Organizational Probation Under the Federal Sentencing Guidelines*

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ORGANIZATIONS CANNOT be incarcerated. The only available criminal sanctions for them, then, are fines, dissolution, and probation. Probation for organizations was formally codified into federal law in November 1991, when the U.S. Sentencing Commission added Chapter 8 to the U.S. sentencing guidelines. Chapter 8 generally covers the criminal sanctioning of federally convicted organizations, and Part D of Chapter 8 specifically sets forth for organizations the circumstances under which a sentence to probation is required, the length of the probation term, the conditions of probation, and factors related to the violation of organizational probation conditions. The purpose of this article is to describe the implementation of federal organizational probation during the first few years after its codification.

Legal Background for Organizational Probation

According to Lofquist (1993, pp. 160–161), before its codification in the guidelines, organizational probation was used for the first time in a federal criminal case in 1971 in *United States v. Atlantic Richfield Co.* (465 F.2d 58). U.S. District Court Judge James B. Parsons, Jr., broke jurisprudential ground by placing Atlantic Richfield on probation so that he could monitor the company's progress in complying with his order to develop an oil spill response program. Judge Parsons' innovation was widely copied by his colleagues, and by the middle 1980s, probation was ordered in approximately a fifth of all federal corporate convictions. Unfortunately, the legal soil in which Parsons tried to root his precedent—the Federal Probation Act of 1925 (18 U.S.C. §§3651-56)—was tenuous because it was intended originally for the rehabilitation of individuals, not organizations. As a result of this weakness, probation sentences for organizations often were successfully appealed on the grounds that they were not aimed solely at monitoring fine collection. Successful appellants generally argued that their probation conditions had nothing to do with the offense, that organizations were not properly subject to the intent of the Federal Probation Act, and that organizational offenders had the right to refuse the "grace" of probation and demand the original sentence (Baldwin, 1974; Levin, 1984; Gruner, 1988).

What seemed to emerge from these appeals was the common law principle asserting that organizational probation only could be established as a mechanism to monitor collection of fines and restitution and completion of community service. It therefore became clear by the later 1980s that if additional conditions of organizational probation were to be allowable—such as those mandating structural changes within convicted organizations—codification into law was necessary. Although the Commission had no mandate to do so, it nevertheless developed sophisticated guidelines for the use of organizational probation including the imposition of orders mandating the remedy of the organizational cause(s) associated with the criminal activity (Lofquist, 1993, pp. 160–161).

The result was the Commission's Section 8D1.1 of the guidelines, which states that the U.S. district court "shall" order a term of probation for organizations if it deems any of the following to be true:

1. Such a sentence is necessary to monitor the payment of restitution, enforce an order to remedy the cause of the offense, or ensure the completion of community service.
2. There may be problems in the collection of any monetary penalties (e.g., fine, restitution, special assessment) that remain unpaid at the time of sentencing.
3. The organization has 50 or more employees and does not have an effective program to detect and prevent future violations.
4. The organization within 5 years before sentencing engaged in any similar misconduct, as determined by a prior criminal adjudication.
5. An individual within high-level personnel of the organization participated in similar misconduct during the instant offense and at another time within 5

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years before sentencing (as determined by a previous criminal adjudication).

6. Such a sentence is necessary to ensure that changes within the organization are made to reduce the likelihood of future criminal conduct.

7. The sentence imposed does not include a fine.

8. It is necessary to promote one or more of the purposes of sentencing under 18 U.S.C. §3553 (a)(2)—the seriousness of the offense, respect for the law, just punishment, general or specific deterrence, protection of the public, and correctional treatment.

According to the guidelines (§8D1.2), when probation is ordered by the court, the minimum duration is 1 year and the maximum is 5. The conditions of organizational probation always include the provisions that no additional federal, state, or local legal violations occur and that any monetary penalties imposed at sentencing be paid within a reasonable time not to exceed 5 years. Any other conditions consistent with 1–8 above also may be imposed including ordering the organization to publicize the offense and to implement a program to avoid similar violations in the future (a "compliance" program).

Data for the Analysis

The Commission collected the data through federal probation officers in U.S. district courts. The information reflects the Commission's recorded population of convicted organizations sentenced under Chapter 8 of the guidelines through 1996, a total of 271 cases.[1] The "sentencing event" is the unit of analysis, which includes the sentencing of a single organization convicted of one or more offenses in the instant case. When more than one organization was involved in the same offense(s), each organization's sentencing is treated as a separate event.

