Standards for Organizational Probation: A Proposal to the United States Sentencing Commission

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STANDARDS FOR ORGANIZATIONAL PROBATION:
A PROPOSAL TO THE UNITED STATES SENTENCING COMMISSION

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This proposal was prepared by the authors in their capacities as consultants to the United States Sentencing Commission. It has not been adopted or endorsed by the Commission. If adopted, the proposal would constitute Part D(2) of the Sentencing Commission’s Organizational Sentencing Guidelines (to be continued in Chapter 8 of the Commission’s Guidelines Manual).

Introduction

a. Background. With the Sentencing Reform Act of 1984, a sentence to probation is now an available sanction that the sentencing court can impose on a convicted organization, either independently of any other sanction or in addition to the maximum sentence otherwise imposable. See 18 U.S.C. § 3551(c). Probation is authorized unless the crime is a Class A or Class B felony or “is an offense for which probation has been expressly precluded” (18 U.S.C. § 3561(a)). Under prior federal law, organizational probation was occasionally imposed, but had to be implemented through the suspension of another sentence, thereby precluding the court from imposing both probation and the maximum sentence. Relatively few cases had considered the scope

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of the court's authority in imposing this sentence, and considerable uncertainty existed. Compare *United States v. Atlantic Richfield Company*, 465 F.2d 58 (7th Cir. 1972); *United States v. Mitsubishi Intern. Corp.*, 677 F.2d 785 (9th Cir. 1982). For an overview of the prior case law, see Gruner, *Let the Punishment Fit the Organization: Sanctioning Corporate Offenders through Corporate Probation*, 16 Am. J. Crim. L. 1 (1988). Under prior case law, defendants were generally viewed as having the power to reject probation and elect to have the maximum sentence imposed. *United States v. Mitsubishi*, supra, at 788-89. Possibly as a result, only sporadic use appears to have been made of organizational probation. U.S. Sentencing Commission data show some 44 sentences of probation between January 1, 1984 and February 28, 1985 (out of 242 corporations convicted in federal courts during this period); typically, the sentence to probation was imposed only to enforce a fine or order of restitution.

The potential utility of the sanction exceeds the limited use to which it has been put to date. A four year survey conducted by the U.S. Sentencing Commission covering the years 1984 to 1987 shows that on average 321 organizations are convicted a year, roughly 65-75% of which convictions are for fraud, antitrust, or property crimes, with another 20-25% involving regulatory offenses. Roughly 10% of these convicted organizations were large, publicly held corporations or the subsidiaries thereof, and the rest were almost exclusively closely-held corporations. Although this data indicates that organizational offenders are under 1% of the total number of offenders facing sentencing in federal court, it also shows that the problem of organizational sentencing arises with sufficient frequency to justify guidelines, particularly because most district court judges will have had little experience with this type of sentencing. The limited use made of probation in the past may reflect the courts' lack of familiarity with its availability or rationale in this context. Judicial education may then need to precede greater use.

b. Rationale. The question thus framed is when and why should organizational probation be used. These guidelines answer that, although organizational probation is authorized as an independent sanction, it should properly be viewed as a supplementary sanction, one that can sometimes add necessary preventive restraints to the deterrent threat of financial sanctions. Thus, it will generally not be a lesser alternative to some other sanction, but rather a means of cumulating sanctions in order to minimize the prospect of a repetition of the same or similar criminal behavior. Although primary reliance
should be placed on financial sanctions — e.g., fines and restitution — to deter organizational misconduct, there are important reasons why financial sanctions, standing alone, may not be sufficient and may need to be supplemented in some cases by the use of additional preventive restraints imposed as probation conditions under a sentence to probation.

