can result in fines of less than fifty percent of the primary offense level's corresponding "base fine." In addition, the Proposed Guidelines contain fewer aggravating and mitigating factors than the First Draft.

Finally, the Proposed Guidelines omit parts of the First Draft. The most significant omissions, at least in the context of theories of organizational sentencing, are the aggravating factor of scienter and the mitigating factor of absence of scienter. The First Draft's scienter aggravator provided for an increase in the base fine if an organization's employees or agents "knowingly engaged in conduct that violated the law under circumstances that evidenced at least a reckless indifference to legal requirements." Conversely, the absence of scienter mitigator reduced the base percentage of maximum statutory fine. For the body of the Offense Level Fine Table, see supra note 109.

152. First Draft, supra note 2, Step IV(a). The commentary to the First Draft provides the following example: If the base fine equaled $1,000,000 and the economic gain to the corporation was $600,000, mitigating factors could not reduce the fine below $600,000 (the gain to the corporation). Id. at commentary cmt. 1. However, if the economic gain was less than $500,000, mitigating factors could not reduce the fine below $500,000 (50% of base fine). Id.

153. For a discussion of the impact of mitigating factors in the fine calculation, under the Proposed Guidelines, see supra notes 91-108 and accompanying text.

154. Compare First Draft, supra note 2, Step II(c) (presenting aggravating factor of "threat to human life or safety") with Proposed U.S.S.G., supra note 1, § 9B2.1(b)(3)(B)(ii) (creating "substantial likelihood of death or serious bodily injury" as specific offense characteristic resulting in offense level increase of 11). Among the aggravating factors that did not survive revision of the First Draft are: threat to the environment, threat to human life or safety, scienter and absence of a permit. See First Draft, supra note 2, Step II(b)-(d), (j) (setting forth these factors). However, some of the omitted aggravating factors did become specific offense characteristics under the Proposed Guidelines. The Proposed Guidelines also eliminated the First Draft's mitigating factor of absence of scienter. See id. Step II(m) (setting forth this mitigating factor).

155. First Draft, supra note 2, Step II(d).

156. Id. Step II(m).

157. For this aggravator, "knowingly" meant a certain degree of knowledge about the criminal nature of the conduct. Id. Step II(d), commentary. This is a different definition of "knowingly" than followed by certain courts in organizational liability cases. For the definition of knowingly used by some courts in organizational liability cases, see supra notes 52-60 and accompanying text.

158. Id. Step II(d). The degree of aggravation would have depended on (1) the level of intent; (2) the level of employee who "knowingly" violated the statute; (3) how many employees "knew" and to what extent they knew of the violation; and (4) whether the violator was a "rogue employee," acting primarily for non-organizational purposes. Id. commentary.
fine, if the government did not prove reckless indifference (or "greater" intent) and the organization was strictly liable.159 In contrast, the Proposed Guidelines do not address, and thus, do not consider, the presence or absence of scienter as a respective aggravator or mitigator.

Apart from these major differences, the Proposed Guidelines track the language of the First Draft closely. Other than the above described differences, every significant definition remains the same.160 For example, both drafts contain essentially the same provisions regarding the "Commitment to Environmental Compliance" and organizational probation, with the exception that the Proposed Guidelines allow for some additional compliance mitigation credit if an organization successfully uses innovative approaches to environmental compliance.161

B. Comparison to the Organizational Guidelines

The Organizational Guidelines apply partially when organizations are sentenced for environmental offenses. Courts must use the Organizational Guidelines to determine whether to order restitution,162 remedial orders,163 community service,164 or notice to victims,165 regardless of the nature of the organizational offense. The fine provisions of the Organizational Guidelines, however, do not apply to environmental offenses.166

When they do apply, the Organizational Guidelines use a significantly different fine calculation method than that used by the Proposed Guidelines. The Organizational Guidelines define the base fine as the greater of: (1) the appropriate amount from its Offense Level Fine Table;167 (2) the pecuniary gain to the organization;168 or (3) the pecuniary loss caused

