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I. INTRODUCTION

The U.S. Sentencing Commission\(^1\) has proposed amendments\(^2\) to its guidelines, policy statements and accompanying commentary that would now govern the sentencing of organizations, including corporations, in federal courts. In general, corporations convicted of federal crimes would face substantially larger fines,\(^3\) significant restitutionary requirements,\(^4\) and potential intervention in corporate management and financial operations under the proposed organizational probation provisions.\(^5\)

The proposed amendments (hereinafter “Proposed Guidelines”) could become effective as early as this year (during 1991), although not necessarily in their present form.\(^6\) Other federal sentencing

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1. The U.S. Sentencing Commission is an independent agency of the judicial branch of the U.S. Government empowered to promulgate sentencing guidelines and policy statements for federal courts. Sentencing Reform Act of 1984, 28 USC § 994(a) (1988). The Sentencing Reform Act requires that the sentencing court select a sentence from within the guideline range; however, if a particular case presents atypical features, the court may depart from the guidelines and sentence outside the prescribed range. 18 USC § 3553(b) (1988); see also, Fed Sent Guide Man 1 (West, 1991).


4. 54 Fed Reg, Part B at 47057 (cited in note 2).

5. Id, Parts B and C at 47057 and 47062.

6. Telephone interviews with Paul K. Martin, Communications Director of the U.S. Sentencing Commission (Aug 8 and 21, 1990 and Feb 20, 1991). Substantial public comment has been received on the Proposed Guidelines. Id. The Sentencing Commission has reviewed the comments which they received and is considering submitting the Proposed Guidelines, possibly with some revisions, to the U.S. Congress by May 1, 1991. If submitted by May 1, 1991, the Proposed Guidelines will automatically become effective on November 1, 1991, provided Congress takes no contrary action regarding them and provided the Sentencing
guidelines for individuals and corporate antitrust offenders became effective in November, 1987 and were recently amended in November, 1990.7

The Proposed Guidelines would apply in federal criminal cases where the convicted defendant is an organization,8 rather than an individual.9 The objectives of sentencing for organizations are identical to those currently for individuals.10 Accordingly, the Proposed Guidelines recognize that the desirable objectives of making restitution available to victims, deterring future criminal conduct and ensuring enforcement of sanctions11 may also be achieved in the sentencing of corporate defendants.

The focus of this comment is to examine whether the Proposed Guidelines will provide an effective deterrent to crimes attributed to corporations. More specifically, this comment will address the following questions: (1) is current sentencing of corporate defendants too lenient?; (2) will courts impose the enhanced, but non-mandatory, probation conditions in the Proposed Guidelines which are intended to ensure that a transgressor company will compensate society?; (3) will the Proposed Guidelines force socially responsible companies to pay for the criminal conduct of errant employees?; (4) will the Proposed Guidelines give rise to excessive sentences that will unfairly drive corporate businesses into bankruptcy?; and (5) will the Proposed Guidelines provide an adequate incentive for corporations to implement self-policing? In other words, this comment addresses whether the Proposed Guidelines add an exclamation point to the sentence for corporate crime.

This comment endeavors to distill much of the current12 published commentary and background materials regarding the Proposed Guidelines, the salient portions of the text of the Proposed Guidelines, and certain relevant judicial decisions. At the end of this comment, the author's conclusions and recommendations are

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8. “Organization” is defined as “a person other than an individual.” 18 USC § 18 (1988). This definition includes: corporations, unions, associations and partnerships. 54 Fed Reg at 47057 (cited in note 2).
9. Id at 47056.
10. Id. See also, 18 USC § 3553(a)(2) (1988).
11. 54 Fed Reg at 47056 (cited in note 2).
12. The analysis includes commentary published through July 1990.
II. DISCUSSION

A. Is Current Sentencing of Corporate Defendants Too Lenient?

According to the Chairman of the U.S. Sentencing Commission, Judge Wilkins, both the Commission and U.S. Congress generally believe that, historically, fines have been too low to deter crimes attributed to corporations. Judge Wilkins has stated that federal judges currently have unbridled authority to impose a wide range of penalties for any given offense. Consequently, according to Judge Wilkins, fines are often too low to prompt corporations to implement self-policing policies. Empirical data, as reported by the U.S. Justice Department, indicate that during 1975 and 1976, over 60 percent of the nation's largest corporations had at least one enforcement action initiated against them, and that over 40 percent of the manufacturing corporations engaged in repeated criminal violations. The U.S. Department of Defense reported that since 1983, 20 of the largest 100 defense contractors have been convicted in criminal cases. Furthermore, the Resolution Trust Corporation reported that during 1989, fraud was discovered in 60 percent of the savings and loans seized by the U.S. government.

Nevertheless, the number of organizations convicted and sentenced in the federal courts over the last few years was relatively small compared to the number of individuals, while the costs, both socially and financially, of corporate crimes were immense.

