

**INTEGRATING WHITE COLLAR CRIMINAL DEFENSE LAWYERS INTO HEALTH CARE
LAW FIRMS TO ENHANCE CORPORATE COMPLIANCE PROGRAMS FOR OPTIMAL
MITIGATION UNDER THE FEDERAL CORPORATE SENTENCING GUIDELINES**

By
Benson Weintraub¹
© 2008

TABLE OF CONTENTS

- I. INTRODUCTION**
 - A. Summary of Article**
 - B. Exponentially-Increased Health Care Prosecutions**
 - C. Corporate Crime is Committed by Individuals:
Unique Pathology of White Collar Offenders**
- II. TRADITIONAL HEALTH LAW PRACTICES**
- III. PREVENTIVE MAINTENANCE IN COMPLIANCE PROGRAMS**
- IV. SUBSTANTIVE REASONS TO INTEGRATE WHITE COLLAR CRIMINAL
DEFENSE WITH /HEALTH CARE LAWYERS & FIRMS**

¹ BENSON WEINTRAUB practices federal white collar criminal defense law in Miami/Ft. Lauderdale and designs industry-specific corporate compliance programs. He is the Senior Partner of Benson Weintraub Law Offices emphasizing preventive maintenance and correlation with the Federal Sentencing Guidelines for Business Organizations with health care and other corporate concerns and medical practitioners. Mr. Weintraub is a former full-time professor of law and prolific writer, widely published and cited *e.g.*, YALE L.J., FED. SENTENCING REP., HARV. L. REV., STANFORD J. LAW & SOC. POL., FED. PROB., courts/appellate judges, NOTRE DAME L. REV., and a law school text book on punishment (West-Thomson). He graduated from Hofstra Law School (JD,1979) & The American University School of Government and Public Administration (BA 1974) where is also performed forensic graduate work at the prestigious Center for the Administration of Justice,

In 1985, after passage of the SRA, Mr. Weintraub was appointed by the Hon. Billy Wilkins, US Court of Appeals for the Fourth Circuit, the first Chairman, US Sentencing Commission, to assist the new agency in drafting the corporate and individual Federal Sentencing Guidelines.

- V. **THE “ADDED VALUE” OF TEAM DEFENSE AND OVERCOMING THE “DISCONNECT” BETWEEN HEALTH CARE AND CRIMINAL DEFENSE COUNSEL**

- VI. **SPECIFIC AREAS OF FEDERAL CRIMINAL LAW CORRELATED WITH VIOLATIONS OF HEALTH CARE STATUTES AND REGULATIONS**
 - A. **US SENTENCING GUIDELINES (FSG) FOR ORGANIZATIONS**
USSG §§ 8A1.1, *et. seq.*

 - B. **OVERVIEW OF THE FSG FOR ORGANIZATIONS**
 - 1. **EXAMPLE OF INEFFECTIVE COMPLIANCE PROGRAM & ITS CONSEQUENCES**

 - 2. **EXAMPLE OF EXEMPLARY COMPLIANCE PROGRAM**
 - a. **Overview**

 - b. **Specific Components of “Effective” Compliance Program**

 - c. **Summary**

 - C. **CALCULATING “CULAPABILITY SCORE” UNDER THE FSG IS DETERMINED BY *ORGANIC REMEDIAL MEASURES OF THE ORGANIZATION PROMULGATED IN ADVANCE OF THE OFFENSE*; HENCE, THE NEED FOR PREVENTIVE MAINTENCANCE THROUGH IMMEDIATE AUDITS & REVISIONS OF COMPLIANCE PROGRAMS TO *MIRROR THE MITIGATING FACTORS* INCORPORATED BY OPERATION OF LAW INTO THE FEDERAL SENTENCING GUIDELINES IS MANIFESTLY EVIDENT.**

I. APPLICATION OF THE CORPORATE GUIDELINES

- a. **Aggravating Offense Characteristics**
 - i. **NON-EFFECTIVE COMPLIANCE & ETHICS PROGRAMS**

 - ii. **DEFINING & DISTINGUISHING PECUNIARY HARM**

 - iii. **“CRIMINAL PURPOSE”**

iv. **SIZE OF THE ORGANIZATION**

v. **PRIOR LEGAL HISTORY**

vi. **PROVEN INVOLVEMENT OR TOLERANCE OF CRIMINAL ACTIVITY, INCLUDING, PARTICIPATION, CONDONING OR BEING WILLFULLY IGNORANT OF THE OFFENSE**

2. POTENTIAL UPWARD DEPARTURES

b. **Mitigating Factors**

i. **EFFECTIVE COMPLIANCE & ETHICS PROGRAMS**

ii. **SELF-REPORTING**

iii. **EARLY AND VOLUNTARY RESTITUTION TO REMEDY ANY HARM CAUSED**

iv. **RETENTION & SEGREGATION OF RECORDS**

v. **EARLY FRAUD DETECTION**

3. ADVISORY NATURE OF THE GUIDELINES AFTER *BOOKER, RITA, and GALL*

VII. METHODOLOGY OF COMPUTING CORPORATE “CULPABILITY SCORE”

A. **Summary of Calculating Culpability Score**

B. **Illustrative Example of Computation Of Culpability Score**

1. **Introduction**

2. **Counts of Conviction**

3. **Restitution**

4. **Criminal Fine**

5. **Base Offense Level & Multiple Counts (‘Grouping’)**

6. **Determination of Culpability Score Plus Minimum & Maximum Guideline ‘Multipliers’**
7. **Determination of Guideline Fine Range**

VIII. PROBATION & ORGANIZATIONAL MONITORING BY USPO

IX. CURRENT DEBATE ON CORPORATE WAIVER OF ATTORNEY/CLIENT PRIVILEGE

- A. **Introduction**
- B. **US Sentencing Commission**
- C. **The Organized Bar**
- D. **US House of Representatives**
- E. **US Senate**
- F. **The Judiciary**
- G. **Summary**

X. CONCLUSION

**I.
INTRODUCTION**

A. Summary of Article

The overriding proliferation of federal health care fraud prosecutions by the Department of Justice— *criminalizing* traditionally *regulatory* violations—² has caught many distinguished health care lawyers and corporate compliance officers unprepared in the absence of exceptionally experienced white collar criminal defense attorneys and/or integrated, free-standing white collar defense sections of *every* health care law firm.

The evolution of legal health care requirements— and its criminal variants— has largely detracted many from the pathologies of white collar offenders and those individuals committing serial corporate crimes in connection with the delivery of health care services.

² See *e.g.*, Benson B. Weintraub & Jon A. Sale, "Criminalization" of Civil Law Claims— CORPORATE SENTENCING FOR CORPORATE COUNSEL: PRELIMINARY CHALLENGES TO GUIDELINE SENTENCING OF ORGANIZATIONAL DEFENDANTS, American Law Institute - American Bar Association Continuing Legal Education (April 18, 1991) C640 ALI-ABA 225.

Though the response to this entire phenomenon has been slow in coming, grossly mixed, and frequently misinterpreted, *the manifestation of social, political, and economic concerns with systemic white collar criminality and health care fraud in particular has become vitally important* to prosecutors, legislators, candidates, and more critically, the electorate.

B. Exponentially-Increased Health Care Prosecutions

Perhaps the most significant indicator of this ongoing concern is the exponential increase in criminal, civil, and regulatory actions to enforce existing anti-fraud statutes and regulations, addressed *infra*.³

And based upon such increased prosecutorial challenges to corporate entities *qua* organizational entities, the advent of largely standardized “guidelines” for the determination and complex calculation of sanctions against offending organizational defendants, the US Sentencing Guidelines have addressed offenses committed by corporations and smaller business organizations pursuant to the Sentencing Reform Act of 1984⁴ and progeny and have established “benchmarks”— both in terms of *methodologies* employed in determining these complex regulatory/statutory indicia of the relative severity of overall “offense behavior” (not limited to the “offense of conviction”)— as well as the frequently severe or often excessive financial *sanctions* ordinarily indicated for corporate law violations which can threaten the financial soundness of companies or markets.

Invariably, however, health care counsel must, with the first indication of government investigation of a demonstrably guilty corporate offender, compel independent compliance officers (under counsel’s supervision for myriad reasons, including the privilege, addressed in detail, *infra*, to ensure that all appropriate *remedial steps* are taken to ameliorate the potential problem, ultimately, under a worst case scenario, to lay the groundwork for seeking a Deferred Prosecution Agreement (DPA).

This article advocates the axiomatic imperative of fully integrating experienced federal white collar criminal defense lawyers into the traditional legal delivery systems of law firms engaged largely in the complex civil and regulatory aspects of health care law, given the exponential increase, number, and frequency of national criminal anti-kickback and fraud cases.

Moreover, white collar defense counsel serve a critical function in auditing, reviewing, monitoring, and updating corporate compliance programs of health care providers in order to design a mirror image of the exceedingly complicated organizational Guidelines which inform and which frequently inform DPA decisions and generally govern corporate governance and sentencing in order to substantially mitigate potential financial sanctions against the client while preserving the integrity of the company for the benefit of its shareholders, many of whom are “victims” of corporate fraud by

³ See Notes 24-25, *infra*.