An unknown number of organizational sentencing events during the period are not included. The major caveat, then, is that the conclusions stated here are based on the assumption that those missing cases do not paint an appreciably different picture of the outcomes of organizational sentencing events than are now represented in the data set. The data constitute the entirety of the Commission's recorded information about organizational guidelines sentencing for the time period.

Characteristics of the Convicted Organizations

Before presenting findings about the granting of organizational probation, it seems best to give the reader some idea about the general make-up of the organizations studied. Of the 271 convicted organizations, the most frequently represented business sectors were: Industrial (30), Motor Vehicles (29), General Sales (23), Food and Beverage (23), Mining/Oil Exploration (19), Shipping and Transportation (15), Electronics and Appliances (15), Clothing and Apparel (14), and Health and Human Services (11). Only seven of the sentenced organizations were openly traded companies. Virtually all (about 95 percent) of them were "closely held." An organization is closely held when "regardless of its size, relatively few individuals own it" (*Guidelines,* §8C3.4 Commentary). Among the 196 organizations for which information was available, about two-fifths (42 percent) had 10 or fewer employees, and about four-fifths (80 percent) had 50 or fewer employees. Only about one in seven (14 percent) had more than a hundred employees. And only 1 in 10 organizations was a recidivist. Thus, unlike the image of criminal organizations that the media has portrayed—large and complex with publicly traded stock, hundreds of stockholders, thousands of employees, and millions of dollars in annual sales—organizations criminally convicted in U.S. district courts imply a rather completely different image. In fact, they mostly are owned by only a few individuals, have fewer than 50 employees, and are first-time offenders.

There are probably several reasons for the discrepancy between the popular image of criminal organizations and the reality. Foremost, larger organizations most likely constitute only a small proportion of the universe of criminal organizations, and their relative infrequency among federal convictees is approximately proportionate to that low incidence (that is, they are not underrepresented and may be overrepresented). Earlier research (Rabe, 1995) found a similar lot in the universe of federally convicted organizations for the 3 years before the implementation of the guidelines. It also is possible that the federal government, through selective regulatory enforcement and prosecutorial discretion, may be less likely to pursue larger publicly traded organizations when they do violate the law. If pursued, larger organizations may be more likely to be charged with civil sanctions rather than criminal ones or they may be more adroit at heading off criminal indictments or hiding illegal behavior because of their greater resources. Whatever the reason(s), it is clear that the vast majority of organizations prosecuted and convicted by the federal government are small.

More than three-quarters (209) of the organizations acted alone in their offense (i.e., they did not collude with other firms). Only three firms were deemed to be "criminal purpose organizations," having as their primary purpose the commission of acts that violate federal law. The vast majority of the defendants (88 percent) were convicted after pleading guilty (including two organizations that pleaded *nolo contendre*). And more than four-fifths of the organizations, most of which cooperated with the authorities, accepted responsibility for their crime(s).

Organizational Probation

Probation Orders

Almost two-thirds (169) of the organizations were put on probation. Their lengths of probation varied considerably and are reported in figure 1. The average amount of probation time among those receiving it was 37.5 months and the median was 3 years. As figure 1 shows, virtually all firms were given probation for an exact number of years (e.g., 1, 2, 3). The most frequent length of probation ordered was the maximum of 60 months, a term given to 62 (37 percent) of the firms that received probation. Three of those firms (2 percent) were on probation for 4 years, 36 (22 percent) for 3 years, 29 (18 percent) for 2 years, and 35 (22 percent) for 1 year. One firm in the motor vehicle industry received probation for 3 months, which is less than the minimum required of 1 year.

Probation and Financial Penalties

Chapter 8 (Part C) of the guidelines specifies that restitution be imposed in all cases and that fines be imposed according to the severity of the offense(s) and the organization's culpability. Table 1 describes the kinds of financial penalties ordered according to whether probation also was ordered. Only 18 organizations received no financial penalty whatsoever *and* no probation. Of those organizations that did receive probation, 37 were not fined, 110 did not receive an order to pay restitution, and 15 received neither as part of their sentence. Fines for probationers ranged from $800 to $15.5 million, with the median at $25,000. Probationers' restitution orders ranged from $429 to $3.7 million, with the median at $50,000. Considering both probationers' fines and restitution orders combined, the range was $429 to $19.2 million and the median was $45,000.