First, placing exclusive reliance on fines to deter serious instances of criminal behavior tends to exaggerate the state of existing knowledge about deterrence. To be sure, in economic theory, deterrence can be achieved by raising the expected penalty so that it exceeds the expected gain from the misbehavior (after discounting both by the probability of detection and conviction). Yet, even if one accepts this theory without reservation (and most criminologists do not), it is unlikely that this approach can be reliably implemented today or in the foreseeable future, because we simply lack the ability to estimate accurately the critical variables that this approach depends upon — namely, the likelihood of apprehension and conviction that the offender faced (or, more accurately, that the offender perceived) and the expected gain or loss from the crime (which may be greater or lesser than the actual gain or loss). Even if loose "ballpark" estimates can be made of the overall risk of apprehension for particular crimes, such knowledge can be very misleading when applied to a specific case, both because individual defendants may vary greatly in terms of their level of skill and sophistication (or in terms of their own self-estimates of their likelihood for success, which is the critical variable) and because past data may not prove predictive for the future, as new and more ingenious frauds are invented.

Even if one could determine the precise expected penalty cost that would deter the organization as an entity, there is no assurance that its agents would be similarly deterred. Individuals within an organization are subject to different pressures and incentives and for personal reasons may cause their organization to act illegally, even when it is not in the organization's rational interest (narrowly conceived) to do so. As a result, to cause the organization to invest in monitoring controls to detect and prevent its agents from acting illegally, it is logically necessary to overdeter it by not only canceling the expected gain, but also creating an expected loss that justifies investment in monitoring controls\(^1\) — unless other means (such as the use of probation conditions) can be employed to assure the court that adequate monitoring

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1. Merely removing the expected gain does not of itself give the organization an adequate incentive to invest in monitoring expenditures to prevent its employees and agents from acting
controls have been installed. In this light, a sentence to probation can be means by which society economizes on the costs of punishment.

More generally, preventive probation conditions are a safeguard against the danger that excessive reliance on the logic of general deterrence may lead us systematically either to "underdeter" or "overdeter" organizations with threatened fines. For example, under § 8B3.1 of the Organizational Sanctions Discussion Draft, which addresses fines, the presumptive "offense multiple" is set at 2.0 for private fraud offenses, unless a higher or lower multiple is specially justified. Thus, if the actual risk of apprehension is less than fifty percent (as it may be for many hard-to-detect offenses), financial penalties based on such a multiple should systematically underdeter, because they do not adequately compensate for the lower than estimated detection risk. Conversely, if individual sentencing judges seek to utilize higher multiples because they underestimate the likelihood of apprehension and conviction, they may err in the opposite direction and impose unnecessarily severe penalties. In this light, imposing preventive probation conditions can be viewed as a means of de-emphasizing the importance of those variables that we cannot reliably estimate, such as the apprehension risk.

From a policy perspective, the critical issue surrounding the use of probation for organizational offenders is the cost of such a strategy in relation to its benefits. If a sentence of probation were conceived of as granting the sentencing court a broad charter to intervene in internal corporate decision-making, the costs of such an approach might be high, as a danger of bureaucratic interference would arise that could chill economic efficiency. Still, Congress addressed these concerns in the statute and provided in § 3563(b) that all conditions of probation "involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing"; in addition, § 3563(b) specifies that probation conditions not preclude the organization from illegally. To illustrate, assume in a given case that the expected gain is $1,000,000, and the likelihood of apprehension for the corporation is 10%. In theory, it would take a fine of $10,000,000 here to deter the organization, but even this punitive a fine will not necessarily deter the individual actor who may face a much lower risk of apprehension. If we assume that individual actors within the organization are often harder to detect and convict than the organization, it follows that they may not be deterred when the organization is. Assume further that a $200,000 investment in monitoring controls would prevent employee misconduct that could create liability for the corporation. Given the 10% likelihood of corporate apprehension, it should in theory take an increase of $2,000,000 in the fine to justify this investment. An order of probation might impose adequate internal controls much more cheaply without the need for extraordinarily severe financial penalties.
engaging in any legitimate occupation, business or profession. In compliance with these directions, these guidelines take a narrow view of the court’s role in setting probation conditions. No authority is granted the court to interfere in, or supervise, areas of legitimate business discretion. The central aim of these guidelines is to improve the corporation’s own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed. See § 8D2.5.