⁴ See *e.g.*, 18 U.S.C. §§ 3551, *et. seq*; 28 U.S.C. §§ 991, *et. seq*; Chapt. 8, US Sentencing Guidelines.

causational market fluctuation and diminished value of the company's securities by virtue of corporate of high level criminal misconduct.

Finally, this timely and comprehensive article also addresses the current and contentious debate on whether waiver of the attorney/client privilege in the corporate setting may, consistent with fairness, due process, and the proper administration of justice, condition dispositional leniency or a "cooperation" motion if the putative defendant fails to accede to such governmental demands.

C. Corporate Crime is Committed by Individuals: Unique Pathology of White Collar Offenders

Typically, the "white collar"⁵ offender has its own "pathology," one which is strikingly different for numerous reasons from other categories of offenders. There is an ongoing and historical debate among criminologists and legal scholars over the appropriate "treatment" of white collar offenders, many of whom believe that such criminals are inherently less "culpable" ⁶ thereby warranting more lenient treatment. *Id.*⁷

On the other hand, Courts have noted that white collar offenders—particularly those whose sentences are Guideline-driven—sometimes exceed those of "murderers." *United States v. Ebbers*, 458 F.3d 110, 129 (2nd Cir. 2006)("[t]wenty-five years is a long sentence for a white collar crime, longer than sentences routinely imposed by many states for violent crime, including murder or serial child molestation.") *Id.*

⁵ The term "white collar crime" is generally acknowledged as having been first used by Edwin H. Sutherland who defined it as an offense "committed by a person of respectability and high social status in the course of his occupation." See Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability* 42HOUS. L. REV. 393, n. 224 (2005)(citation omitted). See generally, Marc L. Miller, *The Sentencing Equality Pathology*, 54 EMORY L.J. 271 (2005).

⁶ See e.g., Stanton Wheeler, *et. al.*, SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 1992 (1988)(observing that courts are likely to be more lenient on white collar crime because such offenders may "remind [them] of a colleague or neighbor, while the street offender is no more than a stranger"); J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1264-65 (1999)(interpreting the dissent in *Harmelin v. Michigan*, 501 U.S. 957, 1021 (1991) as suggesting "the defendant's 'moral guilt' was less than that of violent criminals.").

⁷ However, with the current 'sentencing revolution' in progress— and a revitalized popular, legislative, and judicial demand for more rationale sentencing options— this trend should continue. See e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Rita v.*, 551 U.S. --, 127 S. Ct. 2456 (2007); *Kimbrough v. United States*, 551 U.S.--, --, S. Ct.-- 2007 WL 4292046 (Dec. 10, 2007), *Gall v. United States*, 551 U.S.--, --S.Ct.--, 2007 WL 4292116 (Dec. 10, 2007).

In the *Enron* cases, former CEO Jeffrey Skilling was sentenced to more than 24-years imprisonment.⁸ In the *Adelphia* case, sentences of 15-25 years were meted out.⁹ Moreover, directors at WorldCom agreed to a civil settlement to personally pay \$18M of a \$54M settlement with shareholders, while Enron directors agreed to personally pay \$13M toward a \$168M settlement with shareholders.¹⁰

The sentencing of white collar offenders, including those convicted of health care law offenses,¹¹ is particularly complex, frequently defies categorization or methodology, and gender may also play a significant role in prosecution and sentencing.¹²

This author, however, subscribes to the belief that white collar offenders typically exhibit Type A Personality characteristics, they're inherent unreasonable risk takers and arrogant, often undeterred even with knowledge of the relative severity of potential sentences if convicted, and some of whom are distinctly sociopathic.¹³

⁸ John Emshilleer, *Skilling Gets 24 Years in Prison*, WALL ST. J., (Oct. 24, 2006) at C1. *But see post-Kimbrough/Gall Reply Brief of Jeffrey Skilling*, Case No. 06-20885 (5th Cir.)(filed Dec. 21, 2007) at 152-160 (arguing unwarranted sentencing disparities in Enron cases)(pending).

⁹ Ellen Podgor, *White Collar Crime Blog*, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/2006/sentencing_ofj_1.html (June 20, 2005).

¹⁰ Fairfax, *locus cit.* at n. 4, citing, Ben White, *Former Directors Agree to Settle Class Actions; Enron, WorldCom Officials to Pay Out of Pocket*, WASH. POST (Jan. 8, 2005) at E01.

¹¹ *See e.g.*, Notes 24-25, *infra*.

¹² Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Sentencing Guidelines World*, 37 McGEORGE L. REV. 691, 691-98 (2006)(noting gender-based differences in sentencing for the same crime); Kathleen Daly, *Gender and Varieties of White Collar Crime*, 27 J. CRIM. L. 769, 770-71, 789-91 (1989)(“ Men’s white collar crime, though more frequent than women’s and exacting more social injury or harm, should not be used as the ‘norm’ from which women’s white collar crime is thought to deviate. Women’s illegalities should be explored on their own terms. *The multiple influences of gender, class, and race relations, both within and outside work organizations and occupations, should also be investigated.* These relationships not only generate many varieties of white collar crime, they also undoubtedly play a role in who is caught and prosecuted for white collar crime.”)(emphasis added). *See also*, Prof. Douglas A. Berman, *Is It Gender Bias, a Good-Looks Discount, and/or the Virtues (or Vices?) of Jury Sentencing?* FEDERAL SENTENCING LAW & POLICY (Law Professors’ Blog)(Dec. 19, 2007).

¹³ These conclusions are based largely on anecdotal impressions of the scores of white collar clients as federal criminal defense counsel for more than 25 years.

This is particularly true, *a fortiori*, in cases involving health care fraud. *Id.*, especially where the health care provider/defendant is typically in a state of complete [legal and factual] denial—unlike the more “professional” offender— who readily acknowledges guilt and acceptance of responsibility in stark contrast to “*situational*” criminals, to defense counsel. *Id.*

[T]he culture, environment, and privileges of white collar occupations lead to criminal behavior by promoting the values of unbridled competition and encouraging individuals to function above the law.

This theory predicts that the more established white collar workers are more likely to commit crimes because they have more thoroughly internalized the culture of their occupation and have greater ability to avoid prosecution.

To solve this problem, the attitudes of corporate America must be changed. . . ¹⁴

Finally, while white collar crime originally had “sociological roots,”¹⁵ “[t]ranslating the sociological concept into a legal one presents deficiencies when placed in the context of the federal sentencing guidelines structure.”¹⁶ The difficulty and anomalies in this interdisciplinary approach is always significant, particularly in health care cases.¹⁷

In summary as to this point, the pathologies exhibited by white collar offenders are often reliable stereotypical and particularly complex matters which confront sentencing judges— for both corporations and individuals— with formidable dispositional challenges as to alternatives dependent largely upon the history, background, and characteristics of the defendant¹⁸ and the utilitarian and

¹⁴ Book Note, 105 HARV. L. REV. 2098, 2100 (1992), *citing* Weisburd, Wheeler, Waring & Bode, WHITE COLLAR CRIMINALS UNMAKSED; WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS, Yale University Press (1991),

¹⁵ Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM.. L. and CRIMINOLOGY 731, 733-35 (Spring 2007) © Northwestern University, School of Law, Ellen S. Podgor.

¹⁶ *Id.* at 734.

¹⁷ *See generally* Norval Morris & Michael Tonry, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM, 77, Oxford Univ. Press (1990)(“Sentencing choices from among interchangeable punishments (or packages of punishments) should be governed by the purposes to be served *at* sentencing not by the purposes *of* sentencing.”)(original emphasis).

¹⁸ 18 U.S.C. §3553(a).

moral purposes of sentencing, all against the backdrop of the centrality of the codified principle of parsimony which requires imposition of the least restrictive sanction necessary to achieve desired social goals.¹⁹

II. TRADITIONAL HEALTH LAW PRACTICES

There appears to be a significant “disconnect” between health care practitioners, including those in large firms with White Collar Crime sections, and the more diversely experienced, and tenacious federal criminal defense lawyers, many of whom cut their teeth on the defense of federal criminal offenses not typically handled by traditional health care firms.

Anecdotal evidence supports the notion that large (100+ member [mult-city] health care firms often have no in-house white collar defense lawyers), clearly missing out on enhanced billing opportunities while others are staffed by very competent, but more politicized lawyers lacking the depth of an intimate knowledge of the critical integration between white collar crime and the subtle, extensive nuances of ever-changing contemporary health care law. “But the times, they are a-changin’.”²⁰

Experienced health care lawyers were initially trained and practiced in forums which were largely civil or regulatory. Of course these attorneys have contemporized their practices in view of the relatively recent escalation of federal health care fraud prosecutions nationwide. However, recent modernization and integration of new concepts with both *specific* health care and *general* criminal statutes and properly delegated regulations cannot optimally substitute for the experience garnered over decades of a federal white collar criminal defense lawyer’s *daily* menu of vigorous litigation in the trenches of United States District Courts, the federal Courts of Appeals, and U.S. Supreme Court.