15. Id.
16. Id.
18. Etzioni, Legal Times at 21, col 1 (cited in note 17).
19. The Resolution Trust Corporation was established by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 to manage the U.S. savings and loan bailout.
20. Id.
21. Approximately 350 companies per year were convicted and sentenced. 54 Fed Reg at 47056 (cited in note 2).
22. Id.
23. Epstein, Pittsburgh Press at B1, col 1 (cited in note 14). According to Mr. Epstein, these immense costs include massive saving-and-loan scandals; criminal insider trading on Wall Street; pervasive frauds in defense contracts; unsafe foods, drugs and other products; unsafe working conditions; costly oil spills; and dumping of toxic wastes. Id.
Unfortunately, except for one guideline addressing fines for antitrust violations, the federal sentencing guidelines currently in effect do not govern the sentencing of corporations.\textsuperscript{24}

Historically, when corporations were convicted, the punishment rarely suited the crime.\textsuperscript{25} For example, when General Electric was convicted of price-fixing in the early 1960s, the corporation was fined approximately $450,000, which a former federal prosecutor characterized as “a three dollar ticket for overtime parking for a man with a $15,000 income.”\textsuperscript{26} Similarly, the fines imposed on 60 banks convicted of money-laundering since 1982 were so small that the convicted corporations could easily absorb the fines as part of the cost of doing business.\textsuperscript{27} In fact, in several cases top corporate executives have directed their employees to systematically violate criminal laws.\textsuperscript{28}

Prior to 1984, statutes often made it impossible for courts to impose large, and thus meaningful, fines upon convicted corporations.\textsuperscript{29} Consequently, prosecutors have been relegated to charging executives rather than the corporations because they could not obtain significant sentences against the companies.\textsuperscript{30} In fact, according to the U.S. Sentencing Commission staff, the average fine imposed in all corporate cases between 1984 and 1987 was approximately $48,000.\textsuperscript{31} Moreover, 67 percent of the penalties during this period were $10,000 or less.\textsuperscript{32}

The sizes of fines, in terms of dollars, that federal courts could impose were dramatically increased by the Criminal Fine Enforcement Act of 1984.\textsuperscript{33} In addition, penalties were subsequently increased by Congress for a variety of crimes committed by individu-

\textsuperscript{24} 54 Fed Reg at 47056 (cited in note 2).
\textsuperscript{25} Russell Mokhiber, \textit{Greedy Corporations: Criminals by Any Other Name}, Los Angeles Daily J 4, col 5 (Feb 28, 1986).
\textsuperscript{26} Mokhiber, Los Angeles Daily J at 4, col 5 (cited in note 25).
\textsuperscript{27} Etzioni, Legal Times at 21, col 1 (cited in note 17).
\textsuperscript{28} Id. “For example, the shenanigans at General Dynamics that cost the [U.S.] Defense Department hundreds of millions of dollars in the 1970s were orchestrated by its chief executive officer. At Beech-Nut, top management oversaw the systematic adulteration of apple juice sold to infants.” Id.
\textsuperscript{29} 54 Fed Reg at 47057 (cited in note 2).
\textsuperscript{30} Etzioni, Legal Times at 21, col 1 (cited in note 17).
\textsuperscript{32} Franklin, NY L J at 5, col 2 (cited in note 31).
als in organizations, or the organizations themselves. According to the U.S. Sentencing Commission, the average fine imposed in all corporate cases during 1988 rose to approximately $195,000. Furthermore, only 45 percent of the fines were less than $10,000.

Traditionally, courts and legislatures have proceeded under the assumption that a corporation could not be incarcerated. This is clear from the case law and legislative history under the sentencing statutes. However, such case law fails to cite any modern authority for such a proposition. Recognizing this juristic inconsistency, some federal judges have imposed probation on corporate defendants as a type of incarceration. For example, in *U.S. v Mitsubishi International Corp.*, the court required the defendant corporation to lend the services of an executive to a charitable organization for one year to develop an ex-offenders program. In *U.S. v Danilow Pastry Co.*, the court required the defendant bakery companies to donate bread to organizations for the needy. These

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34. 54 Fed Reg at 47057 (cite in note 2). For example, penalties were increased for crimes such as money laundering, major fraud and insider trading. See Money Laundering Control Act of 1986, Pub L No 99-570, subtitle H, 100 Stat 3218-35 (1986); Major Fraud Act of 1988, Publ L No 100-700, 102 Stat 4631 (1988); and Insider Trading and Securities Fraud Enforcement Act of 1988, Pub L No 100-704, 102 Stat 4677 (1988).


36. Id.


40. 677 F2d 785 (9th Cir 1982). Defendant corporations were indicted for numerous violations of the Elkins Act (49 USC §§ 11903 and 11915 ( ) ), including violations of railroad freight tariffs that resulted in favorable treatment for Mitsubishi. The district court sentenced each defendant corporation to the maximum fine of $20,000 on each count; however, upon the condition that the minimum fine of $1,000 be paid on each count, the balance of the fine was suspended and each corporation was placed on three years probation. Defendants appealed and challenged the legality of the sentence and the conditions of probation; the United States Court of Appeals for the 9th Circuit affirmed the district court's decision. *Mitsubishi*, 677 F2d at 786.