For the most part, the types of internal controls that might be imposed under a sentence to probation are not novel and have well established precedents, both in the standard practices of the Securities and Exchange Commission, which more than a decade ago pioneered the development of improved monitoring and auditing controls through consent decrees and injunctions,2 and in earlier practices of federal courts in fashioning injunctive remedies, which sometimes have involved monitoring corporate conduct through judicially appointed overseers.3 In principle, there is no reason why a sentencing court, following a criminal conviction based upon proof beyond a reasonable doubt, should have less flexibility in the preventive restraints that it can impose than another federal court, which may grant an injunction in a civil action brought by an administrative agency based only upon a preponderance of the evidence and without any showing that criminal conduct has occurred. Moreover, the bar generally has not opposed, and has in many cases adopted, the SEC’s standard consent decree conditions. Today, in the wake of a major corporate scandal, the corporation’s board will usually conduct a detailed internal investigation, typically involving the use of outside special counsel, and resulting in a lengthy self-study and improved internal controls.4

2. Consistent with the SEC’s approach on internal controls, no attempt has been made in these guidelines to mandate any particular system of internal controls. Rather, as the SEC has observed, “[t]he test is whether a system, taken as a whole, meets the statute’s specified objectives. ‘Reasonableness’, a familiar legal concept, depends on an evaluation of the facts and circumstances.” SEC Exch. Act. Rel. No. 34-17500 (1981).

3. This tradition traces back at least to Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), which upheld injunctive relief involving the appointment of a monitor to prevent further criminal conduct by the defendant corporation. See also Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975); Pennsylvania v. Porter, 659 F.2d 309 (3rd Cir. 1981).

Federal law also requires most publicly held corporations to maintain an adequate system of internal accounting controls. In this light, corporate probation represents not a new departure, but a codification of existing practices and requirements, coupled with a clearer judicial role to ensure the integrity of the process.

A final reason for authorizing corporate probation involves public confidence in our system of criminal justice. In the public's eye, a precisely calibrated system of fines may be perceived as amounting to a tariff system that permits corporations and other business entities to engage in criminal behavior so long as they are prepared to pay the specified tax. Ultimately, the aim of the criminal law (and of Congress) is to prevent the prohibited behavior, not simply raise the cost of engaging in it. Thus, while it is defensible to structure a system of penalties so that the fine approximates either the expected benefit or the expected social loss, it is particularly important in such instances to communicate clearly that this effort to price the crime does not legitimize it. Organizational probation, as a supplementary sentence, makes clear that there is no price that, when paid, entitles the organization to engage in the misbehavior.

§ 8D2.1 Imposition to a Term of Probation

(a) In addition to any other sentence imposed by the court, an organization should be sentenced to probation, subject to the restrictions in subsection (b) below, when

(i) the offense was either

(A) a felony, or

(B) a misdemeanor that (1) resulted in a loss of human life, (2) otherwise threatened the health or safety of any individual, or (3) was part of a pattern of criminal behavior involving at least one other criminal conviction within the five years immediately preceding the date of the instant conviction; and

(ii) the court finds that

(A) management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and

5. Section 13(b)(2) of the Securities Exchange Act of 1934, added by the Foreign Corrupt Practices Act of 1977, requires all "reporting" corporations to "devise and maintain a system of internal accounting controls sufficient to provide" certain specified assurances.
such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely; or

(B) the circumstances surrounding the offense, including the possible involvement of senior organizational officials, have not been adequately clarified, and the failure to obtain such clarification is likely to diminish respect for the law, hinder internal accountability, or otherwise be contrary to the public interest; or

(C) the organization would not otherwise be required to make restitution to any person or persons injured as a proximate result of its criminal behavior, and any complication or prolongation of the sentencing process resulting from awarding such restitution as a condition of probation is outweighed by the need for restitution of such victim or victims; or

(D) the organization is able to provide essential community service or interim relief for the benefit of the victims of its crime, or to repair or restore specific harms or injuries, provided that in all cases hereunder the court first finds that an order of restitution is either not feasible or not otherwise an adequate substitute; or

(E) the organization is sentenced to pay a fine, make restitution, satisfy an order of criminal forfeiture, comply with an order of notice, or perform community service, and either it is unable to perform or make full payment thereof, as required, or such payment or performance is to be delayed in whole or part for a period extending more than 30 days from the date of sentencing.