The time, therefore, has arrived for health care lawyers, federal criminal defense attorneys, and corporate compliance officers to reach out to each other— form new relationships and partnerships— to share their diverse perspectives and expertise in augmenting the clients’ *ultimate legal delivery system*.²¹

Once enhanced to more appropriately and experientially respond to institutional crises BEFORE they arise, *e.g.* immediate audit/revision of existing client compliance programs and corporate governance principles, corporate reorganization recommendations, as well as the responding to the

¹⁹ *Id.* (“The court shall impose a sentence sufficient, but not greater than necessary...” to achieve the statutory purposes of sentencing)(emphasis added).

²⁰ Bob Dylan, *THE TIMES THEY ARE A-CHANGIN*,’ Special Rider Music © (1963).

²¹ See Alan Chaset & Benson Weintraub, *New Guidelines for Sentencing Corporations*, TRIAL, 41-44 (April 1992) (concluding, “The [federal corporate sentencing] guidelines will require that many attorneys who have not previously had to deal with the criminal justice system become familiar with the evolving common law of sentencing so that they can best represent and defend their clients’ interests.”)

increased proliferation of search warrants for the seizure of electronic and corporate records instead of the traditional use of a subpoena *duces tecum*, the clients' defense will be met with immediate and experienced criminal litigators backed by an arsenal of health care experts seeking, for example, the immediate return of property under Rule 41, Fed. R. Crim. P., and preventive measures to preclude such action if possible.²²

III. PREVENTIVE MAINTENANCE

Whether serving as General Counsel to the nation's largest health care providers, including medical device manufacturers, DME distributors, pharmaceutical manufacturers and wholesale/retail outlets (including issues of "group pricing discounts" now under prosecutorial scrutiny), internet sales, offshore issues, *etc.* or as outside counsel to small to mid-range corporations providing health care services, it's essential that clients consult you regarding "preventive maintenance" *before* any violations are detected and for YOU *QUA* COUNSEL to ensure the PRIOR inclusion of optimal "mitigators" under Federal law, especially Chapter Eight of the US Sentencing Guidelines,²³ to reduce/mitigate the client's potential criminal and financial liability in anticipation of reaching a Deferred Prosecution Agreement (DPA)²⁴ which is typically intended to be *more reparative than retributive* while holding the company adequately accountable for its criminality by imposing punishment— "sufficient, but not greater than necessary"— under 18 U.S.C. § 3553(a) to achieve the statutory purposes of sentencing and the fair and proper administration of justice.

²² Similarly, this also applies to the more benign, and therefore subordinated issues, of potential restitution and criminal forfeiture allegations.

²³ USSC §§ 8A1.1, *et. seq.*

²⁴ *See e.g.*, US Dept. of Justice, US ATTORNEYS MANUAL at § 9-22.010 (1997). DPA's were recently reported to be increasingly used.

In the District of New Jersey alone, the US Attorney has recently announced Deferred Prosecution Agreements (DPA), in conjunction with HHS, in lieu of corporate or individual federal criminal prosecution in numerous health care cases. *See e.g., In Re: Biomet, Inc., Stryker Orthopedics, Zimmer, Inc., Smith & Nephew Inc., and Depuy Orthopedics*. These firms agreed to pay back a total of \$311M to settle claims under the Anti-Kickback Statute and Federal False Claims Act. The firms also agreed to interim supervision by Federal Monitors. <http://www.usdoj.gov/usao/nj/press/index.html>.

During the same period, however, and in the same judicial district, criminal prosecutions were waged against other health care providers: *US v. Philip Etough*, MD (physician indicted on 10 counts of prescribing OxyContin for no legitimate medical purpose); *US v. Albert Poet*, MD (physician sentenced to 10 months for substituting unapproved Botox); *US v. Tung* (Podiatrist plead guilty to defrauding Medicare and agreed to pay \$1.2M civil settlement and criminal restitution); *US v. Joan Jaszult*, MD, (physician convicted after trial of conspiracy to illegally distribute thousands of OxyContin and Percocet (sentencing pending, Guidelines: 292-365 months). *Id.*

In certain federal districts in New York, for example, pretrial diversion agreements, however, elusive, are also available as alternatives to criminal prosecution. Yet the mainstay of deterrence against corporate crime and individual health care fraud offenses/violations remains criminal prosecution for white collar or traditional narcotics distribution offense.

Similarly, R. Alexander Acosta, the US Attorney for the Southern District of Miami has been particularly tenacious in pursuing these matters.²⁵

²⁵ See e.g., *United States v. Valdez* (prosecuted by Dep. Chief Kirk Ogrosky, Fraud Section, DOJ (“Medicare Fraud Strike Force Case has Charged 120 Defendants with Medicare Fraud Since March 2007)(owner/operator of DME company sentenced to more than 12 years imprisonment, \$3.5M restitution, and supervised release... [through the assistance of] Benjamin Metch, an attorney convicted of Medicare fraud in 2006, Unimed Pharmacy’s license [was reinstated] and from 2001-2003 collected \$7M for aerosols... the DME company collected in excess of \$3M [and] [The] Medicare program paid for almost \$155M... [I]n Miami-Dade County alone, account[ing] for more paid DME claims than every state in the country except California, Texas, New York, Michigan, and Ohio....” <http://www.usdoj.gov.usao/fls>. *Id.* See also *United States v. Royzen, Vista Mar Med. Rehab., Inc., Romana Medical, Plantation Medical Recovery, Dial Medical* (imprisonment, fines, and restitution imposed for fraudulent PIP claims involving staged car accidents), *Id.* *United States v. Modica, et. al.*, (indictment [Oct. 26, 2006] alleged more than 150,000 oxycodone pills; defendants face mandatory minimum sentences of 5-40 years imprisonment for possession and conspiracy to distribute narcotics, 21 U.S.C. §§ 841(a), 846). *Id.*

The Southern District of Florida prosecutions have also targeted DME distributors. See e.g., *United States v. Aenile, et. seq.* (84 months imprisonment for \$28M in false Medicare claims; *United States v. Penichet*, (imprisonment for \$14M false Medicare claims)(12/20/2007); *United States v. Iglesias, et. al.* (12/17/2007)(imprisonment for \$6.8 false Medicare claims).

See also *United States v. Pilavyan*, (C.D.Ca.)(10 years imprisonment and \$7M restitution for health care fraud and money laundering conspiracy)(Dec. 17, 2007).

For additional information regarding *South Florida as the leading hotbed* of health care fraud, See Jim McElhatton, WASH. TIMES (Sept. 21, 2007): “South Florida Bills Billions for HIV: Doctors and clinics in three Southern Florida counties account for most of the billions of dollars charged to Medicare nationwide for HIV and AIDS drugs and services, billing records show.”.

“Federal health care regulators call the lopsided billing patterns “egregious” and warn that South Florida — particularly Broward, Miami-Dade and Palm Beach counties — is a potential hotbed for health care fraud, waste and abuse.” *Id.*

“It’s. . . part of the money-driven, underground economy in Miami,” said Benson B. Weintraub, a health care fraud lawyer based in Fort Lauderdale.” *Id.* “According to a report this week by the Inspector General for the U.S. Department of Health and Human Services, health care providers in Broward, Miami-Dade and Palm Beach submitted \$2.5 billion in claims to Medicare on behalf of HIV/AIDS patients in 2005. . .” *Id.*

IV.
**SUBSTANTIVE REASONS TO INTEGRATE
CRIMINAL/HEALTH CARE PRACTICES**

When the rubber meets the road and your client, already under administrative or civil federal scrutiny, *and is in total denial about being poised for imminent indictment* (e.g., “But I didn’t do anything illegal.”), this *represents the critical time* for “The Power of Full Engagement”²⁶ by integrating federal criminal defense counsel with health care and compliance divisions, with internal offices of General Counsel or as outside counsel is indicated or warranted.²⁷

More broadly, mid-large sized law firms with Health care specialties should, for potential cost/benefits, consider such integration full-time into their Health Care and/or White Collar sections to enhance overall their delivery of legal services with particularized expertise from the combination of a working knowledge of corporate compliance *and* application of the federal criminal, civil, and regulatory laws’ complexities and nuances of the federal Corporate Sentencing Guidelines in particular.

V.
**THE “ADDED VALUE” OF TEAM DEFENSE AND OVERCOMING THE “DISCONNECT”
BETWEEN HEALTH CARE AND CRIMINAL DEFENSE COUNSEL**

The federal defense of a prospective or existing criminal defendant prosecuted for committing violations relating to the delivery, billing, or false/insufficient maintenance of medical services or records is no different than defending more traditional federal offenses, including all variants of fraud (mail/wire/theft of ‘honest services),²⁸ false statements,²⁹ large scale Title 21 narcotics distribution,³⁰

”By contrast, providers in the rest of the country submitted less than \$1 billion in claims combined.”, *Id.*, *republished* by US Senate Comm.. on Homeland Security & Government Affairs (Sen. Tom Coburn, MD [R-OK])(emphasis added).