Among those not receiving probation, 22 (21 percent) were not ordered to pay any fine and 83 were not ordered to pay any restitution. Among the nonprobationers, fines levied ranged from $1000 to $5.6 million (median = $40,000) and the restitution ordered ranged from $181 to $7.5 million (median = $20,000). Combining both fines and restitution for nonprobationers, the range was $1000 to $7.5 million (median = $50,000). In sum, based on logistic regression, there was no statistically significant relationship between the ordering of probation and the amount of the ordered fine, the amount of the ordered restitution, or the amount of both combined. However, logistic regression also reveals that persons receiving probation were about two and one-half times more likely to be ordered to pay restitution ($p = .003$) (but the order of probation was not related either to the order of a fine or the order of both fines and restitution).

Note that the most important variable associated with whether organizations were fined is whether the court considered them able to pay the fine without adversely affecting innocent parties such as victims and employees (see *Guidelines* §8C3.3). Based on logistic regression, firms that were deemed able to pay a fine were 96 times more likely to be imposed a fine ($p = .0000$). The ability to pay the fine explained, by itself, 37 percent of the variance in whether a fine was levied. Interestingly, although the guidelines demand that probation be ordered when no fine is imposed (see above), to the contrary, 22 organizations were not fined or ordered to probation (only one of which was deemed able to pay a fine).

FIGURE 1. NUMBER OF MONTHS PROBATION

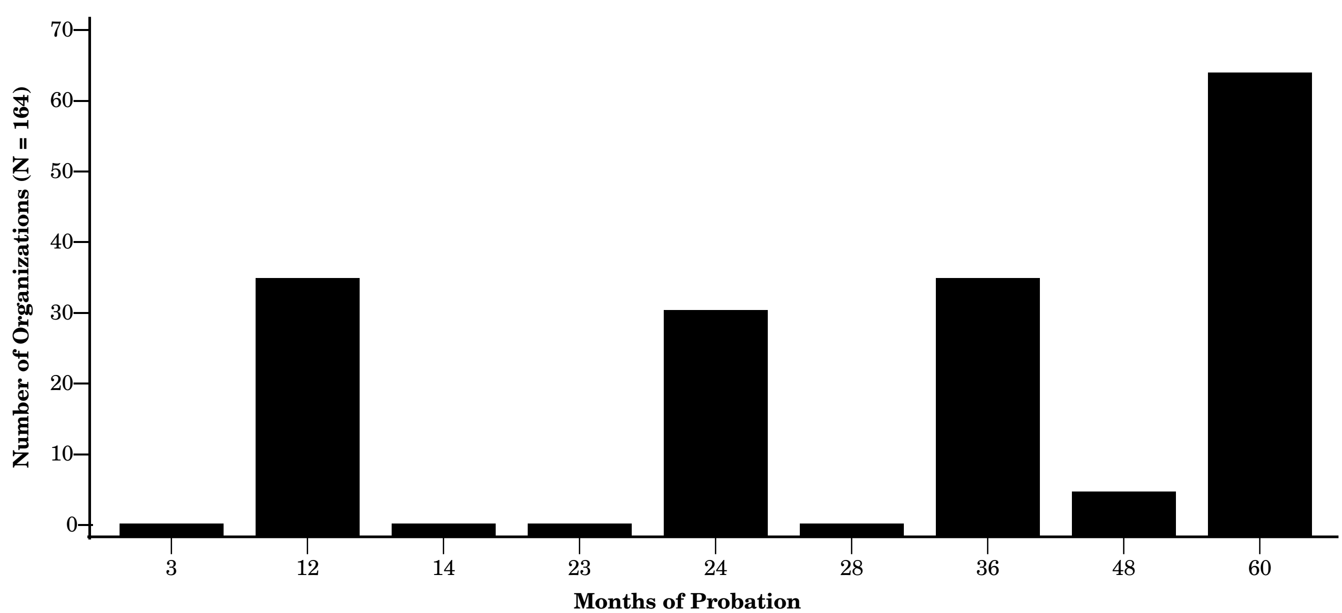

TABLE 1.
FINANCIAL PENALTIES
ORDERED FOR ORGANIZATIONS (N = 270)

Fines	**Organizations Sentenced to Probation (N = 169)**	**Organizations Not Sentenced to Probation (N = 101)**
None	37	22
Low	$800	$1000
High	$15.5 million	$5.6 million
Median	$25,000	$40,000
Average	$388,000	$359,000
Restitution		
None	110	83
Low	$429	$181
High	$3.7 million	$7.5 million
Median	$50,000	$20,000
Average	$375,000	$627,000
Fines and Restitution		
None	15	18
Low	$429	$1000
High	$19.2 million	$7.5 million
Median	$45,000	$50,000
Average	$476,000	$477