(b) A sentence of probation may not be imposed in the event:

(i) the offense of conviction precludes probation as a sentence;

(ii) the offense of conviction is an infraction.

Commentary

Rather than make probation a mandatory sentence for all felonies and serious misdemeanors, this section authorizes a sentence to probation only in five circumstances:

First, where management policies, practices or inadequate controls bear a causal responsibility for the criminal behavior, subparagraph (A)
of § 8D2.1(a)(ii) instructs the court to impose a sentence to probation, unless the court finds that these deficiencies were subsequently corrected so as to minimize the risk of recidivism. In making both of these determinations, it is assumed that the court will consider, and may rely upon, information and evaluations contained in the presentence report prepared by the probation officer, who may be specially appointed by the court under § 8D2.5. However, the organization, itself, will have the opportunity to comment on this report and may seek to convince the court that any problems or deficiencies noted in it have been corrected so as to obviate the need for a sentence to probation. See § 8D2.6. Thus, this section creates an incentive for voluntary compliance.

The following examples illustrate circumstances in which the conditions specified in subparagraph (A) might require the preparation of such a compliance plan:

Illustration One. XYZ Corp. is convicted under the Foreign Corrupt Practices Act, after having made cash payments to political officials and purchasers' representatives in several foreign countries. At trial, it is proven that a $10 million slush fund had been established, which had never come to the attention of the corporation's audit committee, although it was known to certain of its accountants.

Illustration Two. B. Corp. and several of its executives are convicted of having sold colored water as apple juice over a five year period. Midway during the period, senior corporate executives learned of this illegal practice and consulted the corporation's lawyers as to whether it must be halted; however, no report or other communication about this on-going problem ever reached the board of directors or its audit committee.

Illustration Three. ABC Corp., a brokerage firm, is convicted of 500 counts of mail fraud for systematically defrauding its commercial banks through a standard procedure of making overdrafts on its accounts. Over fifty of the firm's local branch offices are found to have participated in this program of overdrafting.

Illustration Four. On three occasions within the last five years, Widget Corp. has been found to have leaked a toxic mercury substance into local waterways and to have contaminated local drinking water. Two of these prior instances resulted in civil penalties, and the third and most recent instance led to a criminal conviction on a misdemeanor conviction.

The foregoing examples are only illustrative and not exclusive, but they show factors — repetition, involvement of senior management, a
systematic practice, persistent information blockage within the organization, or dysfunctional internal controls — that should be addressed at sentencing and that may justify use of a sentence to probation. Essentially, this same view that preventive restraints constitute legitimate probation conditions has been endorsed by the American Bar Association in its Standards for Criminal Justice. See ABA, Standards Relating to Sentencing Alternatives and Procedures, 18 ABA Standards for Criminal Justice § 2.8(a)(v)(A) (recommending as a precondition for the imposition of a sentence to probation that the court find that the underlying criminal behavior have been “facilitated by inadequate internal accounting or monitoring controls or . . . that a clear and present danger exists to the public health or safety”). Where the corporation is publicly held and has an independent board, the focus of probation conditions should be on the re-establishment of internal accountability. Where this is not the case and the corporation is controlled by persons who may benefit from the crime, more interventionist strategies may sometimes be appropriate, involving special recordkeeping procedures that the probation officer will supervise and reports from designated officials or employees. See § 8D2.4(b)(1).