²⁶ See Lohehr & Schwartz, THE POWER OF FULL ENGAGEMENT (“Managing Energy, Not Time, Is the Key To High Performance. . .”) Simon and Schuster (New York) (2005 ed.).

²⁷ See e.g., Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POLICY 833 (2000);. Note, *The Good, The Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley and the Problems With Legislating Good Behavior*, 116 HARV. L. REV. 2123 (2003)(doubting the deterrent effect of corporate codes of behavior); Jeffrey Parker [former USSC Counsel] and Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J. L. & ECON. 423 (1999).

²⁸ 18 U.S.C. §§ 1341, *et. seq.*

²⁹ 18 U.S.C. §1001.

³⁰ 21 U.S.C. §§ 841(a)(1),(b)(1)(A)-(C), 846, 848.

conspiracy,³¹ money laundering,³² health care fraud,³³ HIPAA violations,³⁴ Anti-Kickback provisions (federal and state),³⁵ obstruction of justice,³⁶ RICO (criminal/civil)³⁷, *etc.* must be addressed pre-indictment in optimal anticipation of less restrictive governmental action.

VI.
SPECIFIC AREAS OF ORGANIZATIONAL FEDERAL SENTENCING GUIDELINES
CORRELATED WITH VIOLATIONS OF HEALTH CARE STATUTES

A. US SENTENCING GUIDELINES FOR ORGANIZATIONS:
USSG §§ 8A1.1, *et. seq.*

The Federal Sentencing Guidelines (FSG)— particularly Chapter Eight regarding “Organizational Guidelines,” is— by specific design—based on the “carrot and stick” approach.³⁸

The corporate FSG provide a “mirror image” of what EVERY corporate compliance program must incorporate for the sake of fully protecting valued corporate assets and integrity.³⁹

B. OVERVIEW OF THE FSG FOR ORGANIZATIONS

First, the relative seriousness of the offense is largely determined by a term of art, “pecuniary harm,”⁴⁰ (loss/gain) a factor which experienced white collar counsel can often negotiate successfully

³¹ 18 U.S.C. §371.

³² 18 U.S.C. §§ 1956-1957.

³³ 18 U.S.C. §§1347, 1349.

³⁴ *Id.*

³⁵ 42 U.S.C. § 1395nn

³⁶ 18 U.S.C. § 1509, *et. seq.*

³⁷ 18 U.S.C. §§ 1961, *et. seq.*

³⁸ See *e.g.*, Wesley. Cragg, ETHICS CODES, CORPORATIONS, AND THE CHALLENGE OF GLOBALIZATION, Edgar Pub. (MA)(2005); Winthrop M. Swenson and Nolan Clark, *The New Federal Sentencing Guidelines: Three Keys to Understanding the Credit for Compliance programs*, 1 CORP. COMP. Q 1 (1991); Hon. Billy Wilkins, *Testimony Before House Sub-Committee on the Judiciary*, 3 FED. SENTENCING REP. 118, 120 (1991).

³⁹ See generally Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense To Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605 (1995).

with claims of offsets, the government proving causation, defendants establishing intervening factors defeating causation or “but for” liability, mitigation, economic methodological calculation, realistic economic theories through forensic accounting, *etc.*

1. **EXAMPLE OF INEFFECTIVE COMPLIANCE PROGRAM & ITS CONSEQUENCES**

As set forth with particularized detail, *infra*, the lack of an “effective”⁴¹ compliance program for purposes of the Corporate Sentencing Guidelines— violations of which materially and substantially increase a corporate defendant’s disgorgement of assets— is the poor example set by The PBSJ Corporation, a 4,000 employee company based in Florida and the *mea culpa* it was required to disclose to the public and markets regarding material deficiencies concerning its “organizational culture”⁴² at the top, tolerance of criminal activity by substantial level personnel, including the convicted CEO, CFO, and others, which could have been completely obviated by employment of meaningful and proper preventive compliance maintenance the organization in the first instance.

The following corporate admissions by PBSJ to the Securities & Exchange Commission serve as an illustration of the worst type of corporate governance— notwithstanding cosmetic lip service of adherence to ethical commercial values and holding this large company out as a “model corporate citizen”— of **WHAT NOT TO DO** in the design, implementation, and maintenance of an “effective” corporate compliance commitment correlated with reducing culpability for the purposes of seeking deferred prosecution (DPA) or sanctions under the corporate Guidelines:⁴³

The Company itself— deriving 77% of its revenue from governmental contracts regarding infrastructure, [airport] building, road construction, transportation, design and engineering— placed itself at incalculable risk to its corporate integrity and employee shareholders (and the CEO and CFO received lengthy terms of imprisonment) based on the impact of financial soundness caused by intervening circumstances for which the firm was inherently unprepared because it had never given

⁴⁰ See *e.g.*, USSG §§ 8C2.4, comment. (n. 1), 2B1.1, comment. (n. 2)(and exclusions/offsets to be asserted by corporations in mitigation of sanction)

⁴¹ See USSG § 8B2.1 which, to be truly must actually be “effective,” and the organization “shall... exercise due diligence to prevent and detect criminal conduct.” *Id.* at (a)-(a)(1).

⁴² USSG § 8B1.2(b) Appendix A (Amendment 673)(2004).

⁴³ For purposes of full disclosure, this author served a criminal defense counsel of a low level defendant in the underlying misappropriation by the CFO, and other substantially high ranking personnel in the \$36M misappropriation and rampant national political corruption in which corporate officials were convicted, *inter alia*, of making illegal campaign contributions, *United States v. Maria Garcia*, Case No. 06-20583-CR-King (S.DFL.)(on appeal to US Court of Appeals for the Eleventh Circuit, Case No. 07-13594-C)(pending), and the Company reached a favorable settlement under the False Claims Act for over-billing the United States [and other (uncharged) political subdivisions].

serious consideration to establishing the actual mechanics of an industry-specific “effective”⁴⁴ corporate compliance program with segregated controls, monitoring and inherent safeguards in this technological age.

These principles apply with no less force and effect to the health care compliance industry.

The following, therefore, is an excerpt of the Company’s admission of its material omissions from an “effective” compliance program:

**Form 10-K, PBSJ Corporation [of Florida] (Annual Report Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934)
(fiscal year ended Sept. 30, 2005): . . .**⁴⁵

“Material Weaknesses in Internal Control Over Financial Reporting...”

1. “Entity Level Controls”

“The company did not design and maintain effective entity-level controls... [e.g.,] (control environment, risk assessment, control activities, information and controls, and monitoring).”...

“The company did not maintain appropriate tone at the top [what the Guidelines call “corporate culture”] and did not give special consideration to the risk management override of internal controls, including the review and control of journal entries. This material weakness, among others described below, resulted in the restatement of the Company’s financial statements...”

Id. at 97

“The Company did not conduct a fraud risk assessment... This material weakness created an environment where financial statement fraud and the misappropriation of the company’s assets... resulted in material misstatements... to the consolidated financial statements and remained undetected for a significant period of time”

“Additionally, the Company did not maintain the appropriate security controls or access limitation controls to the company’s accounting system.” *Id.*

“The Company did not adequately communicate to all employees of the organization the importance of internal controls...”

“The Company did not maintain appropriate monitoring controls...” *Id.*

⁴⁴ USSG § 8C2.5(f).

⁴⁵ *Id.*

“The Company did not have a sufficient number of personnel with an appropriate level of accounting experience, and training... [under] (“US GAAP”)...” *Id.* at 98.

2. **“Inadequate Controls Related to Accounting for Government Contracts...”**

3. **“Inadequate Controls Related to the Closing and Financial Reporting Cycles...”**

4 **“Inadequate Controls Over the Cash Management Process and Safeguarding of Assets**

Id. at 99.

5. **“Inadequate Controls Related to Cash Recognition Cycle. . .”**

Id. at 100 (emphasis added).

Had PBSJ— prior to detection of the irregularities (**which it failed to self-report to the US Attorney or law enforcement officials substantially forfeiting claims to potential “mitigation”**)—⁴⁶ any “culpability score” described under the Guidelines would have otherwise been substantially mitigated as described, *infra*.⁴⁷

Moreover, the Capitol Hill newspaper of record, ROLL CALL, also reported:⁴⁸

⁴⁶ This conduct is itself a violation of obstruction of justice statutes and misprison of felonies, but an *increase* to the offense level on the basis of obstruction has not been added, primarily because the grouping rules prohibition of an increase “[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic... to another of the counts.” USSG § 3D1.2(c), comment. (n. 5) and on the basis of other Guideline provisions too.

⁴⁷ For reasons perhaps best known to the Bush Administration, former Attorney General Gonzalez, or US Attorney for the Southern District of Florida, PBSJ, as a corporate entity, was neither charged nor convicted of any violation of federal law.

⁴⁸ “As allegations mounted that illegal campaign contributions had tainted the 1996 presidential election, government lawyers were becoming more and more certain something was amiss. But with the statute of limitations nearing expiration, and with penalties for running afoul of campaign finance laws rivaling those for moving violations, the bad guys mostly got away.”

