



Office of the Attorney General
Washington, D. C. 20530

5 April 1988

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your request that the Administration provide its views on means for deterring violation of criminal laws by corporate entities. This issue was discussed by the Domestic Policy Council and our response is attached.

By way of background, Thomas Moore, Member of the Council of Economic Advisers, chaired an interagency working group that produced the attached memorandum. Please feel free to contact Dr. Moore at 395-5046 if you have any questions about our response.

The Administration appreciates the efforts of the U.S. Sentencing Commission on this subject as well as the other areas you have addressed. I am certain your work will be of great benefit to law enforcement and the administration of justice throughout the country.

Sincerely,

Edwin Meese III

Edwin Meese III
Chairman Pro Tempore
Domestic Policy Council

**THE WHITE HOUSE
WASHINGTON**

March 30, 1988

MEMORANDUM FOR THE UNITED STATES SENTENCING COMMISSION

FROM: DOMESTIC POLICY COUNCIL
SUBJECT: Principles of Corporate Sentencing

I. Introduction

The sentencing practices that apply to corporate defendants in Federal Courts across the country appear to stand in need of reform. Initial review of data collected from executive enforcement agencies suggests that fines are often much smaller than the harms inflicted by the corporate crimes the sanctions are intended to punish. The generally low levels and lack of uniformity of these fines imply the absence of a coherent approach to the Federal sentencing of corporate defendants. The Sentencing Commission has a unique opportunity to remedy this problem.

Corporate sentencing is complicated by the nature of the business entities that are the objects of criminal sanctions. Business organizations consist of many different individuals with different stakes and incentives with respect to the enterprise. The problems of corporate sentencing are simplified somewhat, however, because corporate crimes are largely economic in character. Sanctions for corporate crimes based on deterrence generally do not run afoul of principles of moral desert or just punishment. The treatment of corporate sentencing, therefore, can follow practical lines, and need not raise questions as to the appropriateness of different philosophies of punishment that in this context are more complementary than conflicting.

This memorandum sets out in general terms an approach to corporate sentencing that the Domestic Policy Council (DPC) has formulated with the cooperation of the various executive agencies that have criminal enforcement responsibilities. The objective is to encourage the Sentencing Commission to take these observations and recommendations into account in formulating guidelines that will apply to corporate defendants.

II. General Objectives of Criminal Punishment

Commentators on the criminal law have long recognized that punishment serves a number of different objectives.¹ Criminal punishment serves to compensate the victim, to deter similar crimes from occurring in the future, and to inflict on the wrongdoer a just sanction.

Corporations and other business entities² present a special case for criminal sentencing. As artificial rather than natural persons, they are not subject to imprisonment. Generally, therefore, sanctions take the form of monetary fines.³ Because they are organized to pursue profits, their behavior probably tends to be more reliably rational than that of individuals, who sometimes commit crimes out of passion or while under the influence of addicting substances. Most corporate crimes, by contrast, are motivated by a desire for pecuniary gain. For all of these reasons, the general approach of deterrence seems the most appropriate for formulating the punishment of corporate wrongdoers. In the context of corporate fines, moreover, the deterrence approach is consistent with just punishment.

Fines should be set according to a standard that advances the general purposes of the criminal laws. At a minimum, therefore, fines should be large enough to force the potential criminal to take into account the social cost of its act, that is, the cost the corporation would inflict on others through the criminal act. Fines of this magnitude might be called compensatory, because they take away from the criminal, in effect, the value of the harm that the criminal conduct inflicted on the

¹ See, e.g., H.L.A. Hart, Punishment and Responsibility, chapter 1.

² "Corporations" will be used throughout to refer to all for-profit business entities, whether incorporated or not. Crimes by non-profit organizations present an important problem that should be addressed in sentencing guidelines. They are, however, beyond the scope of this paper.