Subparagraph (B) of § 8D2.1(a)(ii) establishes the triggering conditions for a probation condition that essentially codifies the SEC’s established practice of requiring an internal investigation and report. The premise here is that adequate internal accountability normally cannot be restored unless and until the board of directors (or, if there is not a disinterested board, the shareholders) has an adequate understanding of the events resulting in the conviction. In addition, subparagraph (B) is also a response to an unfortunate plea bargaining dynamic that often results when corporations are prosecuted. Recurrently, the charges are dropped against individual officials at the same time as the corporation pleads guilty in exchange. In such instances, the corporation’s plea of guilty may establish very little factually about the nature of the criminal conduct. Indeed, the contrast is striking between a plea of guilty in an individual case, where Rule 11 of the Federal Rules of Criminal Procedure requires the court to ascertain that the defendant’s plea is knowing and voluntary — a process that as a practical matter requires the court to review the factual elements of the indictment — and a corporate prosecution where the corporation’s plea of guilty (or nolo contendere) communicates very little information about what actually happened.

6. See Henderson v. Morgan, 426 U.S. 637 (1976) (failure to ascertain that defendant understood elements of the crime and acknowledged committing them prevented court from accurately determining whether the plea was voluntary).
Although the permissibility of plea bargaining is not here questioned, § 3553(a)(2) states that a purpose of sentencing is “to promote respect for the law,” and this obligation implies that the court should not permit the sentencing process to serve as a shield by which the involvement of culpable individuals can be effectively screened from public view.

When the court finds that the circumstances specified in subparagraph (B) of § 8D2.1(a)(ii) are present, it should require an investigation under § 8D2.4(b)(2). It should be emphasized, however, that the purpose of the investigation is to restore internal accountability and maintain respect for the law, not to gather evidence for further criminal proceedings against individual officials. As noted in § 8D2.4(b)(2), no individual should be required to waive the privilege against self-incrimination; nor should the organization or any individual be required to waive the attorney-client privilege. The court may also substitute a generic disclosure of the broad outlines of the conduct for a specific factual disclosure if it finds that “unjustified” injury to any individual or the organization would otherwise result. See § 8D2.4(b)(2).

Subparagraph (C) of § 8D2.1(a)(ii) authorizes the use of probation as a means to provide restitution where an independent sentence of restitution could not be imposed, because 18 U.S.C. § 3663 (“Order of restitution”) authorizes restitution only for offenses under Title 18 and one other statute. The legislative history of the Comprehensive Crime Control Act of 1984 expressly indicates that restitution may be imposed as a condition of probation where it could not be ordered as an independent sentence. Senate Report No. 98-225 states that the Act “carries forward the current law provision permitting imposition of a condition that the defendant be required to make restitution to a victim. The court could in an appropriate case order restitution not covered by paragraph [§ 3563](b)(3) (and section 3556) under the general provisions of subsection [§ 3563](b)(20). In a case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses.” (at pp. 95-96).

Section 3663(d) requires a sentencing court to order restitution by the defendant, unless the complication or prolongation of the sentencing process resulting from the fashioning of such an order outweighs the need to provide restitution to any victims. This same standard should govern when restitution is awarded as a condition of probation, and the last clause of subparagraph (C) adopts essentially this formulation. However, when the court determines that the victim’s need for restitution does outweigh these considerations of delay, it is not limited by the
standards of § 3663 and may, for example, order restitution of non-medical expenses. See S. Report No. 98-225 at 95-96.

Subparagraph (D) of § 8D2.1(a)(ii) specifies the circumstances in which an order of community service is deemed justified. Section 3563(b)(13) provides that the court may require as a condition of probation that the defendant "work in community service as directed by the court," and the Senate Report indicates that "[t]his condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victims cannot be readily identified or the actual amount of the injury is slight." See S. Rep. No. 98-225 at p. 98. No indication exists that Congress intended this condition to apply only to individuals, and prior case law had also upheld the imposition of a community service probation condition on a convicted corporation. See United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159, 1164 n. 11 (S.D.N.Y. 1983). An illustrative case where an order of community service might be appropriate would be one involving environmental damage, resulting from an oil spill caused by illegal activity. In such a case, much of the harm or injury might not occur to identifiable individuals (or might occur to wildlife), and thus an order of restitution would be either infeasible or not an adequate substitute for an order of community service requiring the offender to clean up the spill.