“Benson Weintraub, an attorney for Maria Garcia, one of the three former PBS&J employees, suggested that the 2002 corporate reimbursement for the Georgia Senate race is just the tip of the iceberg.”

"It's our impression that there has been a wide proliferation of political corruption by PBS&J," Weintraub said. "We believe that the illegal campaign contributions were widespread on a national basis."

"The more information [that is] uncovered will indicate the scale and scope of a pattern of illegal

2. **EXAMPLE OF EXEMPLARY COMPLIANCE PROGRAM**

a. **Overview**

COMPUTER ASSOCIATES INTERNATIONAL, Inc., (CA), had been the target of an ongoing regulatory and criminal investigation until September 2004 at which time it **revolutionized the corporate compliance industry** by entering into the most strict Deferred Prosecution Agreement (DPA) with the US Attorney for the Eastern District of New York, Case No. Cr. No. 04-837 (ILG).

This agreement was unparalleled by virtue of the defendant company's sincere commitment to radical change in the internal rules of corporate governance and establishment of an entirely new paradigm for corporate compliance, largely irrespective of whether it's industry-specific or theoretically applicable to all business entities, including health care providers.

In consideration of CA's agreement to accept as true the allegations in a two count Information charging violations of securities fraud, 15 U.S.C. § 78j(b), and obstruction of justice, 18 U.S.C. §1512(c)(2), the government agreed to defer prosecution, negating a guilty plea and sentencing under the "draconian"⁴⁹ Guidelines.

However, what made this agreement a standard bearer, notwithstanding payment of approximately \$300M based on its repetitive nature, high executive level toleration, and the relative severity of the offense conduct is the reparative nature of concessions made by CA as a radical innovator in the compliance culture.

b. **Specific Components of "Effective" Compliance Program**

The company committed itself to a total reorganization of its corporate governance principles, in practice, and *really* initiated perhaps the most proactive and comprehensive compliance programs in Corporate America.

campaign contributions," he said. . ." *Id.*

"Garcia's attorney also said a member of PBS&J's board recently told him the reimbursement of illegal campaign contributions "unfortunately still continues today." ... *Id.*

Matthew Murray, *DOJ Eyes Donor Reimbursement*, ROLL CALL (October 12, 2006). 2006 WLNR 17696494.

⁴⁹ See *e.g.*, Linda Greenhouse, *Justices Uphold Disputed System of Sentencing*, NY TIMES (Jan 19, 1989)("Benson Weintraub, a lawyer for the National Association of Criminal Defense Lawyers, a 10,000-member organization that filed a brief against the commission, said the decision today "*validates a Draconian system*," which, he said, defense lawyers would continue to challenge.")(emphasis added), *rev'd sub nom United States v. Booker*, 543 U.S. 220 (2005).

Broadly, the organization's organic structure was immediately changed by appointment of a truly independent compliance division, approved after arduous deliberation by the court, and appointed Pat Gnazzo to the unprecedented position of Senior Vice President (SVP) of Business Practices & Compliance, Chief Risk & Compliance Officer.⁵⁰

As more fully addressed, *infra*, these compliance program modifications are particularly significant because: (1) the compliance division was divorced and segregated from management, *e.g.*, CEO, CFO, *etc.*, accountable only directly to the newly formed Audit & Compliance Committee of the Board of Directors; (2) established substantive, detail-driven practices that “meet or exceed pertinent laws, regulations, and company policies;” (3) “embed[ed]” business processes into the firm’s “culture” to “implement [effective] controls that will detect and prevent wrongdoing;” (4) ensured job-specific training in applicable laws and regulations, ethics, conflicts of interest, *etc*; *Id.*

Moreover, (5) created a “third party Helpline and Ombudsperson to encourage the disclosure of wrongdoing or alleged wrongdoing—anononymously or confidentially, as requested— with every incident being investigated by the compliance office; (6) distributed and requires annual acknowledgment by all officers, managers, employees, and vendors of familiarity with every applicable corporate compliance standard; (7) developed a “Risk Management program to review and recommend remediation to business processes; (8) ensured a meaningful “Business Continuity program; (9) developed comprehensive ethical review programs which build trust; (10) screening new hires and existing personnel and vendors; *Id.*

And critically, (11) initiated “A robust Records and Information Management program that protects critical business information from being inappropriately destroyed” and to “process, respond to and track government requests made to the company,” mandating “Root cause corrective action,” at the risk of disciplinary action.⁵¹

c. Summary

Thus, in stark contrast to the deliberately lax deficiencies in corporate compliance conceded by PBSJ, *supra*, the innovative, independent, and comprehensive scope of CA's genuine commitment to corporate integrity— all with whatever corporate funding is necessary to finance such an ambitious undertaking— with a full-time and part-time staff of approximately 100 employees is truly as groundbreaking as commendable.

Clearly, this compliance program, is the standard bearer for all industries, including those involved primarily in the delivery of health care services or manufacturing/distribution of pharmaceuticals, medical devices, and ancillary services.

⁵⁰ See Patrick J. Gnazzo, *The Elephant in the Room: An Update on Corporate Cooperation Policies (“Power Point Presentation”)*, NACDL/Georgetown Law Center White Collar Crime Institute (September 27, 2007) © Computer Associates.

⁵¹ *Id.*

A. CALCULATING “CULAPABILITY SCORE” UNDER THE FSG IS DETERMINED BY ORGANIC REMEDIAL MEASURES OF THE ORGANIZATION PROMULGATED IN ADVANCE OF THE OFFENSE; HENCE, THE NEED FOR PREVENTIVE MAINTENANCE THROUGH IMMEDIATE AUDITS & REVISIONS OF COMPLIANCE PROGRAMS TO MIRROR THE MITIGATING FACTORS INCORPORATED BY OPERATION OF LAW INTO THE FEDERAL SENTENCING GUIDELINES IS MANIFESTLY EVIDENT.

1. APPLICATION OF THE CORPORATE GUIDELINES

A. Aggravating Offense Characteristics

Application of the organizational FSG is governed by the same General Application Principles employed for individual defendants, USSG §§ 1B1.1, *et. seq.*

That is, the Base Offense Level” (BOL) reflects the relative severity, in the Commission and Congress’ view, of the “offense behavior” or “relevant conduct,” USSG § 1B1.3 which does not limit calculation of the Guidelines to the sole count(s) of conviction, unless otherwise stipulated.⁵² Thus the measure of “harm” attributable to corporations— for the purpose of imposing criminal fines,⁵³ restitution,⁵⁴ disgorgement,⁵⁵ or the rarely used “corporate death penalty,⁵⁶⁻⁻ is not generally⁵⁷ limited in any respect by the “offense of conviction.⁵⁸

⁵² See *e.g.*, USSG §1B1.2 (higher offense level); USSG §6A1.3 (lower offense factor stipulation; not binding on court). In the seminal case, *United States v. Liss*, 265 F.3d 1220, 1230-31 (11th Cir. 2000), the Court vacated the sentence for referrals relating to office leases and equipment under the Stark Act and determined pecuniary harm on the amount of the kickback, whereas the government typically seeks to hold defendant accountable for the full amount of “loss” represented by the total fraud.

⁵³ USSG §§ 8C2.4, 8C2.7; 18 U.S.C. 3571(d).

⁵⁴ USSG 8B1.1

⁵⁵ USSG § 8C2.9

⁵⁶ USSG § 8C1.1.

⁵⁷ *But see* USSG, *Guidelines Manual*, Appendix C, Amendment No. 617 (“[T]he amendment incorporates this causation standard that at a minimum requires factual causation.”). *See also* USSG § 2B1.1, comment., [(n. 3(A)(i)], *et. seq.* (regarding limitations on actual and intended loss).

⁵⁸ *United States v. Watts*, 519 U.S. 148 (1997).

B. DEFINING & DISTINGUISHING PECUNIARY HARM⁵⁹

“Criminal” causation⁶⁰ of the “harm is an essential element of the burden of proof and production allocated to the government to establish the nature and extent of pecuniary harm⁶¹ in the first instance.⁶²

Under the relevant conduct provisions, subject to specified exceptions, the defendant company is responsible for jointly undertaken criminal activity undertaken with others, including other entities or individuals, USSG § 1B1.3(a)(1)(B), and this is particularly significant to application of the corporate guidelines for offense levels enhanced on the basis of knowledge of “high level personnel of the organization,” USSG 8A1.2, comment. (n. 3(b)) or the higher scale of “substantial authority personnel,” *Id.* at (n. 3(c)) who are involved in commission of the offense behavior. This may also impact adjustments for “role in the offense.” USSG § 3B1.1, *et. seq.*

C. “CRIMINAL PURPOSE”

In considering the nature and circumstances of the offense and the history and characteristics of the organization, 18 U.S.C. § 3553(a), may, upon finding by a “preponderance of the evidence,”⁶³ determine that if the corporation operated primarily for criminal purposes, *e.g.*, distributing drugs via

⁵⁹ (...[m]eans reasonably foreseeable pecuniary harm that results from the offense.”). USSG § 2B1.1, comment., [(n. 3(A)(iii)].