41. 563 F Supp 1159 (S D NY 1983). Six defendant wholesale bakery corporations were sentenced together with six individual defendants. All pleaded nolo contendere to raising and fixing prices and engaging in a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of the Sherman Act, 15 USC § 1 (1980); the district court imposed fines, suspended execution of jail terms, placed the defendants on probation, and ordered five of the six individuals and all of the corporations to perform community service as a condition of probation; the court ordered the corporate defendants to donate specified amounts of their pastry products to needy organizations, which organizations were to be designated in a subsequent order. *Danilow Pastry*, 563 F Supp at 1163.
types of sentences have been criticized, however, as too novel, as exceeding judicial power, or as converting the courts into charitable foundations.\(^\text{42}\)

In \textit{U.S. v Allegheny Bottling Co.},\(^\text{43}\) the court concluded that it would treat a corporation no less severely than it would any individual who similarly disregarded the law.\(^\text{44}\) Contrary to the traditional view at the time, the Allegheny court held that a corporation can be imprisoned.\(^\text{45}\) Furthermore, the court determined that, definitionally, imprisonment requires only that the corporation be restrained or immobilized.\(^\text{46}\)

The Allegheny court sentenced one company to prison, suspended the sentence, placed it on probation and ordered it to commit four high-salaried officials to two years of community service. Judge Doumar, who rendered the court’s opinion, told Allegheny Bottling Company’s lawyers that he imposed the sentence because the maximum $1 million fine he levied would likely be viewed by the corporation as simply a cost of doing business.\(^\text{47}\) Although the probation sentence was subsequently overturned, Judge Doumar commented that public reaction to this sentence indicated that many people felt that corporate sentencing had been inadequate, and that he thought that the Allegheny view might someday become the law.\(^\text{48}\)

The Proposed Guidelines provide a significant additional step in this direction. The U.S. Sentencing Commission has set forth two options (hereinafter “Options I and II”) for consideration in addressing fines.\(^\text{49}\) Option I bases the range of fines on the greater of (1) the loss, (2) the gain, or (3) a specified amount relating to the

\(^{42}\) Coffee, NJ L J at 18, col 1 (cited in note 39). In other words, courts were prone toward the use of unbridled judicial discretion in creative attempts to impose novel sanctions. Id at 9, col 1.

\(^{43}\) 695 F Supp 856 (E D Va 1988), aff’d in part, rev’d in part, 870 F2d 655 (4th Cir 1989), aff’d, 870 F2d 656 (4th Cir 1989), cert denied, 110 S Ct 68 (1989). Defendant soft drink bottling corporation was sentenced for engaging in a price-fixing conspiracy which violated the Sherman Act, 15 USC § 1 (1984); the corporation was sentenced to three years imprisonment and a fine of $1 million; execution of that sentence of imprisonment was suspended, and all but $950,000 of the fine was suspended; the defendant was placed on probation for a period of three years; as a special condition of the probation, four high-salaried officials were required to render two years of community service. Allegheny, 695 F Supp at 857-59.

\(^{44}\) Id at 858.

\(^{45}\) Id at 859.

\(^{46}\) Id at 861.

\(^{47}\) Carter, Natl L J at 4, col 1 (cited in note 37).

\(^{48}\) Epstein, Pittsburgh Press at B7, col 6 (cited in note 14).

\(^{49}\) 54 Fed Reg at 47058 (cited in note 2).
offense level, with adjustments based upon aggravating or mitigating factors as set forth in the Proposed Guidelines.\(^6\) Option II bases the fine range entirely upon the offense level, also with adjustments based upon aggravating or mitigating factors as set forth in the Proposed Guidelines.\(^8\) For the first time, the amount of fines will generally correlate with the amount of harm done by the company.\(^9\) Consequently, past practice may not necessarily reflect the rule in present and future practice.\(^6\)

Historically, sentencing may have been too lenient to provide an effective deterrent to crimes committed by corporations. However, recent court decisions, recent federal legislation and the Proposed Guidelines indicate that the trend is changing; future criminal conduct on the part of corporations may well lead to increasingly stern sentencing.

B. Will Courts Impose the Enhanced, But Non-Mandatory, Probation Conditions in the Proposed Guidelines Which Are Intended to Ensure That a Transgressor Company Will Compensate Society?

The Proposed Guidelines set forth the circumstances when corporate probation is authorized as a substantive sanction or as a means to enforce another sanction, such as a fine or a form of restitution.\(^6\) Probation is mandatory if, at the time of sentencing, the corporation has not completely paid its monetary penalties and restitution.\(^5\) If necessary, probation is also required for enforcement of restitution, a remedial order, or community service.\(^6\)

Furthermore, the Proposed Guidelines mandate probation for preventive purposes where (1) the corporation or a high-level management member has been convicted for a similar offense within the past five years; (2) the court concludes that the offense indicates a significant problem with the corporation's policies for preventing crime; or (3) the court concludes that "probation will significantly increase the likelihood of future compliance with the

\(^{50}\) Id.
\(^{51}\) Id at 47059.
\(^{52}\) Tracy Thompson, Corporations Face Stiffer Sentencing, Wash Post B1, col 5, at B4, col 3 (Nov 8, 1989).
\(^{53}\) 54 Fed Reg at 47057 (cited in note 2).
\(^{54}\) 54 Fed Reg at § 8D1.1, 47062 (cited in note 2).
\(^{55}\) Id.
\(^{56}\) Id.
The court may only impose conditions that are reasonably related to the nature of the offense and are necessary to achieve the court's purpose.\textsuperscript{58}