³ Administrative remedies frequently apply non-monetary sanctions on corporate wrongdoers. These sanctions include debarment from doing business with the government, loss of license, and other actions that impose losses on the firm. These sanctions are not under review by the Commission or directly subject to the guidelines. To the extent possible, however, these remedies should be coordinated with criminal fines that are imposed for the same criminal actions along the same lines as civil damage penalties. See discussion of civil liability below.

victim. When a criminal corporation provides full restitution to a victim, it pays in effect a compensatory fine.

In order to deter a crime effectively, however, the expected fine must exceed the criminal's expected gain from the crime. Almost all crimes impose costs on society that are greater than the benefits they bring to the criminal, so an expected fine that equals the social cost of the criminal act will in almost all cases be sufficient to deter the act. If we assume that the criminal will be detected and punished for its crime, this fine will be equal to the social harm caused by the crime.

This is, unfortunately, a most unrealistic assumption. Most potential criminals realize that there is a chance of escaping punishment altogether. This is no less true of organizations than of individuals. If a criminal firm which is caught merely has to return or pay for what it has stolen, for example, it faces a no-lose situation. If it is caught, it is no worse off; it merely gives back what it took. If it is not caught, it keeps its booty. By dividing the harm caused by the crime by the probability of detection,⁴ one can set the criminal sanction at a level that eliminates the expected gain from the crime.

This approach is consistent with the principle that the punishment should be equivalent to (or fit) the crime usually associated with the ideal of just punishment. The idea that punishment for crime should be equivalent to the harm caused is, of course, ancient: "An eye for an eye." Beyond this elemental intuition, however, confusion may set in rapidly. Some argue that a fine dictated by a deterrence approach may be justified "economically" but not morally. In fact, a deterrence-based fine is a fine based on the harm that is caused by a crime, which is also the basis for a just punishment. The harm caused by a crime includes not only that inflicted on a particular victim, but also other losses imposed by the crime on society at large.

The deterrence approach captures most of the elements usually advanced under just punishment theories. Characteristics of a crime that make it particularly pernicious, such as crimes that tend to corrupt government officials, or exploit vulnerable victims, are usually also traits that make a crime more socially

⁴ "Probability of detection" is used throughout to mean the probability that a crime is detected and the criminal actually punished -- in this context, this includes the actual payment of the fine imposed by law. This probability should be considered the average probability of detection and punishment. These approximations are not intended to fluctuate with special efforts to increase enforcement.

harmful, more difficult to detect, or both. Through the use of aggravating and mitigating circumstances that have been used traditionally by courts in sentencing, factors that tend to increase the social harm of an offense, or make it more difficult to detect, can be taken into account. The fact that the aggravating and mitigating circumstances which the deterrence approach suggests judges should consider are virtually identical to those suggested by a just punishment approach, implies that the differences between the two approaches are of little practical consequence.

Deterrence, therefore, is not an "economic" as opposed to a "moral" basis for punishment. The claim that deterrence is not moral is often made because the punishment that might initially seem appropriate for a given crime, say, paying the victim for the harm done, will usually be smaller than the punishment required to deter such crimes. But because not all criminal behavior can be detected and punished, a just punishment must inflict an expected "eye" for an "eye" so that the offender expects to be punished by the same amount of harm that he inflicts on others.

The criticism that the deterrence approaches would punish criminals more than they deserve fails to give adequate weight to the fact that it is a primary -- perhaps the primary -- responsibility of the state to protect its citizens from crime. This idea is firmly rooted not only in the common law of crimes, but in moral and political theory and tradition as well. If criminal punishment does not serve adequately to protect citizens from crime, it fails to achieve its primary purpose. If criminal sanctions, including corporate sentences, fail to take account of the true size of the harm criminals inflict on society, or the difficulties of detecting and punishing certain kinds of crime, then the criminal law will almost certainly fail to serve its primary purpose. The general terms of the Congressional enactments that apply to fines thus should be interpreted by the Commission with the need to protect the public from crime firmly in mind.

III. Principles of Corporate Sentencing

Corporate criminal liability provides the Federal Government with a powerful tool against crime. The sections below outline the basic reasons why this is true, and suggest a general approach to corporate sentencing that is consistent with the justification for corporate criminal liability.