159. Id. Step II(m).
160. For a discussion of definitional and provisional differences between the First Draft and the Proposed Guidelines, see supra notes 155-56 and accompanying text.
161. Proposed U.S.S.G., supra note 1, §9D1.1(a)(8). However, the significance of this factor is limited by the heavy burden placed on the organization to demonstrate the additional utility of innovative approaches. For a discussion of the burden an organization bears in trying to obtain additional mitigation, see supra notes 104-05 and accompanying text.
162. U.S.S.G., supra note 25, §8B1.1. Restitution orders are designed to compensate identifiable victims of the offense. Id. § 8B introductory commentary. Restitution is mandatory under certain circumstances. Id. § 8B1.1.
163. Id. § 8B1.2. Remedial orders are designed to “remedy harm that has already occurred and to prevent future harm.” Id. § 8B1.2 commentary. Remedial orders are not mandatory under the Organizational Guidelines. See id. (noting lack of language making remedial orders mandatory).
164. See id. § 8B1.3 (recognizing community service as non-mandatory remedial device).
165. See id. § 8B1.4 (directing court to order notice to victims pursuant to U.S.S.G., supra note 25, § 5F1.4).
166. Id. § 8C2.1 background commentary.
167. Id. § 8C2.4(a)(1); see also id. § 8C2.4(d) (setting forth Offense Level Fine Table).
168. Id. § 8C2.4(a)(2).
by the organization. As previously discussed, the Proposed Guidelines do not follow this process, but rather determine the base fine first and then consider “economic gain plus cost.” Further, while using offense levels to calculate the appropriate fine under method one above, the Organizational Guidelines match offense levels with a specific fine amount, not with a percentage of the statutory maximum fine like under the Proposed Guidelines.

In addition to its different method of fine calculation, the Organizational Guidelines treat aggravating and mitigating factors differently than the Proposed Guidelines. Under the Organizational Guidelines, aggravating and mitigating factors are used in a separate determination of an organization’s “culpability score.” Factors that can increase the culpability score include an organization’s size, coupled with personnel tolerance of and involvement in the offense, an organization’s prior history, the violation of an order and an organization’s obstruction of justice. Factors decreasing the culpability score include an effective compliance program, organizational cooperation, self-reporting of the violation and organizational acceptance of responsibility. The adjusted culpability score results in minimum and maximum “multipliers” of the base fine, which in turn determine the appropriate fine range. Thus, in some cases, aggravating factors may increase the base fine by more than one hundred percent, while mitigating factors may in some cases result in a fine range of five to twenty percent of the base fine. Generally, 

169. See id. § 8C2.4(3) (limiting application to loss caused “intentionally, knowingly, or recklessly”).

170. For a discussion of fine determinations for non-criminal purpose organizations under the Proposed Guidelines, see supra notes 78-122 and accompanying text.

171. U.S.S.G., supra note 25, § 8C2.4(d). For example, under the Organization Guidelines Offense Level Fine Table, an offense level of 24 “merits” a base fine of $2,100,000. Id. Under the corresponding Proposed Guidelines table, the adjusted fine for an offense level of 24 is the statutory maximum. Proposed U.S.S.G., supra note 1, § 9E1.1.

172. U.S.S.G., supra note 25, § 8C2.5. Each organization starts with a culpability score of five which is then adjusted according to appropriate aggravating and mitigating circumstances. Id. § 8C2.5(a).

173. Id. § 8C2.5(b)-(c). For a discussion of aggravating circumstances under the Proposed Guidelines, see supra notes 85-90 and accompanying text.

174. Id. § 8C2.5(f), (g). For a discussion of mitigating circumstances under the Proposed Guidelines, see supra notes 91-108 and accompanying text.

175. Id. § 8C2.6. For example, an organization with a culpability score of 10 will face a fine range of two (minimum multiplier) to four (maximum multiplier) times the base fine. Id.

176. Id. In contrast, the Proposed Guidelines do not allow aggravating factors to increase the base fine beyond 100% of the statutory maximum. Proposed U.S.S.G., supra note 1, § 9E1.1. For a discussion of the Offense Level Fine Table and statutory fine percentages, see supra notes 109-10 and accompanying text.