When corporations are placed on probation because they did not fully pay their fine, restitution, or special assessment by the time of sentencing, the Proposed Guidelines recommend (but do not require) that the court impose certain enhanced conditions (hereinafter "Enhanced Conditions") to secure the defendant's obligation to pay.\textsuperscript{59} These recommended Enhanced Conditions include the following: (1) requiring the corporation to submit to regular and unannounced audits and to the interrogation of knowledgeable employees; (2) prohibiting the corporation from paying any distributions to any equity holders, such as dividends, without prior court approval; (3) prohibiting the corporation, without court approval, from issuing new equity or debt securities, or obtaining additional financing outside the ordinary course of business; and (4) prohibiting any merger, consolidation, refinancing, liquidation, bankruptcy or other major transaction, without court approval.\textsuperscript{60}

Federal judges have found that probation is generally unworkable as a sanction for corporate defendants, although suitable for individual defendants.\textsuperscript{61} Courts rarely have imposed probation and have only used it to maintain noninterventionist jurisdiction over a matter until all fines were paid by the corporation.\textsuperscript{62} In fact, the incidence of probation sentences has been approximately 18 percent for convicted organizations for the period 1984 through 1987.\textsuperscript{63} This period includes enactment of the Criminal Fine Enforcement Act of 1984\textsuperscript{64} and substantial additional crime enforcement legislation pertaining to individuals in organizations.\textsuperscript{65}

According to the National Association of Manufacturers (hereinafter "NAM"), imposing the recommended Enhanced Conditions, i.e., placing corporations on probation for failing to pay their mon-

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\textsuperscript{57} Id.
\textsuperscript{58} Id at § 8D1.3(b), 47062.
\textsuperscript{59} Id at § 8D1.3(c), 47062.
\textsuperscript{60} Id.
\textsuperscript{61} Victoria Toensing, Corporations on Probation: Sentenced to Fail, NJ L J 7, col 1 (Feb 22, 1990).
\textsuperscript{62} Toensing, NJ L J at 7, col 1 (cited in note 61).
\textsuperscript{63} Mark A. Cohen, Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 10 Whittier L Rev 103, 139, n.5 (1988).
\textsuperscript{64} See note 33.
\textsuperscript{65} See note 33.
etary fines at the time of sentencing, would be the equivalent of having the courts run the commercial enterprise. NAM is especially concerned that the courts will delve into the traditional company decision-making provinces pertaining to dividend payments, financing, and mergers and acquisitions.

Under the Proposed Guidelines, a convicted corporation should, as a first priority, be forced to make restitution to identifiable victims of its criminal conduct. A corporation may be ordered to perform community service and provide an expeditious way of repairing the harm caused by the offense. The federal courts are divided as to whether a court may order a convicted corporation to engage in mandatory community service or to pay community restitution as a condition of probation.

Apparently, for large corporate violators the Proposed Guidelines tend to rely on probation sentences. Nevertheless, the Proposed Guidelines do not provide any guidance for a court to determine whether a company should pay dividends, issue new debt, or enter into a merger. They merely recommend that a defendant corporation submit its own compliance plan.

Additionally, unanswered legal questions may further impede imposition of probation. For example, if a court disagrees with a corporate board of directors' decision and issues a contrary order, and that order causes a depletion of company assets, can the court be sued by the shareholders for breach of fiduciary duty?

Also, courts may be uncertain as to what general purposes are to be achieved through probation. Theoretically, probation can disable corporations through the costs of convictions and can also effectuate restitution to victims. However, the Proposed Guidelines impose probation on a corporation as a whole and not directly on middle-management personnel who might be the actual culprits. If courts find that probation prompts corporations to monitor and

68. 54 Fed Reg Part B at 47057 (cited in note 2).
69. Id at § 8B1.3, 47058.
70. Community restitution is a payment to a charity or broad class of citizens, as opposed to a payment to specific victims of the defendant's offense.
72. 54 Fed Reg at § 8D1.3(d)(1), 47062 (cited in note 2).
take greater responsibility for middle-management activities, then courts will be more willing to impose it. Nevertheless, it has yet to be seen if this would occur.

Ultimately, the Proposed Guidelines represent a message not only to the corporate community, but also to the courts. In the modern era, both have increased responsibilities to the community. By providing clearer sentencing standards and objectives, the Proposed Guidelines continue the philosophies underlying recently augmented corporate crime enforcement legislation. Therefore, courts will likely impose the recommended Enhanced Conditions, but only on carefully considered case-by-case bases.

C. Will the Proposed Guidelines Force Socially-Responsible Companies to Pay for the Criminal Conduct of Errant Employees?

In 1909, in *New York Central & Hudson Railroad Co. v U.S.*, the United States Supreme Court concluded that a corporation may be held responsible for, and charged with, the knowledge and purposes of its agents acting within the authority conferred on them. More recently, in 1987 the court in *U.S. v Bank of New England, N.A.* held that a corporation may be charged for knowing violations of the law, even though no single agent intended to commit the offense or even knew of the existence of the operative facts resulting in the violation.