⁶⁰ See *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2006); *United States v. Rutoske*, 504 F.3d 170, 179 (2nd Cir. 2007). See also *United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir.1999) (“Section 1B1.3(a)(3) establishes a causation requirement when determining actual loss.”); *United States v. Molina*, 106 F.3d 1118, 1123- 24 (2d Cir.1997) (holding that causation is established for purposes of U.S.S.G. § 1B1.3(a)(3) when the defendant “put into motion a chain of events that contained an inevitable tragic result” of the relevant harm) (internal quotation marks omitted); *United States v. Fox*, 999 F.2d 483, 486 (10th Cir.1993) (holding that causation is established for purposes of § 1B1.3(a)(3) when the harm was a “direct result” or “flowed naturally” from the defendant’s criminal misconduct.

⁶¹ In the new loss definition, reasonable foreseeability is the standard for legal cause with respect to the outcome determinative issue of “loss.” However, the new phrase, “**resulted from**,” addresses in the Commission’s statement of reasons for this crucial amendment is that now there is a “**but for**” test, *i.e.*, that a loss that “**resulted from**” an offense is one that would not have occurred **but for** the occurrence of the offense.

The “resulted from” concept is, *a fortiori*, is, incorporated into the sections on “Intended Loss,” pecuniary harm, and intended pecuniary harm, USSG § 2B1.1, comment. (n. 3(A)(ii)-(iv))(2006), addressed in greater detail, *infra*.

⁶² See *e.g.*, *United States v. Cover*, 199 F.3d 1270, 1276 (11th Cir. 2000)(collecting cases).

⁶³ See Note 58, *supra*, USSG § 6A1.3, p.s., Comment.

internet or other aggravating case-specific circumstances, the fine and other sanctions imposed shall functionally divest the organization of all its net assets (corporate death penalty). USSG § 8C1.1.

D. SIZE OF THE ORGANIZATION

The size of the organization, *i.e.*, number of employees, is relevant to determining the culpability score (e.g., >5000, USSG § 8C2.5(1)(A), >1000, *Id.* at (A), >200, *Id.* at (3)(A), >50, *Id.* at (4), >10, *Id.* at (5)).

E. PRIOR LEGAL HISTORY

If, subject to specified exceptions, any part of the instant offense was committed after “(A) a criminal adjudication based on similar misconduct, or (B) civil or administrative adjudication(s) based on two or more separate incidents of similar misconduct,” the culpability score is increased. USSG 8C2.5(c)-(e), including violation of an order or obstruction of justice. *Id.*

F. PROVEN INVOLVEMENT OR TOLERANCE OF CRIMINAL ACTIVITY, PARTICIPATION, CONDONING OR BEING WILLFULLY IGNORANT OF THE OFFENSE

These provisions relate to involvement of “high-level personnel,” USSG § 8C2.5(b)(1)(A) or “substantial authority personnel,” *Id.* at (2)(A)(ii), and serve to increase the culpability score.

G. POTENTIAL UPWARD DEPARTURES

In rare cases, a court may find that the applicable culpability score and resultant advisory guideline range *understates* the nature, seriousness, or harm of the relevant conduct and may impose a sentence higher than that which is otherwise indicated by the FSG for, *e.g.*, threat to national security, threat to environment, threat to markets, official entity, risk of death or bodily injury, public entity, members or beneficiaries of the organization as victims (*e.g.*, shareholders), remedial costs that greatly exceed gain, mandatory monitoring, *etc.* USSG §§ 8C4.2-8C4.11, p.s; 18 U.S.C. § 3553(b).

H. MITIGATING FACTORS

A host of mitigating offense characteristics may exist upon which criminal defense and health care counsel must acquire immediate proficiency in order to immediately update, audit, and enhance corporate compliance and governance programs— many of which already incorporate these matters, but are in insufficient detail—to mitigate or eliminate prosecution of the company at all through a DPA.

The burden is on the defendant to show extraordinary circumstances which *overstate* and mitigate the advisory Guidelines. These accepted judicial reasons often involve, for example, the impact of the organization’s offense on the continuity of employment of non-involved employees and collateral consequences to the surrounding community, extraordinary community service, victimization of shareholders and/or employees’ ERISA assets whose value is diminished or rendered worthless by criminal acts in which they had no knowledge or participation.

I. TRULY-EFFECTIVE COMPLIANCE & ETHICS PROGRAMS

While commitment to such concepts is elementary, and generally incorporated into compliance and governance programs, the corporate FSG contemplate significantly more than cosmetic lip service to serve as a mitigator or non-prosecution factor since DPAs which are generally informed by application of the Guidelines, USSG § 8C2.5(f) which reduces the culpability score and resultant Guideline, if warranted.

However, the seriousness of this cosmetic distinction is codified in the FSG by penalizing an organization, emphasizing that the programs (*See* USSG § 8B2.1) must be truly “effective,” and the organization “**shall**... exercise due diligence to prevent and detect criminal conduct.” *Id.* at (a)-(a)(1)(emphasis added).

The company must also ensure an “**organizational culture**” that promotes the letter and spirit of this section. *Id.* at (2) (emphasis added). The corporate Guidelines further establish minimum standards that our clients must meet and should exceed. USSG §§ 8B2.1(b)(1)-(7), (c), and to obtain maximum (preventive maintenance) legal benefits to protect the company’s assets and integrity.⁶⁴

J. SELF-REPORTING, COOPERATION & ACCEPTANCE OF RESPONSIBILITY

If, prior to an imminent threat of disclosure or government investigation/prosecution, an organization reports the violation (or potential violation) to appropriate law enforcement officials, *i.e.*, prosecutors (not regulators like the SEC) (beyond counsel’s duties, in this author’s view under *Sarbanes-Oxley*), these factors will substantially mitigate the culpability score and applicable sanction. USSG § 8C2.5(g).

Most significantly, the ANNALS OF INTERNAL MEDICINE measured physicians’ attitudes defining their responsibilities to patients and society. Responding to a hypothetical question without specific reference to the Stark Act or other legal parameters, a large majority stated that they would, for example, refer patients to facilities in which they had invested, and 25% stated that they would not disclose to such patients their financial interest. As condemned by the NY TIMES editorial board (Dec. 24, 2007) at 24A, they noted: “In addition to raising questions about misplaced loyalties, several findings suggest that doctors could become an impediment to much-needed efforts to rein in health care costs.” *Id.*

⁶⁴ The court and prosecutors may appropriately consider organic corporate reorganizations to segregate assets of the most violation-prone divisions from the repository of corporation’s major assets, as indicated and ethical.

H. EARLY AND VOLUNTARY RESTITUTION TO REMEDY ANY HARM CAUSED

This unilateral gesture will invariably impress regulators and prosecutors and materially impact the contemplated case disposition.

J. RETENTION & SEGREGATION OF RECORDS

Needless to say, no material records should be destroyed, hidden, or misplaced, not only at the risk of being upwardly adjusted under FSG, but being criminally charged or Guideline-enhanced for obstruction of justice as well.

To minimize this potential— and eliminate even the appearance of this possibility— the post DPA policy of Computer Associates (CA) should be followed to segregate the company’s maintenance of material records from management, except as commercially necessary, with copies securely maintained in a separate Records Management or Information Technology (IT) division unaccountable to the CEO, CFO; only to the new Audit & Compliance Committee or Board of Directors.

The Records Management Department will maintain orderly, chronological, topical and financial records.

K. EARLY FRAUD DETECTION

Corporations’ accountants and Audit Committees routinely examine their financial records for irregularities but in some instances, particularly where, for example, there was a \$36M embezzlement by the CFO and others at PBS&J,⁶⁵ the Audit Committee did not exercise due diligence either in reporting the massive misappropriation (other than to adjust earnings statements pursuant to *Sarbanes-Oxley*), failed to report the crime to law enforcement—all out of fear that governmental audit of *their* books would reveal the corporations commission of more serious and egregious offenses,⁶⁶ including

⁶⁵ See text accompanying Notes 45-48, *supra*.

⁶⁶ See Dan Christensen & Patrick Danner, MIAMI HERALD (Aug. 26, 2006) (“A federal grand jury is investigating whether one of Florida’s biggest government contractors, Miami-based PBS&J , illegally reimbursed tens of thousands of dollars in campaign contributions made by its employees.”

“Election records show PBS&J executives, employees and its political action committee have given to the campaigns of dozens of federal and state candidates and their political action committees.”

“Both federal and state law prohibit the use of phony donors to get around individual contribution limits -- \$500 per election in Florida.”

“The alleged scheme to repay political contributions at PBS&J was uncovered during an ongoing probe of a suspected \$36 million embezzlement at the company. That inquiry, led by the FBI and the U.S. Attorney's Office, has been going on for more than a year.”). *Id.* See also Note 48, *supra* (*Roll Call*)

systematic and national illegal campaign contributions, illegal reimbursement to employees for same, massive fraud in governmental infrastructure contracts (federal, state, and local), that enhanced audit measures must be designed by criminal defense lawyers, many of whom have “seen it all” from the culprits’ perspective, retain independent forensic experts, and conduct unannounced audits with regularity.