177. U.S.S.G., supra note 25, § 8C2.6. As is the case with the Proposed Guidelines, under the Organizational Guidelines, the base fine may not be reduced to
under the Proposed Guidelines, base fine ranges are narrower.\textsuperscript{178} For example, the lowest adjusted offense level under the Proposed Guidelines results in a set fine of ten percent of the statutory maximum, with no fine range whatsoever.\textsuperscript{179}

Ultimately, the Organizational Guidelines limit fines to the statutory maximum, regardless of whether the base fine was determined by pecuniary gain, pecuniary loss or the tables.\textsuperscript{180} The Proposed Guidelines circumvent this limitation by requiring the minimum fine at least to equal "economic gain plus cost," subject to general limitations other than the statutory maximum.\textsuperscript{181} For example, given a felony offense, which results in economic/pecuniary gain to the organization of $600,000, an economic/pecuniary loss caused by the corporation of $300,000 and an applicable statutory maximum of $500,000,\textsuperscript{182} the Organizational Guidelines would impose a fine of $500,000.\textsuperscript{183} Given the same circumstances, the Proposed Guidelines would impose a fine of $900,000.\textsuperscript{184} This result demonstrates, therefore, that the Proposed Guidelines attempt to circumvent statutory maximums.

The Organizational Guidelines and the Proposed Guidelines also differ substantially in their respective treatment of compliance programs. The Organizational Guidelines state that an effective compliance program operates as a mitigator in determining the culpability score, but they do not define or describe such a program.\textsuperscript{185} In addition, high-level personnel participation in the offense precludes application of this mitigator zero by mitigating factors. \textit{Id.}; Proposed U.S.S.G., \textit{supra} note 1, § 9E1.1 (Offense Level Fine Table) (creating 10% minimum statutory fine, if imposed). The 50% offense level reduction limitation for mitigation under the Proposed Guidelines has no comparable equivalent under the Organizational Guidelines.

\textsuperscript{178} See Proposed U.S.S.G., \textit{supra} note 1, § 9E1.1 (indicating percentage ranges of maximum statutory fine).

\textsuperscript{179} See \textit{id.} § 9E1.1 (Offense Fine Level Table) (setting fine at 10% of statutory maximum for offense levels zero to six).

\textsuperscript{180} U.S.S.G., \textit{supra} note 25, § 8C3.1(b) ("Where the minimum guideline fine is greater than the maximum fine authorized by statute, the maximum fine authorized by statute shall be the guideline fine.").

\textsuperscript{181} Proposed U.S.S.G., \textit{supra} note 1, § 9E1.2(c). For a discussion of fine calculations under the Proposed Guidelines, see \textit{supra} notes 78-122 and accompanying text.

\textsuperscript{182} 18 U.S.C. § 3571(c) (1988). Five hundred thousand dollars is the felony default maximum under this statute, as long as the substantive offense does not provide for a greater maximum. \textit{Id.} For a discussion of the Proposed Guidelines approach to statutory maximum fines, see \textit{supra} note 77 and accompanying text.

\textsuperscript{183} For further discussion of fine determinations under the Organizational Guidelines, see \textit{supra} notes 167-69 and accompanying text.

\textsuperscript{184} For a discussion of fine determinations under the Proposed Guidelines, see \textit{supra} notes 113-15 and accompanying text.

\textsuperscript{185} U.S.S.G., \textit{supra} note 25, § 8C2.5(f). In contrast, the Proposed Guidelines set out seven detailed requirements for a compliance program to earn mitigation credit. Proposed U.S.S.G., \textit{supra} note 1, §§ 9C1.2(a), 9D1.1(a)(1)-(7). For a discussion of the Proposed Guidelines' approach to compliance programs, see \textit{supra} notes 95-108 and accompanying text.
under the Organizational Guidelines. Under the Proposed Guidelines, however, it results in a rebuttable presumption that the mitigator is not satisfied. Furthermore, the development of an effective compliance program may be a condition of probation under the Organizational Guidelines, while the Proposed Guidelines require such a condition in certain circumstances.

Despite these differences in the treatment of compliance programs, other probation provisions of the Proposed Guidelines are virtually identical to those of the Organizational Guidelines. It is evident that the Proposed Guidelines borrowed extensively from the Organizational Guidelines for its definitional sections and, occasionally, its operational sections.

C. Extent to Which the Proposed Guidelines Fulfill the Statutory Goals of the Sentencing Guidelines

The Sentencing Reform Act gave the Sentencing Commission the duty to fulfill certain sentencing goals. This section examines how well the Proposed Guidelines, published by the Advisory Group, meet these co-existing, yet conflicting goals.