In *St. Johnsbury Trucking Co. v U.S.*, the court held that taking great care to prevent unlawful conduct does not necessarily constitute a defense. Furthermore, a corporation does not have to necessarily benefit from the criminal acts of its employees in order to be criminally liable as an entity. In *Old Monastery Co. v*

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74. 212 US 481 (1909). Defendant railroad company and its assistant traffic manager were convicted for payment of rebates and entering into an unlawful agreement and arrangement with its shippers. *New York Central*, 212 US at 489.

75. Id at 494-95.


77. Id at 855.

78. 220 F2d 393 (1st Cir 1955) (Magruder, J., concurring). (Motor vehicle common carrier was convicted of violating Interstate Commerce Commission regulations pertaining to labeling during transport of dangerous substances). *St. Johnsbury Trucking*, 220 F2d at 393.

79. Id at 398.

the court concluded that a corporation may be culpable even if it has been harmed by an employee’s actions.82

Currently, under the federal doctrine of imputed liability, two distinctly different types of potential corporate defendants exist: corporations whose management plans and participates in the criminal violations and corporations that invest heavily in compliance programs, while errant employees commit violations despite the company’s policies.83 Since the Proposed Guidelines do not distinguish between these two types of defendants, mandatory fines will be imposed even on a corporation that has done everything reasonably possible to prevent a crime.84

Furthermore, as previously noted, the Proposed Guidelines require probation where any high-level management member has been criminally convicted for a similar offense within the past five years.86 Therefore, mere coincidence of similarity of offense between the current conviction of the corporate defendant and that of prior management can cause the imposition of corporate probation.

Under the Proposed Guidelines, a substantial probability exists that some socially-responsible companies will be forced to pay for the criminal conduct of errant employees. However, the Proposed Guidelines do consider four mitigating factors in setting fines: (1) lack of knowledge of the offense by corporate management; (2) a meaningful compliance program in effect at the time of the offense; (3) prompt reporting of the offense or cooperation in the criminal investigation; and (4) steps taken by the corporation to remedy the harm, discipline individuals, and prevent a recurrence.88

Thus, truly socially-responsible companies may qualify under these mitigating factors and reduce the costs in the event of transgressions by such criminally-errant employees. Additionally, in some cases juries may be hesitant to render corporate convictions which would result in large fines on otherwise socially-responsible companies for the criminal conduct of errant employees.

81. 147 F2d 905 (4th Cir 1945), cert denied, 326 US 734. Defendant corporation and a number of people were convicted of conspiracy to violate the Emergency Price Control Act. Old Monastery, 147 F2d at 905.

82. Id at 908. In fact, the acts attributed to the corporation in this case, including the improper disbursement of $1,800 of corporate funds, were to its detriment. Id.


84. Church, Los Angeles Daily J 6, at col 3 (cited in note 66).

85. 54 Fed Reg at § 8D1.1(c)(1), 47062 (cited in note 2).

86. Id at § 8C2.1, 47059.
D. Will the Proposed Guidelines Prompt Excessive Sentences That Will Unfairly Drive Corporate Businesses Into Bankruptcy?

According to the NAM, the Proposed Guidelines are extremely harsh, punitive, unwarranted and will place many businesses on the threshold of insolvency.\textsuperscript{87} Furthermore, the NAM believes that the recommended Enhanced Conditions,\textsuperscript{88} which place corporations on probation for failing to fully pay their monetary fines at the time of sentencing, constitute overreaching.\textsuperscript{89} In addition, the NAM believes that probation will result in unusually strict supervision, the loss of jobs, and the eventual demise of any business faced with probation.\textsuperscript{90} Considering the potentially large fines in the Proposed Guidelines, the lack of set-off for restitution paid, and the fact that probation and restitution could last from one to five years,\textsuperscript{91} the NAM has concluded that imposition of these fines could dry up credit, prompt suppliers to cease deliveries, and cause employees to feel insecure in their jobs.\textsuperscript{92} The Proposed Guidelines require restitution, unless the court finds that the cost would be too complicated and prolonged relative to the need for compensation to victims.\textsuperscript{93} The only exception to the restitution requirement is for cases where determination of the economic amount is unduly difficult.\textsuperscript{94} In addition, the Proposed Guidelines envision application of both restitution and a penalty fine, but without a set-off for the cost of restitution.\textsuperscript{95}

Nonetheless, great difficulty currently exists in properly scaling corporate fines to deter or punish large corporations.\textsuperscript{96} Such com-

\textsuperscript{87} Church, Los Angeles Daily J 6, at col 3 (cited in note 66). Moreover, the NAM believes that “the business community [already] accepts responsibility for its employees’ actions, even when committed in violation of a company policy.” Id.