L. ADVISORY NATURE OF THE GUIDELINES AFTER *BOOKER*

United States v. Booker, 543 U.S. 220 (2005) permits corporate counsel to persuasively argue against the previously mandatory sanctions dependent only on the creativity of such counsel and foresight in the design and implementation of contemporary compliance programs responsive to the Guidelines, statutes, and applicable regulations must mitigate the organizations culpability, including its impact on the income and subsistence of innocent employees, and seek “variances” and departures below the now “advisory” rather than mandatory Guidelines.

VII. METHODOLOGY OF COMPUTING CORPORATE “CULPABILITY SCORE”

A. Summary of Calculating Culpability Score

The “culpability score” represents one of the most complex algorithmic jurisprudential equations and it’s inalterable calculation is not appropriate for publication here, save for a brief, yet complex, summary. The starting score can range from 0-10.⁶⁷

Under USSG § 8C2.5(a)-(b)(1)(B)(ii), the organization “starts” with a score of 5-10, and points are added dependent upon whether high-level personnel or substantial authority personnel are involved, if different sized companies tolerated, participated or were willfully blind to the criminal activity. *Id.*

Lawyers for the individual *defendants argued that but for their own disclosure of their own substantial misappropriation, the government would have had no knowledge, fearful, according to one defendant, of exposing the company—through disclosure of its books, journals, and records—to the US Attorney out of being caught in the commission of criminal offenses more serious than a \$36M embezzlement by the CFO and others.*

⁶⁷ “The increased culpability scores under subsection (b) are based on three principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in. . . criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management’s tolerance of that offense is pervasive.” USSG § 8C2.5 (*backg’d*).

Adjustments— aggravating or mitigating factors as set forth herein, *e.g.*, effective compliance program in place prior to offense, company’s prior regulatory, criminal or civil profile, etc.— are addressed herein and those factors impact on an applicable increase or decrease in the culpability score.⁶⁸

Using the culpability score, we apply any “Special Instructions” to “determine the applicable minimum and maximum multipliers from the table below.” USSG § 8C2.6.

The applicable guideline range is then determined by “multiplying the base fine... by the applicable minimum multiplier...” and the “maximum of the guideline fine . . . range is determined under § 8C2.6...” USSG §§ 8C2.7-8.⁶⁹

B. Illustrative Example of Computation Of Culpability Score

1. Introduction

The model case of “WHAT NOT TO DO” in designing and implementing a corporate compliance program has consistently referred to PBSJ, a Florida corporation, which again, has NEVER been charged (despite overwhelming evidence) with criminal *corporate* misconduct. Therefore, these calculations should be deemed, in the interest of fairness, merely hypothetical, but in the author’s view, nevertheless persuasive and accurate to a high probability of certainty.

2. Counts of Conviction

If, for example, ABC, Inc., a corporation for profit⁷⁰ not publicly traded but with significant ERISA benefits to its 4,000 employees, participated in and was convicted of the concealment of a fraud of approximately \$36M, and obstructed justice along with misprison of a felony, and, illegal campaign contributions, (total: 4 counts), the first step is to “Determine from Part B, Subpart 1 (Remedying the Harm from Criminal Conduct)” the sentencing judge would be required to ascertain “sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.”⁷¹

⁶⁸ See Janet Woodka, *Sentencing the CEO: Personal Liability of Corporate Executives for Environmental Crimes*, 5 TUL. ENV’T L. L.J. 635 n. 86 (1992)(“ “For an excellent overview of the sentencing guidelines and the methods for computing [corporate] sentences, see Weintraub & Chaset [Counsel to USSC], *Federal Sentencing for Organizations: You Ain’t Seen Nothin’ Yet*, THE CHAMPION [Journal of NACDL] (MAY 1992) AT 6.” *Id.*

⁶⁹ Fines paid by closely-held organizations are subject to reduction, USSG § 8C3.4 to prevent double counting against individuals.

⁷⁰ The corporate FSG also apply to non-profit organizations.

⁷¹ USSG § 8A1.2(a).

3. Restitution

For restitution to apply,⁷² there must be an “identifiable victim.”⁷³ Typically, shareholders are victims of such offenses but as an employee-owned company whose employees predominantly own classes of in-house company § 401(k) accounts, the corporate defendant, ABC, Inc. would be liable for the full amount of \$36M as restitution.⁷⁴ Restitution may be payable in a lump sum or as directed by the Court, but if not paid in full immediately, courts ordinarily impose a sentence of probation as well, if only to ensure full payment, at the risk of probation violation, during the court’s period of ongoing jurisdiction.⁷⁵

4. Criminal Fine

Though restitution has priority, a criminal fine must also be imposed pursuant to § 8A1.2(b), referencing §§ 8C2.2-8C2.9.⁷⁶ A compelling case is made for application of subsection (b)(1) because “the organization operated primarily for a criminal purpose or primarily by criminal means⁷⁷ (guilty pleas previously entered by past CEO, then-current CFO, and substantial authority personnel). It is readily ascertainable from Securities & Exchange Commission filings that the organization is able to pay a fine. USSG § 8C2.2.

⁷² 18 U.S.C. §§ 3663A-3664.

⁷³ USSG §§ 8B1.1(a); 2B1.1, comment. (n. 1).

⁷⁴ By interesting analogy to the PBSJ case, in which the company was portrayed as a “victim” of the CFO’s misappropriation, with others, of \$36M, also sought an additional \$20M in restitution for payment of outside attorneys fees and other professional services, a demand which it later withdrew after extensive briefing by the parties.

⁷⁵ USSG § 8B1.2(b)-(e).

⁷⁶ In this hypothetical, we shall gratuitously assume that the organization was not operated primarily for criminal purposes or through criminal means notwithstanding guilty pleas by the CFO, former CEO, and other substantial high ranking decision making personnel. In such cases, “the fine shall be set at an amount (subject to statutory maximum) sufficient to divest the organization of all it’s net assets.” USSG § 8C1.1. “net assets... means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.”). USSG § 8C1.1, comment. (n. 1).

⁷⁷ Therefore, “... the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all it’s net assets.” USSG § 8C1.1. However, based upon the horrendous impact this would have upon innocent third party employee victims, this section could be mitigated or ignored under 18 U.S.C. §3553(b) or *Booker* variables.

5. Base Offense Level & Multiple Counts (‘Grouping’)

The Application Instructions then require determination of the fine by applying the Chapter Two Offense Levels and Chapter Three Multiple Counts.⁷⁸ The highest offense level is 36 as per § 2B1.1 for Group 1.

There are two groups of closely related multiple counts, fraud and election law violation(s) plus the misprison conviction (highest offense level 30). USSG § 3D1.2. Therefore, under § 3D1.4 the “combined offense level” represented by the 2 groups of multiple counts is 2 ½ units resulting in an increase of 3 offense levels yielding an **adjusted offense level** under § 8A1.2(b)(2)(B) is **39** in order to “determine the base fine.”⁷⁹ The circumstances associated with failure to self report, and that inherent obstruction of justice, plainly denies statistical mitigation under the Guidelines.

6. Determination of Culpability Score Plus Minimum & Maximum Guideline ‘Multipliers’

According to § 8C2.4, the base fine for level 39 is \$72,500,000. However, the Application Instructions, § 8A1.2(D) then directs calculation of the “culpability score” under § 8C2.5 which is 12 at which point the culpability score is adjusted by “Minimum and Maximum Multipliers.”⁸⁰

Since the culpability score is “10 or more,” *Id.*, the minimum multiplier is 2.00 and the maximum multiplier is 4.00.⁸¹

7. Determination of Guideline Fine Range

The “Guideline Fine Range—Organizations”⁸² according to **the results of both the minimum and maximum multipliers is \$72.5M x 2.00 = \$145,000,000 (minimum) or \$72.5M x 4.00 = \$290,000,000 (maximum)**. In determining where, within the applicable fine range for organizations—subject to any statutory limitations and 18 U.S.C. § 3572— is determined according to codified statutory, *Id.*, and guideline factors⁸³ and now, *Booker*, 18 U.S.C. § 3553(b) or USSG § 8C4.1, p.s. *See also* 18 U.S.C. § 3553(b).

⁷⁸ USSG §§ 8A1.2(B)(2)(B), 8C2.3.

⁷⁹ USSG § 8A1.2(b)(2)(C).

⁸⁰ USSG § 8C2.6.

⁸¹ *Id.*

⁸² USSG § 8C2.7,

⁸³ USSG §§ 8C2.8, p.s., 8C3.1

XIII. PROBATION & MONITORING

The imposition of a term of probation of up to 5 years, while technically discretionary, is frequently required to oversee and compel payments of court ordered financial sanctions, community service, or other special conditions, including access to the organization's books and records by a United States Probation Officer (USPO) who is ordinarily not an accountant, lawyer, or otherwise extremely skilled in interpreting complex financial data and in whom the power to seek violation of probation largely rests. USSG §§ 8D1.1-4.