A. Why Punish Corporations?

Crimes are, in a literal sense, always committed by natural persons, not abstract corporations. Why should corporations, rather than particular natural persons, be the object of criminal sanctions? This question must be addressed initially to put the purposes of corporate sentencing in perspective. The Federal criminal law provides for corporate criminal liability when an agent of the corporation, while acting within the scope of his employment, commits a crime for the benefit of the corporation. By punishing the corporation for crimes committed for its benefit by its agents, the law creates an incentive for the corporation to take the steps necessary to prevent its agents from committing crimes.

Punishing only the agents of corporations, and leaving the corporate entities themselves untouched, would be a flawed approach for several reasons. For many corporate crimes there is no one person or group of persons who satisfy the law's requirements for culpability. In practice, for example, it may be impossible to prove that any one person or group of persons actually had the intent which must be proven to establish guilt. The corporation as a whole, however, may have had in its possession the information necessary to know that a crime was being committed.

Problems such as this can be avoided by taking the nature of the business organization into account. The corporation is best thought of as a network of contracts or agency relationships defined by the various duties persons owe to the corporation and which the corporation owes to them. When an agent of the corporation commits a crime under conditions that make his firm liable, there has been a failure within this network of agency relationships. This network is supposed, among other things, to prevent such crimes from occurring. But it is frequently impossible to determine, especially to the high level of certainty demanded in criminal law, exactly where the system of monitoring broke down when a crime occurred. Courts are ill-equipped to disentangle the web of corporate decisionmaking and determine who within a corporation should have done what in order to prevent a particular crime. Courts would have to undertake this task, however, if they had to select individuals to punish, rather than the corporation itself.

Punishing corporations also allows the government to use the network of duties defined by substantive corporate law and unwritten firm practices to distribute responsibility for corporate crimes in a more accurate, refined, and efficient manner than would be possible in many cases if prosecutors had to select responsible agents on the basis of inadequate information. Agents who, in the corporation's view, failed in their duties are

subject to dismissal and other sanctions within the firm. Conversely, if corporations are not liable for the crimes of their agents on their behalf, corporations may actually encourage their agents to commit such crimes, since the company could benefit without bearing the risk of punishment.

The corporation is, moreover, best equipped to decide what steps should be taken to prevent crimes on its behalf and to control or eliminate those agents who expose it to criminal sanctions. Managers, officers, and directors are exposed to dismissal, civil lawsuits, and losses in personal wealth and reputation if they fail to shield the corporation from criminal liability. These agents are also in the best position to decide what is the least costly way to insure compliance with the law. The corporation is organized to maximize profits and is under constant pressure to do so. The threat of fines allows the government to tap the interest in profits to make the corporation use its extensive resources to prevent crimes on its behalf.

Management efforts to control the conduct of corporate agents and employees are, however, scarce resources. When corporate management pays too little attention to the possibility of criminal behavior, it imposes social costs that are often substantial. Similarly, however, management inattention to other aspects of the business enterprise can also impose significant social costs. Profit and loss provide the proper signals of social cost for business issues that confront a corporation, but it is the level and structure of criminal penalties that must reflect the social costs of criminal conduct. Just as penalties that are too low lead management to ignore the possibility of criminal conduct in favor of other concerns, penalties that are too high may impose substantial social costs if they lead management to slight other concerns. Expected penalties that just exceed the expected social costs of criminal conduct provide incentives that are sufficient to deter crime, without inappropriately diverting resources from the legitimate business of the corporation.

Because some violations are more serious than others, an efficient penalty structure levies larger fines on more serious potential violations. If penalties are too high for relatively insignificant violations of the law compared to the penalties imposed for more serious violations, corporate efforts to control their agents and employees may be diverted to avoid relatively insignificant violations at the expense of more important efforts to control more serious violations. Penalties for all violations must be sufficiently high to adequately deter, but they should not be so high that they encourage unproductive efforts to avoid relatively insignificant violations that impose far lower social costs.