\textsuperscript{88} As previously noted, these recommended Other Conditions include (a) requiring the corporation to submit to audits, regular or unannounced, and to interrogation of knowledgeable employees; (b) prohibiting the corporation from paying any distributions, such as dividends, to any equity holders without prior court approval; (c) prohibiting the corporation from issuing new equity or debt securities, or obtaining additional financing outside the ordinary course of business, without court approval; and (d) prohibiting any merger, consolidation, refinancing, liquidation, bankruptcy or major transaction, without court approval. 54 Fed Reg at § 8D1.3, 47062 (cited in note 2).

\textsuperscript{89} Church, Los Angeles Daily J 6, at col 3 (cited in note 66).

\textsuperscript{90} Id.

\textsuperscript{91} 54 Fed Reg at § 8D1.2, 47062.

\textsuperscript{92} Church, Los Angeles Daily J at 6, col 4 (cited in note 66).

\textsuperscript{93} 54 Fed Reg at § 8D1.1, 47062 (cited in note 2).

\textsuperscript{94} Toensing, Washington Law at 31, col 1 (cited in note 83).

\textsuperscript{95} Id at 30, col 3.

Companies can often shift the economic burden of large fines to innocent employees, shareholders, or customers. Furthermore, imposing a $1 billion fine on a corporation of Exxon's size, for instance, would represent a startlingly small penalty for a serious felony, considering that Exxon's net income for the first nine months of 1989 was approximately $2.5 billion.

Under the Proposed Guidelines, as previously noted, defendant corporations who have not fully paid their monetary fines or made complete restitution by the time of sentencing face mandatory probation. However, the exact amount of the fines will not be revealed until sentencing day. Furthermore, despite this mandatory language, it may, for example, be physically impossible for defendant corporations to complete clean up of environmental violations by that date, and all victims entitled to restitution may not have been found by that date.

Only at the sentencing date can a corporation, which usually follows regularized internal procedures in issuing payments, initiate the procedures to obtain the sum required. But if the fine is not completely paid then, the court must impose probation. Moreover, the Proposed Guidelines fail to address whether a corporation that appeals its conviction must still pay its fine on the date of sentence.

Despite these uncertainties, the Proposed Guidelines do allow the court to defer payment of a fine if the corporate defendant is unable to make such a payment or if requiring immediate payment would pose an undue burden on the corporate defendant. In addition, the Proposed Guidelines allow the court to reduce the fines in certain instances, where it finds that the corporate defendant is clearly unable to pay or where imposition of the fine would impair the corporate defendant's ability to pay court-ordered restitution.

If a corporate defendant has benefitted from its criminal activity, then prosecution and sentencing should punish it, deprive it of

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98. Id at col 1.
101. 54 Fed Reg at § 8D1.1, 47062 (cited in note 2).
102. Church, Los Angeles Daily J at 6, col 3 (cited in note 66).
103. 54 Fed Reg at § 8C3.2, 47061 (cited in note 2).
104. Id at § 8C3.3.
its unjust advantage and provide funds for restitution to victims.\textsuperscript{105} Under the Proposed Guidelines, Option I for assessing fines attempts to achieve this goal by relating fines to the loss caused by the corporation's offense, the gain to the corporate defendant, or an amount from the Proposed Guidelines' fine table,\textsuperscript{106} whichever is greater.\textsuperscript{107} That result would be adjusted by the aggravating or mitigating factors specified in the Proposed Guidelines.\textsuperscript{108} Option II for assessing fines attempts to achieve this with a fine range entirely based upon the offense level, with adjustments for aggravating or mitigating factors.\textsuperscript{109}

Similarly, where a corporation was created primarily for the purpose of facilitating criminal activity, prosecution should conclude with its dissolution.\textsuperscript{110} In these cases under the Proposed Guidelines, the fine should be set at an amount sufficient to divest the corporation of its assets.\textsuperscript{111}

Innocent shareholders reap the benefits of illegal, but profitable, corporate behavior.\textsuperscript{112} Furthermore, shareholders are the ultimate source of corporate sovereignty over their executives.\textsuperscript{113} Therefore, it may be equitable to require even innocent shareholders to pay for the sentence imposed.\textsuperscript{114}

It is this author's impression that the greatest danger critics perceive in the Enhanced Conditions is that they could give courts the power to destroy corporate defendants. However, until now courts have dealt with corporate-sentencing cases without any real guidelines. The Proposed Guidelines represent a major step in clarifying when and how the courts can use their broadest powers relative to corporations: the Enhanced Conditions. In essence, they are a much needed clarification of the parameters for use of these powers and they mitigate unbridled judicial intervention into corporate decision-making.

\textsuperscript{105} Id at 47057.
\textsuperscript{106} The fine tables correspond to offense levels from the sentencing guidelines for individuals.
\textsuperscript{107} 54 Fed Reg at § 8C2.1, 47058 (cited in note 2).
\textsuperscript{108} Id at 47058-59.
\textsuperscript{109} Id at 47059-60.
\textsuperscript{110} Id at 47057.
\textsuperscript{111} Id at § 8C1.1, 47058.
\textsuperscript{113} Etzioni, Legal Times at 21, col 3 (cited in note 112).
\textsuperscript{114} Id.
E. Will the Proposed Guidelines Provide an Adequate Incentive for Corporations to Implement Self-Policing?