Probation and Offense Type

About three-quarters (202) of the convicted organizations could be classified as having committed one of four major offense types. By far, the most prevalent offense was “equity skimming,” which involves embezzling funds or property associated with federal housing loans; 123 (45 percent) of the convicted organizations were involved in this sort of crime. Eleven percent of them were involved in one of two other crimes—some sort of price fixing (31) or smuggling goods (30). Another seven percent (18) were involved in money laundering. The remaining quarter (69) were involved in one of a large variety of crimes including kickback schemes, criminal copyright and trademark infringements, racketeering, gambling, regulatory violations involving food and drugs, tax evasion, bank secrecy, and wildlife crime. No statistically significant relationship was observed between the ordering of probation and the type of offense although organizations involved in price fixing and money laundering were noticeably less likely to receive probation. For those organizations that received probation, the lengths of their probation terms also did not differ significantly according to the type of offense, a summary of which is as follows: 83 equity skimmers (average = 38 months; median = 36 months); 17 price fixers (average = 42 months; median = 36 months); 6 money launderers (average = 38 months; median = 42 months); and 18 smugglers (average = 24 months; median = 24 months).

Price fixers were clearly levied the highest fines (N = 30; average = $943,000; median = $187,000), almost twice the average given to equity skimmers (N = 89; average = $428,000; median = $24,000). The average fine for money launderers was $162,000 (N = 10; median = $19,000), for smugglers, $50,000 (N = 27; median = $16,000), and for the miscellaneous offense category, $185,000 (N = 55; median = $18,000).

Compliance Program Development as a Condition of Probation

As noted, the court has a number of options when deciding upon a convicted organization’s conditions of probation. Most notably, the court may require that the organization implement a program that attempts to promote future legal compliance (*Guidelines* §8D1.4(c)(1)). In addition, the court also may opt to order the organization to be sold, to be dissolved, or to be disbarred from future federal contracts. In only a few cases were organizations not put on probation and ordered to be dissolved or sold. In only one case was an organization not put on probation and disbarred from future federal contracts. For the 169 organizations that were put on probation, 60 (35 percent) were given an additional sentence. Thirty-four (20 percent) were ordered to develop a compliance program, 1 was ordered dissolved and 1 was ordered sold, 4 were disbarred from federal contracts, and 20 were given some other special condition of probation. Thus, the most prevalent special condition of probation, given in one in five probation sentences, was an order to develop a compliance program. It was given to 14 (17 percent) of the equity skimmers, 5 (29 percent) of the price fixers, none of the money launderers, 9 (50 percent) of the smugglers, and 6 (13 percent) of the other offender types. This special condition of probation could not be predicted statistically.

Conclusion

Federal trial court use of organizational probation has come a very long way since it was first implemented in *United States v. Atlantic Richfield Co.* in 1971. Chapter 8 (Part D) of the federal sentencing guidelines, put into effect 20 years later, statutorily has mandated organizational probation and thereby has given federal judges considerable power in sentencing convicted organizations.

This article describes the basic nature of the first few years of organizational probation under the guidelines. According to data supplied by the U.S. Sentencing Commission covering organizational crimes sentenced under Chapter 8, federal judges exercise the probation option in about two-thirds of such cases. Most are given probation for an even number of years, from 1 to 5, with the average at 37 months and the median at 36 months. The vast majority of convicted organizations are relatively small, closely held firms. Three-quarters of the convicted firms committed one of four basic types of offenses: equity skimming, price-fixing, smuggling goods, and money laundering; court-ordered probation was not related to offense type. The most important factor affecting whether convicted organizations were fined is whether they were deemed able to pay it. While the imposition of a fine was unrelated to the order of probation, those organizations ordered to pay restitution were more than twice as likely to be ordered to probation. One in five probationer organizations was ordered to develop a compliance program.

The implementation of Chapter 8, especially Part D, adds a viable alternative to the sanctions available to federal judges in the sentencing of organizations. As William Lofquist (1993, p. 163) has noted, "Its significance is rooted in its divergence from past practice and its linkage to theoretical understandings of the causes and control of organizational crime."

Note

[1]To avoid *ex post facto* concerns, federal trial courts generally did not sentence organizations under Chapter 8 unless their offense was committed *after* October 31, 1991. However, the earliest offense in the data set occurred in October 1989. The earliest sentencing date is May 13, 1992.

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