A more serious consequence of excessive penalties arises when it is difficult to distinguish between legal and illegal conduct. The goal of deterrence requires consideration of the effects of penalties on other, similarly situated corporations, not just the corporation that has already been convicted. Similarly situated firms that are not parties to the case may lack familiarity with the details that led to a particular conviction. Moreover, even unsuccessful prosecutions are likely to impose significant costs on the firm that is challenged. Excessive penalties may, therefore, discourage productive and legal conduct that "looks like" the prohibited conduct.

B. Appropriate Sanctions for Corporations

The cash fine is generally the most appropriate sanction for crimes committed by corporations. In order to arrive at the correct fine, two basic factors should be considered, the size of the harm imposed by the crime and the probability that the crime will be detected and punished. Thus, we envision the sentencing decision as consisting of two basic steps; first, an estimation of the social harm caused by the crime; and second, the application of a "multiple" that will take account of the probability of detection associated with the crime committed. The guidelines, we believe, should make it clear to the courts that this is the process they should apply, and should provide them with simple rules to guide them through the process.⁵ We envision this process as involving the consideration of aggravating and mitigating circumstances that have traditionally been used by courts in setting sentences. The guidelines should help structure the application of these factors to sentencing within a disciplined, intellectually coherent framework.

There is obviously a trade-off between the exhaustiveness of making these estimates on which the fine should be based and the simplicity of the process. We believe the process must be simple in order to be workable; departures from the guidelines might be justified, however, in cases that are by their nature very large and complex. In these cases, more detailed examination of the harms caused and the probability of detection might be justified.

⁵ It is also important that the guidelines provide simple and predictable rules because prosecutors and defense counsel will rely on them in negotiating plea agreements. If the guidelines are unclear or excessively complex, the plea negotiation process will be made much more costly and difficult.

1. Estimating the Size of the Harm

The first step in the determination of an appropriate corporate fine should be an approximation of the loss or harm caused by the criminal activity. The harms caused by corporate crimes are usually difficult to estimate and, in any real sentencing context, can only be approximated. Some corporate crimes, such as fraud, produce harms that are more easily reduced to definite monetary terms. Where victims of mail fraud, for example, suffer financial losses of \$1 million, the social harm can be assumed to be at least that amount.

Certain other costs, however, should be included in an estimate of the harm caused. The Federal Government bears costs associated with detecting and prosecuting the crime. Some portion of these costs should be included in the fine because expenditures on law enforcement could be invested in more productive uses, were it not for criminal behavior. Potential victims may also take steps to protect themselves against crimes of the sort committed. These are costs to society as well. While these costs can only be approximated, some effort should be made in the guidelines to include them in the estimation of the harm.

In practice, even purely monetary crimes produce harms that are almost impossible to measure exactly. Rules of approximation should be used, therefore, to estimate social harms not captured in the initial monetary estimate. These rules should be formulated with the institutional capabilities of the Federal courts in mind. Simplicity in this context is probably of prime importance. Given the costs of determining damages in civil tort actions, which represent the most sophisticated procedures courts have for determining the social costs of wrongful actions, the justification for using simple rules of approximation appears to be powerful. Currently, courts in effect use extremely simple rules of approximation in setting larger sentences for more harmful crimes and smaller sentences for less harmful ones. The guidelines would merely refine and rationalize this process so that courts would have the benefit of the best available approximations of social harm and probability of detection embodied in a uniform framework that could be applied without excessive cost or delay.

While estimates of harm must always be approximate to some degree, the court may be justified in expending greater resources to determine the actual magnitude of the harm in cases where the harm is very large or where the fines may inadvertently deter legitimate business activity. Courts should be able to exercise discretion in deciding whether a more extensive inquiry into the size of harm is justified by these considerations.