186. U.S.S.G., supra note 25, § 8C2.5(f); Proposed U.S.S.G., supra note 1, § 9C1.2(a).

187. Compare U.S.S.G., supra note 25, § 8D1.4(c) ("If probation is ordered under . . . [certain circumstances], the following conditions may be appropriate: (1) The organization shall develop . . . a [compliance] program . . . .") (emphasis added)) with Proposed U.S.S.G., supra note 1, § 9F1.3(d) ("If probation is ordered under [certain circumstances], the court shall impose the conditions set forth in this paragraph . . . (1) The organization shall develop . . . a [compliance] program . . . .") (emphasis added)). The "certain circumstances" in both cases include a lack of an effective compliance program. U.S.S.G., supra note 25, § 8D1.1(a)(3); Proposed U.S.S.G., supra note 1, § 9F1.1(a)(3).


189. Compare U.S.S.G., supra note 25, § 8C1.1 with Proposed U.S.S.G., supra note 1, § 9B1.1. As an example of borrowing with regard to both types of sections, the Organizational Guidelines and Proposed Guidelines have nearly identical sections regarding "criminal purpose organizations." For a discussion of criminal purpose organizations under the Proposed Guidelines, see supra notes 74-77 and accompanying text.

The First Draft more than likely borrowed from the Organizational Guidelines, as well. For a discussion of linguistic similarities between the First Draft and the Proposed Guidelines, see supra notes 160-61 and accompanying text.

190. For a list of these goals and the relevant statutory provisions, see supra notes 17-24 and accompanying text.

1. **Sentence Reflects Seriousness of Offense, Promotes Respect for the Law and Provides Just Punishment**

   The first overriding goal of the Sentencing Guidelines is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." \(^{192}\) The Proposed Guidelines reflect the seriousness of the offense and promote respect for the law by having different primary offense levels for different categories of offenses\(^{193}\) and through increased fine percentage ranges for greater adjusted offense levels.\(^{194}\) The severity of the fine for criminal purpose organizations also indicates that the Proposed Guidelines consider such organizations the most severe offenders.\(^{195}\)

   Additionally, just punishment principles anticipate a sentence that is no more restrictive than necessary to achieve the social goals of sentencing.\(^{196}\) While the social goals behind environmental sentencing presently encourage stiffer sentences for environmental offenders,\(^{197}\) characterization of what constitutes just punishment is disputed by the proponents of the "optimal penalties" and the "economic gain plus cost" sentencing theories.\(^{198}\) The Proposed Guidelines reflect the latter approach, in that fines must at least equal "economic gain plus cost."\(^{199}\) Potential fines under this approach could be astronomical, in light of possible clean up costs. However, the Proposed Guidelines' general limitations on fines ensure that most organizations will be able to pay imposed fines and continue to operate.\(^{200}\)

   Furthermore, the Proposed Guidelines' treatment of compliance programs as conditions of probation also conflicts with the goal of just punish-
Imposing the development of a compliance program as a condition of probation in actuality works a "hidden fine" on the organization in terms of added costs.\textsuperscript{201} If an organization must develop a compliance program, the cost of such a program should be estimated and serve as a reduction of any fine imposed. Alternatively, the court could reserve jurisdiction over reducing the fine when the cost of such a program is demonstrated by the organization.

2. \textbf{Sentence Adequately Deters Criminal Conduct and Protects the Public from Further Crimes}

The Proposed Guidelines strongly emphasize deterrence and the prevention of further crimes through the "carrot and stick" approach found in the provisions defining specific offense characteristics, aggravating factors and mitigating factors. This approach is especially true for the "Commitment to Environmental Compliance provision."\textsuperscript{202} All of the required factors comprising this mitigator are designed to make the organization comply with environmental requirements and thus to self-deter future criminal conduct, as well as to encourage the self-reporting of violations.\textsuperscript{203} As for the "carrot" aspect encouraging self-deterrence and self-reporting, an organization can earn an eight level reduction in the adjusted offense level for having a satisfactory compliance program, even if a violation occurs.\textsuperscript{204} The complementary "stick" aspect is that an organization lacking a compliance program may face an increase of the adjusted offense level by four,\textsuperscript{205} with the added requirement of developing an effective compliance program as a condition of probation (resulting in more costs to the organization).\textsuperscript{206}