According to the U.S. Sentencing Commission’s Chairman, as previously discussed, current fines often are too low to provide adequate incentives to prompt corporations to police themselves. Furthermore, the Sentencing Commission’s Chairman believes that the Proposed Guidelines provide an atmosphere of self-policing which is so strong that employees will think twice, even though the corporation might profit from the crime. In addition, the Chairman believes that the Proposed Guidelines stress rewarding corporations that cooperate with prosecutors and install compliance programs.

However, considering that in the current era employee mobility is high and loyalty to employers is low, the Chairman’s prognosis may be overly optimistic. Employees seeking to compile outstanding, short-term employment records may be totally undeterred by the threat of corporate sentencing facing the company for which he works. Moreover, the imposition of a large fine on a corporation as a whole may have little effect in deterring conduct by middle-level managers who often are the principal culprits. For example, the threat of a large fine upon the Exxon Corporation apparently did not deter the Captain of the Exxon oil tanker Valdez in the landmark Alaskan oil spill calamity.

Of the mitigating factors to be considered under the Proposed Guidelines, three pertain to consideration of corporate self-policing: (1) a meaningful compliance program in place at the time of the offense; (2) prompt reporting of the offense or cooperation in the criminal investigation; and (3) steps taken to remedy the harm, discipline individuals, and prevent a recurrence. However, as previously noted, the Proposed Guidelines do not distinguish between two distinctly different types of potential corporate defendants—those whose managements plan and participate in the crimi-
nal violations and those that invest heavily in compliance programs and yet have errant employees who commit violations despite the company's policies. In the latter case, the Proposed Guidelines do not provide an incentive for businesses to invest in compliance programs.

The Proposed Guidelines, in general, through consideration of mitigating factors, appear to provide some incentives to self-policing. Nevertheless, corporations must be prepared to deal with the existence of disloyal or rogue employees, or middle-managers whose decisions may get lost in the bureaucratic shuffle. In certain cases, those employees' activities can offset the otherwise strong incentives provided by the Proposed Guidelines for corporate self-policing.

### III. Conclusion and Recommendations

The Proposed Guidelines were drafted in the belief that sentencing of a convicted corporation would assist in achieving restitution to victims, deterring future criminal conduct, and ensuring enforcement of sanctions. The Proposed Guidelines may indeed help with regard to these considerations. Ultimately, under the Proposed Guidelines, corporations convicted of federal crimes would face substantially larger fines, significant restitutionary requirements, and potential intervention in corporate management and financial operations under the proposed organizational probation provisions.

Furthermore, the Proposed Guidelines continue recent trends in court decisions and federal legislation towards increasingly stern sentencing for corporate criminal conduct. The Enhanced Conditions may prompt corporations to monitor and take greater responsibility for middle-management activities. The Proposed Guidelines help clarify when and how the courts can impose probation and represent their broadest powers relative to corporate defendants. In addition, the Proposed Guidelines, through potentially large fines and consideration of mitigating factors, provide some incentives for corporate self-policing.

As a practical matter though, the Proposed Guidelines may still not serve their purposes adequately. In addition to the concerns set forth in the discussion portion of this comment, the Proposed Guidelines fail to resolve the following practical difficulties: (1) correlating the amount of a fine to the amount of harm done by a

123. Id at 47056.
corporation and (2) imposing only Enhanced Conditions that are reasonably related to the nature of the corporation's offense and necessary to achieve the court's purpose.

A classic example of the difficulties of both measuring and proving harm done by a criminal defendant, and imposing only probationary conditions that are reasonably related to the nature of the offense and necessary to achieve the court's purpose, is provided by the recent sentencing of Michael Milken, former head of Drexel Burnham Lambert Inc.'s junk-bond department. Although that case involved sentencing of an individual, Mr. Milken's case provides a useful analogy, in light of the following: the nature of the crime, insider trading on Wall Street; its corporate context; that sentencing and probation guidelines for individuals were already effective; and that the objectives for sentencing for corporations are identical to those for individuals.

In Mr. Milken's case, the U.S. Probation Office concluded that his acknowledged crimes cost investors approximately $700,000. Under probation guidelines for individuals, which also consider the losses suffered by the crime's victims, the $700,000 amount meant Mr. Milken would likely only need to serve two years of his previously determined ten-year sentence.

However, the U.S. Attorney's Office which prosecuted Mr. Milken differed sharply with the U.S. Probation Office's conclusions. The U.S. Attorney's Office asserted that Mr. Milken's acknowledged crimes caused approximately $5 million in losses to victims. Moreover, numerous civil suits by corporate shareholders alleged that Mr. Milken's crimes, both acknowledged and otherwise, caused billions of dollars in damages to investors.