Some corporate crimes produce harms that are not easily converted into monetary terms. The courts, however, have long experience in dealing with non-monetary losses in monetary terms. In tort actions, monetary damages are routinely awarded for loss of reputation, loss of marital companionship, pain and suffering, and many other kinds of harm not usually thought of in pecuniary terms. The imposition of monetary fines on corporations is equally justified even for crimes that produce harms that are not easily measured in monetary terms, especially where the alternative is to let the convicted defendant go unpunished or insufficiently punished, or to involve the courts in inappropriate supervision of business activity. This is not to say, however, that sentencing should be as complex as the determination of damages in a tort case: To the contrary, the Commission should provide for guidelines to insure that this undesirable result does not come to pass. That some harms are not monetary, however, does not argue against the court's making the best approximation it can of the appropriate monetary fine for a crime that creates a nonmonetary harm.

These general recommendations could be implemented through guidelines applied to specific areas of crime, such as fraud, and through guidelines that apply to corporate crime generally. Guidelines that apply to specific crimes should strive to use simple rules that make as accurate an estimate of the harm caused as possible. For straightforward fraud cases, for example, such rules should be easy to formulate. The harm caused is about equal to the amount out of which victims have been defrauded. There are some crimes and some characteristics of crimes, however, that tend to cause social harms that are not easily captured in monetary terms. For example, crimes that threaten the integrity of government or important private institutions pose difficult to measure, but nonetheless severe, dangers to society. We recommend that the phase of sentencing during which the social harm is estimated should include consideration of aggravating circumstances which, if present, would increase the size of the fine.

2. Estimating Probability of Detection and Punishment

In order to deter crime adequately, punishment must take account of the probability that a criminal will escape detection and punishment. Probability of detection is probably more difficult to estimate accurately than the size of harm inflicted by a corporate crime. To estimate this factor directly, one

would need to know how much crime of a given kind went undetected.⁶ In most cases, however, such data is currently not available.

Because data on probability of detection is inadequate, the sentencing guidelines should use simple rules of approximation to take into account the circumstances that make some categories of crime, and crimes committed in certain ways, more difficult to detect. Federal courts are also not equipped to make use of complex data or analytic methods concerning probabilities of detection. We recommend, therefore, that probability of detection be taken account of through applying a base estimate of the probability of detection supplemented by the consideration of aggravating and mitigating circumstances that, when present, will increase or decrease the size of the fine imposed. While the "probability of detection" may not be a familiar phrase to the courts, the substantive ideas underlying it are well known to judges: The sophistication of the crime, concealment, misrepresentation, and the likelihood that victims would be able to recognize and report their loss are examples of factors that are used to take account of the dangers which difficult-to-detect crimes pose to society. Aggravating circumstances of these traditional kinds could be incorporated both in guidelines applicable to particular areas of crime, such as fraud and environmental offenses, and in a guideline applicable to corporate sentencing generally, in order to accomplish the same purposes.⁷

All agencies of the Executive Branch should be asked to cooperate fully with the Sentencing Commission in providing it with the data and analyses necessary to allow the Commission to develop reasonable estimates of the social harms caused by crime and the probabilities of detecting those crimes, at the request of the Commission. This cooperation will assist the Commission in formulating the sentencing guidelines. All independent

⁶ Generally, random audit procedures, like those employed by the Internal Revenue Service, are necessary to make relatively exact estimates of the probability of detection. Where random audit results from Federal programs are available and relevant to a particular offense, they should be used to estimate probability of detection.

⁷ While it is important that the guidelines explain to judges the principles underlying the use of a multiplier based on probability of detection and punishment, "probability of detection" is probably not the best term for this part of the sentencing formula. "Deterrence multiplier" would be the more appropriate phrase for use in the official guidelines.

agencies of the Federal Government should be requested to supply such data and analyses, at the request of the Commission.

3. Non-Fine Sanctions

The Sentencing Commission has the authority to provide for sanctions other than fines for crimes committed by corporations. Probation, for example, is now authorized by statute as a separate category of punishment. In general, the DPC believes that probation of corporations should be used principally to insure that the court-imposed sanctions are complied with. Probation should not be used as a substitute for or in lieu of fines. There is a danger that probation could be used to set up ongoing monitoring by the courts of private firms. Probation is in some circumstances, however, a valuable and cost-effective tool to remedy a continuing violation or to help remedy corporate practices as necessary to insure compliance with the law. Probation might also be used to impose conditions on convicted firms that will increase the probability of detecting future crimes by that firm. In some cases firms that have been caught and convicted of a crime may learn how to reduce their probability of being caught in the future. In such cases, probation could be used to make any future violation of the law more readily detectable.