In addition, the Proposed Guidelines impose costs for non-deterrence through specific offense characteristics and aggravating factors such as prior criminal and civil compliance histories.\textsuperscript{207} Further, courts cannot

\begin{itemize}
  \item \textsuperscript{201} See \textit{id.} § 9D1.1(a) (describing steps that need to be taken to satisfy "Commitment to Environmental Compliance"). Additional hidden costs in the compliance programs, include developing the program, paying for any court-appointed experts, program implementation and revision, transactional costs for making records and facilities available to courts and the government. \textit{Id.}
  \item \textsuperscript{202} See \textit{id.} §§ 9C1.2(a), 9D (encouraging deterrence and prevention of future crime by use of aggravating and mitigating factors in area of compliance).
  \item \textsuperscript{203} See \textit{id.} § 9D1.1(a)(1)-(7) (noting factors required for present and future compliance, including self-auditing, self-reporting, self-discipline and self-improvement).
  \item \textsuperscript{204} Proposed U.S.S.G., \textit{supra} note 1, § 9C1.2(a). However, the reduction may not actually be eight levels because of the degree of substantial compliance and the general limitations on mitigation. \textit{Id.} §§ 9C1.2(a), 9E1.2(b). For a discussion on the mitigating factors, see \textit{supra} notes 91-108 and accompanying text.
  \item \textsuperscript{205} \textit{Id.} § 9C1.1(f).
  \item \textsuperscript{206} \textit{Id.} § 9F1.1(a)(3).
  \item \textsuperscript{207} \textit{Id.} § 9C1.1(b),(c).
\end{itemize}
reduce fines due to an organization's "inability" to pay the fine if the or-
organization is a recidivist. 208

3. Sentence Adequately Rehabilitates Defendant

Another sentencing goal is "to provide the defendant with needed
educational or vocational training, medical care, or other correctional
treatment in the most effective manner." 209 Because the Proposed Guide-
lines deal only with organizations, the organizations themselves can be
given only "other correctional treatment." 210 This goal is accomplished
through probation. Courts must impose probation when "advisable to en-
sure that changes are made within the organization to reduce the likely-
hood of future criminal conduct." 211

If probation is imposed to make such changes, a mandatory condition
of such probation is the development of an effective compliance pro-
gram. 212 Such a condition will rehabilitate the organization by making it
more likely that future violations will be detected, if not prevented. 213
However, the goal of rehabilitating the organization through required
compliance program development and implementation conflicts with the
goal of just punishment as discussed earlier. 214

4. Sentences Are Certain and Fair

The Sentencing Reform Act also proposed that guidelines provide
certain and fair sentences. 215 The Proposed Guidelines attempt to com-
promise between absolute certainty and uncertainty, and between cer-
tainty and fairness. For example, the Proposed Guidelines impose fines
from $50,000 to $500,000 per offense if "economic gain plus costs" and
other limitations are ignored. 216 This approach provides for a more cer-

208. See id. § 9E1.2(d)(3) (disallowing permissive reductions in fine if organi-
zation has engaged in "sustained pattern of serious environmental violations").


210. See Maurer, supra note 191, at 831-32 (noting that organizations cannot
rationally receive educational and vocational training). However, individuals
within the organization may be given educational and vocational training through
effective compliance programs. Id.

211. Proposed U.S.S.G., supra note 1, § 9F1.1(a)(4). For a more complete
discussion of probation for organizations convicted of environmental offenses, see
supra notes 123-40 and accompanying text.

212. Id. § 9F1.3(d). For a discussion of an effective compliance program
under the Proposed Guidelines, see supra notes 97-103 and accompanying text.

213. See id. § 9F1.3(d)(1) (requiring condition that program be effective
enough "to detect and prevent future violations of law").

214. For discussion on the goal of just punishment, see supra notes 192-201
and accompanying text.


216. See Proposed U.S.S.G., supra note 1, § 9E1.1 (Offense Level Fine Table)
(stating minimum and maximum percentages of maximum statutory fine). The
smallest maximum statutory fine, determined with reference to 18 U.S.C.
§ 3571(c), and ignoring subpart (d), as directed by the Commentary to the Pro-
tain range of fines than that currently provided by the Organizational Guidelines. Further, prescribed offense levels, specific offense characteristics, definitional sections and specific step-by-step fine calculations inevitably lead to more certainty than the current rather ad-hoc system.