It is the USPO— an Article III employee working “independently” for the court rather than the prosecution— who periodically reports to the sentencing judge regarding the defendant organization's status and retains full discretion, independent of the Article I United States Attorney—to initiate probation revocation proceedings which may lead to the imposition of significantly more onerous sanctions or modification of the conditions of probation.⁸⁴

And of course exemplary probationary “adjustment” may warrant its early termination by the court if all conditions have been met and the sentencing judge is satisfied with the company's genuine commitment to an “effective” compliance program to obviate recurrences and satisfaction of the deterrent value of the sentence imposed and executed.

IX. CURRENT DEBATE ON WAIVER OF ATTORNEY/CLIENT PRIVILEGE

A. Introduction

The issue of whether the government may, consistent with the federal and state Constitutions and due process, **condition a corporate defendant's payment of attorneys' fees to employees as a precondition of a favorable charging decision or the filing of a cooperation motion** is of such critical importance today that each component of government from Article I, II, and III of the Constitution have weighed in on it in meticulous detail.

B. US Sentencing Commission

In 2006, the Sentencing Commission amended USSG § 8C2.5 by deleting the last sentence of Application Note 12 based on the potential for encouraging an interpretation favoring waiver of the attorney/client privilege⁸⁵ as an indication of cooperation, full disclosure, and mitigation. However, this is at odds with the Bush Administration's specific positions on this issue engendering considerable debate⁸⁶ within the organized bar and even Congress. *See generally* McNulty Memorandum (1996),⁸⁷

⁸⁴ *See e.g.*, Rule 32.1, Fed. R. Crim P.

⁸⁵ *Guidelines Manual*, Appendix C (Amendment 695)(Nov. 1, 2006).

⁸⁶ *See generally* McLucas, Shapiro & Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. of CRIM. L. & CRIMINOLOGY 621 (2007).

C. The Organized Bar

White collar defense lawyers, and other attorneys, persuasively argue that waiver of the attorney/client privilege—especially with regard to findings, conclusions, and data obtained by a company’s internal investigation of possible wrongdoing—because, *inter alia*, it draws negative conclusions from the entry of legitimately recognized, but sometimes controversial, “joint defense agreements;” “continuing to employ a person that the government has concluded engaged in wrongdoing, even if the company disagrees or believes the available information is inconclusive. . .”⁸⁸ “A broad coalition—including the US Chamber of Commerce, American Civil Liberties Union, [National Association of Criminal Defense Lawyers], and American Bar Association^[89]—supports the legislation”⁹⁰ maintaining the uncompromising integrity of the privilege.

D. US House of Representatives

In the House of Representatives, Rep. Robert Scott (D-Va.) introduced HR 3013 on July 12, 2007 noting that the Justice Department’s pressure on business organizations to waive the attorney/client privilege⁹¹ in return for more lenient charging decisions has been criticized. On August 11, 2007, HR 3013 with 11 bipartisan sponsors, was reported out of the Judiciary Committee by voice vote.⁹²

⁸⁷ www.usdoj.gov/opa/pr/2006/December/06_odag_828.html

⁸⁸ Memorandum from Wilkie Farr & Gallagher, LLP., *New DOJ Guidelines on Corporate Prosecutions* at 1 (Dec. 28, 2006). The Thompson Memorandum, <http://www.usdoj.gov/usao/eousa/foiareadingroom> succeeded the Holder in this regard.

⁸⁹ Statement of ABA President, Karen J. Mathis Before Committee on the Judiciary of the US Senate Concerning the Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations (Sept. 26, 2006). <http://www.usdoj.gov/criminal/fraud/policy/chargingcorps.html>. The Department has more recently updated by the DOJ McNulty Memorandum’s current manifestation of DOJ policy.

⁹⁰ *Id.*

⁹¹ See generally Statement of Barry M. Sabin, Deputy Assistant Attorney General, Criminal Division, before the House Subcommittee on Crime, Terrorism and Homeland Security (Committee on the Judiciary), *Concerning The Right to Counsel in Corporate Investigations* (March 8, 2007).

⁹² See 81 Cr L 556. (Aug. 22, 2007).

E. US Senate

In the US Senate, S. 186, introduced by Sen. Arlen Specter (R-Pa.) on January 4, 2007 was critical, on policy grounds, of the McNulty Memorandum⁹³ because “the new [DOJ, McNulty] policy, which generally requires prosecutors to obtain high level. . . approval before requesting privilege waivers... whether a company provides legal counsel for an employee under investigation; contributes toward payment of an employee’s attorneys’ fees; enters into a joint defense agreement...; shares information with an employee; or... decid[es] whether a corporation should receive ‘cooperation credit,’ or leniency, in a charging decision.⁹⁴

F. The Judiciary

The judiciary has also weighed in on this critical practice. The DOJ philosophy and practice was condemned by the Hon. Lewis Kaplan in the **massive, pending KPMG case**, *United States v. Stein, et. al.*, 495 F.Supp.2d 390 (S.D.N.Y. July 16, 2007)—the most comprehensive and richly annotated case to date—held that Government's inducement of employer's cut-off of defense costs for its employees was part of broader pattern of government misconduct that shocked conscience, in violation of employees' right to substantive due process, where prosecutors emphasized to employer existence of Justice Department memorandum providing that payment of attorney fees of culpable employees would be considered as negative factor in determining whether employer's degree of cooperation was sufficient to forestall indictment against employer itself, and employer's refusal to pay post-indictment legal fees caused employees to restrict activities of their counsel, limited or precluded their attorneys' review of documents produced by government in discovery, prevented them from interviewing witnesses, caused them to refrain from retaining expert witnesses, and left them without information technology assistance necessary for dealing with mountains of electronic discovery. (government's inducement of employer's cut-off of defense costs for its employees violated due process).

G. Summary

Manifestly, the Department’s zealous effort to combat and deter corporate crime is laudable, but clearly unwarranted by violating fundamental state and federal rights. In a more nuanced way, however, it represents the critically unlawful derogation of law—consistent with so many Bush Attorneys General decisions—to abrogate constitutional rights in a cavalier manner, all while draping it against the background of “patriotism,” a term that must be measured by adherence to settled law, not casual disregard of it, political orientation, or classic 1950’s-type propaganda tactics.

⁹³ See McNulty Memorandum (Dec. 12, 2006). *Id.* at Note 87, *supra*.

⁹⁴ *Id.*

X. CONCLUSION

Critically, the integration of federal and state white collar criminal defense lawyers— also proficient in the civil and regulatory health care schemes— can significantly enhance the delivery of legal services, **especially by new fee-generating and regularized audits of client corporate compliance programs**, especially during their initial period increasingly characterized by criminalization of traditionally civil or regulatory proceedings. It is cost effective to both client and law firm.

There is no better example than the need for the law firm to incorporate into all its clients' compliance programs “mirror images” of the Federal Sentencing Guidelines for Organizations which proactively ensures client preparedness for any potentially criminal or emergency precipitated by a perceived violation of applicable regulations or statutes. Such integration is enhanced by the experience of federal criminal defense lawyers under the Guidelines, generally since 1987, characterized by constitutional challenges under *Mistretta v. United States*, 488 U.S. 361 (1989), *rev's sub nom United States v. Booker*, 543 U.S. 220 (2005) to *Rita v. United States*, 551 U.S.--, 127 S.Ct. 2456 (2007), *Kimbrough v. United States*, 551 U.S.--, --S. Ct.--, 2007 WL 4292116 (Dec. 10, 2007), *Gall v. United States*, 551 U.S.--, --S. Ct.--, 2007 WL 4292040 (Dec. 10, 2007), and possibly *United States v. Skilling*, No. 06-20885 (5th Cir.)(pending)(filed Dec. 21, 2007) at 152, *et. seq.*⁹⁵

More frequently, highly experienced federal criminal defense counsel are representing defendants in sundry health care cases, yet the integration of traditional health care counsel with criminal defense lawyers frequently offers the individual, corporate defendant(s), and if permitted, codefendants, a greater sense of diversity, depth, specialization, experience, confidence, and a significantly more intimate command over pretrial alternatives, trial strategies, plea agreements, cooperation, non-prosecution, or even the ever elusive pretrial intervention disposition without adjudication.⁹⁶ All of these proceedings are undertaken in the first instance against the backdrop of the Organizational Sentencing Guidelines.

Finally, waiver of the attorney/client privilege by corporations and their employees is an issue common to call counsel; yet it appears that the defense bar, lead largely by the 40,000 member National Association of Criminal Defense Lawyers (NACDL), has been and remains in the forefront of this debate, along with broader-based entities including the ABA and US Chamber of Commerce.

The progressive foresight proposals and analysis herein may significantly aid you and your law firm in safeguarding and protecting the financial integrity of the many health care organizations that we represent.

⁹⁵ Skilling's post-*Kimbrough/Gall* reply brief to the Fifth Circuit may provide a much-needed opportunity for further Court analysis of disparity, particularly in white collar sentencing. See Douglas A. Berman, FEDERAL SENTENCING LAW & POLICY (Law Professor's Blog)(Dec. 21, 2007)(citation source omitted).

⁹⁶ US DOJ, US ATTORNEYS MANUAL at §9-22.000.

i