Moreover, probation may be in some circumstances a proper method to bring about restitution for the harm caused by the crime. Legally, restitution for non-Title 18 offenses, if it is to be provided for at all, might have to be provided for under probation conditions. Restitution for some crimes, such as environmental crimes, might involve, for example, cleaning up or paying for cleaning up improperly disposed waste material. It is important, however, that the deterrent effect of the entire penalty package be considered. For the penalty to have the correct deterrent effect, the fulfillment of the probation conditions, plus the payment of fines should equal the total penalty indicated by consideration of the size of the harm and probability of detection.

Guidelines concerning probation must be carefully crafted to prevent abuses from occurring. Otherwise, there would be a risk of a vast expansion of judicial authority in areas where the courts have little experience or expertise. The Administration should, consistent with its commitment to the principles of Federalism, strongly oppose guidelines which would allow probation conditions that permitted courts to supervise the ongoing business activities of private enterprises when they are more properly regulated by State law.

4. Restitution

Statutes provide that defendants should make restitution to victims to the extent possible and that payment of fines should take place after restitution is made. Since restitution is a cost borne by the defendant, it has the same effect as a fine from the point of view of deterrence. When determining the appropriate fine, courts should consider restitution as part of the package of sanctions and conform the package of sanctions to the level suggested by the analysis discussed above. For example, a court may determine that the appropriate level of sanction is a fine three times the loss imposed by crime. In this case, full restitution, plus a fine equal to twice the loss, would be an appropriate sentence.

5. Civil and Other Criminal Liability

Some crimes involve wrongful actions that expose wrongdoers to civil as well as criminal liability. Some Federal statutes, indeed, provide for civil penalties of up to three times the damages actually imposed. It is possible that in some cases defendants who incur large criminal fines and civil liability will bear sanctions much larger than those required by deterrence. Unless so severe a punishment is warranted on other grounds, such a fine would be inconsistent with 18 U.S.C. Section 3552(a) which prohibits fines greater than necessary to achieve deterrence unless required for other specific purposes.

In areas such as securities regulation, there would appear to be significant risk that the cumulation of civil and criminal penalties would impose sanctions so large that parties engaged in lawful conduct would be deterred out of fear that they would be mistakenly convicted, mistakenly found civilly liable, or both. While there is no mechanical way in which courts can anticipate civil penalties when making criminal sentencing decisions, the guidelines should be formulated to take account of this problem. If civil damages have been awarded for the actions out of which a criminal conviction arises, it would be appropriate for the court to take damages imposed civilly into account in determining the criminal sentence. Thus, if victims have already been made whole through civil damages, criminal restitution would be duplicative, assuming the same wrong is at issue. Conversely, the payment of full restitution after criminal conviction should be taken into account in the calculation of civil damages.

This principle does not apply, however, where the corporation is unable to pay the fine imposed. In such cases, it is entirely appropriate for the purposes of deterrence to impose the portion of the fine not paid by the corporation on the corporate agent (or agents) who was (or were) in a position to prevent the crime. Whether it will be legally possible to do this in any

given case depends, of course, on the particular facts of the case and the resolution of many questions of law that may be involved. To the extent possible, however, the guidelines should avoid creating the situation in which fines go unpaid because corporations, but not their controlling agents, are unable to pay them.