In addition, fairness to the public, including organizations, is consistent with just punishment. Presumably, the public, and organizations, would consider it unfair if its desires were frustrated by the Proposed Guidelines. As a result, the Proposed Guidelines attempt to be fair to organizations by reducing fines for mitigating factors and generally by trying to make sure that non-criminal purpose and non-recidivist organizations are not driven out of business by excessive fines.

However, the imposition of "hidden" costs, by requiring organizations to create effective compliance programs while not otherwise recognizing these costs, perpetuates unfairness in the Proposed Guidelines. A court's failure to consider other costs, such as previously imposed civil fines, may not be only unfair, but in certain circumstances, also a violation of constitutional double jeopardy and due process rights. Likewise, it is arguably unfair to disallow mitigation when the organization is held strictly liable, especially if such a conviction results in the same fine as if

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217. See Otto G. Obermaier, A Practical Partnership, NAT'L L.J., Nov. 11, 1991, at 13 (noting uncertain range in Organizational Guidelines). Under similar assumptions, the Organizational Guidelines could impose fines from $250 to $290,000,000. Id.

218. Some cases, however, could lead to greater consumption of judicial time and resources as a result of increased judicial sentencing determinations.

219. For a discussion of just punishment, see supra notes 61-65 and accompanying text.

220. For a discussion of mitigating factors, see supra notes 91-108 and accompanying text.

221. Proposed U.S.S.G., supra note 1, § 9E.1.2(d). For a discussion of fine limitations based on the future viability of an organization, see supra note 114 and accompanying text.

222. See generally Proposed U.S.S.G., supra note 1, § 9E. The Proposed Guidelines do not require the courts to consider such costs in their fine or probation determinations, nor have anything to say on the subject.

223. See, e.g., United States v. Halper, 490 U.S. 435, 446-53 (1989) (holding that under double jeopardy and multiple punishment analysis, in certain circumstances, defendant may not be subject to disproportionately large civil sanction, if defendant has already been criminally punished for same conduct).

224. For a discussion of the scienter mitigator in the First Draft, see supra notes 155-59 and accompanying text.
5. Avoid Sentencing Disparities Among Similarly Situated Defendants While Allowing Individualized Sentences

Lastly, the other purposes of the Sentencing Reform Act include attempts to avoid sentencing disparities among similarly situated defendants while allowing individualized sentences when warranted. These purposes are generally met in the same manner as the concerns regarding

convicted for a similar offense but where high-level personnel in the organization also intended criminal consequences.\textsuperscript{225}

Finally, the auditing requirements of the “Commitment to Environmental Compliance” mitigator do not promote fair sentences.\textsuperscript{226} The Proposed Guidelines require audits as a component of the compliance mitigator, but do not ensure that such audits will not be used against the organization in a subsequent prosecution.\textsuperscript{227} Organizations that self-audit and self-report may thus self-prosecute. Consequently, it might be in an organization’s best interest to self-audit less thoroughly.\textsuperscript{228}

Voluntary organizational audits, therefore, should receive immunity against use in federal environmental prosecutions under the Proposed Guidelines. Several state statutes grant limited voluntary audit immunity.\textsuperscript{229} The federal agencies responsible for environmental enforcement (the Environmental Protection Agency and the Department of Justice) oppose such immunity, primarily because it would force prosecutors to bear the heavy burden of demonstrating that their evidence did not come from an immunized, voluntary audit.\textsuperscript{230}

\textsuperscript{225}. The alternative view is that any change should originate from the intent standard of the substantive offense, not the sentencing of the offense itself. For a discussion of this approach and other views of corporate vicarious liability, see supra notes 52-57 and accompanying text.

\textsuperscript{226}. See Proposed U.S.S.G., supra note 1, § 9D1.1(a)(3) (presenting auditing requirements but permitting no immunity provisions). For a general discussion of such auditing requirements, see supra note 99 and accompanying text.

\textsuperscript{227}. See id. § 9D1.1(a)(3) (noting lack of immunity provision). Instead, the Proposed Guidelines provide for mitigation credit if this factor and all other factors involved in the “Commitment to Environmental Compliance” mitigator are substantially satisfied. Id. § 9C1.2(a).