In Mr. Milken's case, the court tended to agree with the U.S. Probation Office, concluding that the losses from his six acknowledged crimes were less than $1 million. However, Judge Kimba Wood, who sentenced Mr. Milken, said that when she issued the ten-year sentence she had intended that he would serve a mini-

125. 54 Fed Reg at § 8D1.3(b), 47062 (cited in note 2).
126. 54 Fed Reg at 47506 (cited in note 2). See also, 18 USC § 3353(a)(2) (1988).
129. Id.
130. Id, B8 at col 2.
131. Id, B8 at col 1.
mum of 36 months before becoming eligible for parole.\footnote{132} If Judge Wood had found that Mr. Milken's acknowledged crimes caused harm of $1 million or more, the guidelines for individuals would have recommended that he serve a minimum of 40 months before becoming eligible for parole.\footnote{133}

The Proposed Guidelines ostensibly correlate the amount of a fine with the amount of harm done by companies. Nevertheless, they do not provide the underlying rationale for the enumerated multipliers or adjustment factors\footnote{134} to apply to a victim's losses in calculating corporate fines. The Proposed Guidelines merely state the multipliers or adjustment factors to consider. Moreover, the Proposed Guidelines do not thoroughly indicate how a court is to measure the harm done by corporations and what kind of proof is needed. Therefore, even with the Proposed Guidelines, appropriately scaling fines to deter and punish large corporations will remain a difficult responsibility.

Under the Proposed Guidelines, the ultimate fines will be based primarily upon a determination of the losses caused. However, as illustrated by Mr. Milken's case, the tasks of measuring and proving the harm done by an individual criminal defendant are not necessarily clear or easy tasks. If a court's conclusion regarding the losses caused is substantially inaccurate, the fine will also be inaccurate.

There exists no reason to believe that the tasks of measuring and proving harm are any easier with a corporate criminal defendant than with an individual criminal defendant. Furthermore, the multiplier and adjustment factors\footnote{135} included in the Proposed Guidelines can compound potential inaccuracies in fines.

With respect to the Enhanced Conditions, the Proposed Guidelines state that a court should only impose those conditions reasonably related to the nature of the corporation's offense and necessary to achieve the court's purpose.\footnote{136} Nevertheless, the only further guidance provided by the Proposed Guidelines is in the Commentary section,\footnote{137} which merely states that probation may be necessary to prevent a corporate defendant from avoiding the im-
pact of a fine by passing the costs on to consumers or other persons.\textsuperscript{138}

Obviously, the meaning of these parameters—reasonably related to the offense and necessary to achieve the court’s purpose—would be open to much debate and the subject of many court cases. Yet, the Proposed Guidelines do not indicate how a court is to determine if these parameters are satisfied. For example, these vagaries will prompt questions such as: should a court consider expert testimony pertaining to how a certain probation arrangement may reasonably relate to the nature of a specific corporate offense? and, in an environmental damages case, is probation necessary to achieve a court’s purpose, simply because actual future harm, if any, may not be known for decades?

The Proposed Guidelines are not revolutionary in the greater scheme of corporate law enforcement. Rather, the Proposed Guidelines are another evolutionary step in providing clearer standards and objectives in corporate law enforcement. This author opines that the solutions to the practical problems with the Proposed Guidelines will be obtained only through continuation of this evolutionary process.

The Proposed Guidelines should be revised to indicate, in its Commentary sections, the underlying rationale for the enumerated multipliers or adjustment factors to apply to victim’s losses in calculating corporate fines. The Proposed Guidelines should also thoroughly indicate how a court is to measure the harm done by corporations and what kind of proof is needed. In addition, the Proposed Guidelines should clarify what is meant by Enhanced Conditions that are reasonably related to the nature of a corporation’s offense and necessary to achieve the court’s purpose.

Before the Proposed Guidelines, virtually no standards existed for sentencing corporations. The general standards and objectives of the Proposed Guidelines are much needed. Just as with many other legislative- and administrative agency-based bodies of law, case law will need to be developed to fill in the gaps and to resolve the problems of application. This is particularly true with the aforesaid practical problems of the Proposed Guidelines.

Furthermore, the Proposed Guidelines set forth sentencing parameters within which both corporations and courts must work. The Proposed Guidelines mark the beginning of the end of instances of unpunished corporate excesses and also of unbridled ju-

\textsuperscript{138} Id.
dicial intervention in corporate affairs. Consequently, the aforesaid practical problems are not fatal to the Proposed Guidelines. Therefore, the author recommends that the Proposed Guidelines be enacted in their present form.

Ultimately, corporations and the courts must become partners in deterring criminal activity if corporate law enforcement is to be effective. This is also true if the Proposed Guidelines are to adequately serve their purposes. If the Proposed Guidelines become effective, it will be important to see whether they actually are a precursor of such a partnership. For example, will the Proposed Guidelines actually deter crimes involving the following: (1) the health and financial consequences of corporate frauds; (2) marketing of dangerous products; (3) illegal dumping of hazardous wastes; or (4) safety violations in the workplace? Furthermore, in future debates regarding the Proposed Guidelines, it will be interesting to see if corporations will risk having the public think they oppose tough punishment of white-collar crime.

The Proposed Guidelines are not perfect. However, with appropriate supplementation by case law and continued consideration of corporate commentary, they can be workable. The U.S. Sentencing Commission envisioned an evolutionary process through which the Proposed Guidelines would be modified and refined in light of experience. Furthermore, the Proposed Guidelines set forth sentencing standards where virtually none had existed.

The Proposed Guidelines do not add an exclamation point in the sentence for corporate crime. Rather, they add much needed bold-faced type.

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