6. Size of Offending Corporation

In the view of the DPC, the magnitude of the fine necessary to secure adequate deterrence does not depend on the size of the corporation that committed the offense. Every corporation looks on each activity as profit or loss producing, regardless of its size. Thus, the appropriate fine should not vary with the depth of the pockets of the defendant. The guidelines, therefore, should not include size of the corporation as a factor that should be considered in the setting of a fine. Moreover, it is unclear whether the Criminal Fine Enforcement Act would permit fines to be increased beyond that required for adequate deterrence merely because the corporation which committed the crime was large, or reduced below the level required for adequate deterrence, because the firm was small. Thus, the size of a firm is per se irrelevant to sentencing. However, the court should be permitted to review the entire penalty "package" to determine whether the penalty will have the appropriate deterrent and punitive impact. In unusual, atypical, or extraordinary cases, the court may depart to reflect a more appropriate deterrent or punitive impact.

C. Asset Insufficiency

A fine calculated to achieve the correct level of deterrence is based on the harm a crime causes to society, not on the firm's size or ability to pay. Unfortunately, firms with few assets can nevertheless cause great harms. If a firm need not bear the cost of fines equal to or greater than its total assets, however, it will not be adequately deterred from committing crimes. This problem is similar to that of the potential tortfeasor whose assets cannot cover debts to involuntary creditors, such as accident victims, on whom he may inflict damages. If the tortfeasor or criminal is engaged in a risky line of business, he has an incentive to undercapitalize so as to avoid exposure to damage awards or fines.

To avoid these dangers, tort law provides for personal liability of corporate control persons. Failure of managers to exercise proper care in supervising corporate agents can expose them to personal liability, against which the corporation will usually indemnify them. Because of this system of dual liabi-

lity, managers in turn have the incentive to make sure that the corporation is sufficiently capitalized either to bear the cost of a damage award or to indemnify them against personal liability. If corporate agents are themselves judgment proof, however, the firm does not internalize the costs of risky behavior. Civil liability may, therefore, attach to top corporate officials, who are most likely to have substantial personal assets which they will have the incentive to require the corporation to insure.

Criminal law appears to be less flexible in its ability to provide incentives to firms to internalize the costs of risky behavior. Top corporate officials may or may not be liable for crimes committed by corporate agents. Liability for crimes, the fines for which the corporation has insufficient assets to cover, cannot be shifted to managers as easily as civil damage awards can. This problem is practical as well as theoretical. A corporate conviction can leave the fictional corporate entity without assets while the top managers form another corporation to prey upon new victims.

Solving the problem of asset insufficiency in criminal law presents a difficult challenge. It is clear, however, that this problem would only be exacerbated by the notion that the threat of bankruptcy ought to be a defense against a corporate criminal having to bear as much of the cost as it is able, up to all of its assets, of a justly imposed fine. Moreover, if corporate criminals need not expect to pay the full expected social costs of the crimes they inflict on society, then the government is effectively giving them the incentive to commit crimes.

The guidelines should therefore not permit the prospect of bankruptcy alone to reduce the amount of the fine imposed. Under Chapter 11 of the Federal bankruptcy code, a bankrupt firm can reorganize and continue to operate. Fines are, therefore, not likely to drive firms that can lawfully operate at a profit into extinction. If a firm cannot survive reorganization, it suggests that income from criminal activity may have been a necessary condition for its continued operation, in which case extinction of the firm is probably desirable. The Commission may wish to consider using probation in conjunction with the laws of bankruptcy to insure that the fine imposed is paid to the extent possible.

IV. Conclusion

The Sentencing Commission has a unique opportunity to reform the sentencing of corporate defendants in the Federal courts. While many of the problems involved in developing rational sentencing procedures for corporations are extremely challenging, the DPC is of the view that now is the time to take the important

first steps. Over time, the basic approach of setting corporate fines according to the size of the social harm and the probability of detection can be refined and problems ironed out. The evolution of law implicit in our legal system provides one means by which this process of refinement can occur. The Commission, moreover, can revisit organizational sentencing after guidelines are promulgated and can make changes based on experience. The DPC recommends that the Administration cooperate in every way possible to assist the Commission in its important efforts to improve the criminal justice system and take the steps necessary to authorize this cooperation. The recommendations and analysis above will, we hope, be useful to the Commission in formulating its policies and guidelines concerning organizational sanctions.