\textsuperscript{228}. See, e.g., William E. Callahan, The Best Intentions: Liability for Environmental Crimes, SMALL BUS. REP., July 1994, at 9 (indicating that organizations were concerned that their records “could be subpoenaed and used against them”); BNA, EPA, DOJ Hear Debate on Protecting Environmental Audits from Disclosure, DAILY REP. FOR EXECUTIVES, July 28, 1994, § A, at 143 (indicating that firms might do audits differently if subject to disclosure and that atmosphere of “adversarial enforcement” would pervade as opposed to “cooperative compliance”).

\textsuperscript{229}. Intent, Knowledge Key to Prosecution of Corporate Officers, DOJ Official Says, supra note 55, at 33.

\textsuperscript{230}. Id. Under the Supreme Court’s decision in Kastigar v. United States, prosecutors would have a heavy burden of showing that their evidence had a source independent of the immunized materials. Kastigar v. United States, 406 U.S. 441, 461-62 (1972).

However, the definition and potential application of fine provisions regarding "criminal purpose organizations" demonstrate that the Proposed Guidelines do not fully serve the purposes of avoiding sentencing disparities and allowing individualized sentences.

"Criminal purpose organizations" are those "operated primarily for a criminal purpose or primarily by criminal means." The Proposed Guidelines do not further define the terms "operated primarily." Does it mean that an organization must receive over fifty percent of its revenue from criminal ventures to be considered a "criminal purpose organization"? Or is a lesser percent appropriate? The Proposed Guidelines should be more specific in defining "criminal purpose organizations." Added specificity would help to prevent extreme sentencing disparity, such as when one organization receives a simple fine while another similarly situated organization is divested of all its net assets.

V. CONCLUSION

The Proposed Guidelines for environmental offenses committed by organizations provide a sound basis for actual guidelines, if enacted. They generally meet the statutory goals of the Sentencing Reform Act, especially certainty of sentencing and deterrence. Furthermore, they have evolved into a more simple structure than the Organizational Guidelines or the First Draft. However, several changes should be made. This Comment proposes that the Sentencing Commission amend the Proposed Guidelines to account for relative degrees of scienter, in the interest of fairness to organizations with lesser degrees of culpability. In addition, the Sen-

232. For a general discussion of how the Proposed Guidelines meet the certainty purpose of the Sentencing Reform Act, see supra notes 215-18 and accompanying text.

233. See Maurer, supra note 191, at 825-26 (criticizing Organizational Guidelines on same grounds). Maurer’s criticism is equally applicable to the Proposed Guidelines because the Proposed Guidelines define “criminal purpose organizations” exactly the same way as defined in the Organizational Guidelines. See Proposed U.S.S.G., supra note 1, § 9B1.1 (presenting definition of criminal purpose organization and fine determination); see also U.S.S.G., supra note 25, § 8C1.1 (presenting similar definition and fine determination for Organizational Guidelines).

234. Proposed U.S.S.G., supra note 1, § 9B1.1. This section further determines that “criminal purpose organizations” shall be stripped of their net assets, subject to statutory maximums. Id. For a thorough discussion of “criminal purpose organizations,” see supra notes 74-77 and accompanying text.

235. See Maurer, supra note 191, at 832 (suggesting, in context of Organizational Guidelines, that minimum income percentage derived from criminal activities is one factor for court to consider in determining whether organization is “criminal purpose organization”).

236. See Proposed U.S.S.G., supra note 1, § 9B1.1 (divesting “criminal purpose organization” of net assets); see also id. § 9E1.1 (calculating fines for other organizations with general limitation preventing fine from causing organization to cease operations); Maurer, supra note 191, at 826 (describing similar potential sentencing disparity in context of Organizational Guidelines).
sentencing Commission should amend and specify the attributes of "criminal purpose organizations" to prevent unwarranted disparities in sentencing. Finally, the Sentencing Commission should grant organizational immunity for voluntary environmental auditing, to facilitate cooperation between business and government in detecting and preventing environmental violations.

The Proposed Guidelines are a solid start towards fulfilling the goal of the Sentencing Reform Act in relation to organizational environmental offenses. In today's cloudy political climate, however, only time will tell if the Proposed Guidelines will be enacted. Even then, only time will allow us to determine whether the Proposed Guidelines will be effective in sentencing organizations convicted of environmental crimes.

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