Under § 8D2.4(b)(5) when probation is imposed to facilitate an order of community service, the cost to the organization from such an order should not be disproportionate to the maximum fine imposable. However, this cost need not be subtracted from the fine actually imposed (whether or not such fine is the maximum fine allowable). This rule is necessary to provide some outer limit on the court's authority and is also consistent with the prevailing law that probation conditions need only be reasonably related to the crime and the purposes of sentencing. See § 3563(b) (requiring that probation conditions involving deprivations of property be "reasonably necessary for the purposes" of sentencing). The purposes of sentencing include the imposition of "just punishment for the offense" (see § 3553(a)(2)(A)), which concept certainly includes making victims whole.

Subparagraph (E) of § 8D2.1(a)(ii) recognizes that a sentence to probation is a useful and appropriate mechanism by which to enforce orders to pay a fine, restitution, or perform acts having financial or other costs. For the corresponding probation conditions, see § 8D2.4(b)(4). See also § 8D2.7 on enforcement.
§ 8D2.2 Term of Probation

(a) When a sentence to probation is imposed, the term of probation shall be:

(1) in the case of a felony, at least one year, but in no event more than five years;

(2) in any other case, no more than three years; provided, however, that the term of probation should not extend beyond the court's immediate objective in imposing a term of probation, unless a longer term is required by law.

(b) After considering the factors set forth in § 3553(a) and the recommendations, if any, of the probation officer, and after giving notice and an opportunity to respond to the government, the court may order early termination of probation and discharge the organization, if it finds that (i) no condition of probation has been violated, and (ii) the circumstances requiring probation no longer exist and are not likely to recur; provided, however, that, in case of a felony, any such termination and discharge shall not take place prior to the completion of at least one year of probation.

(c) The court may, after a hearing, extend a term of probation, if less than the maximum term was previously imposed, or modify or enlarge the conditions of probation, at any time prior to the expiration or termination of the term of probation, as provided in 18 U.S.C. § 3564, if it finds that a condition of probation was violated or if it acquires new information not in its possession at the time of the last sentencing hearing that indicates the need for such an extension in light of the purposes of sentencing.

Commentary

When the court imposes a sentence to probation in order to facilitate an order of restitution or community service or to ensure payment of a deferred fine, the term need not exceed the period necessary to determine and award restitution, perform the required community service, or pay the deferred fine — unless the crime is a felony. In the case of a felony, 18 U.S.C. § 3561(b) requires a minimum term of one year (and also specifies a maximum term of five years). In a case where any required restitution or fine is paid shortly after sentencing, the organization will thus remain subject to § 3563(a)'s mandatory condition that it not commit another crime during the remainder of the mandatory one year term of probation. If it violates this condition, additional preventive conditions may be imposed, the term of probation may be extended,
or probation may be revoked and a higher fine imposed (if the maximum fine was not originally imposed).

Subsection (b) of § 8D2.2 tracks the language of 18 U.S.C. § 3564(c), including its minimum one year term. Where the conditions specified in subsection (b) are satisfied, it may be assumed that the interests of justice warrant termination. Extension of a term of probation is authorized by § 3564(d), and modification of the conditions of a sentence to probation by § 3563(c). See also Rule 32.1 of the Federal Rules of Criminal Procedure.

§ 8D2.3 Conditions of Probation

(a) Any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation; provided, however, that if another crime occurs within a different and unrelated unit of the organization, the court should revoke probation only if it finds that the new violation evidences a pattern of violations or otherwise indicates that the organization has not attempted diligently and in good faith to comply with the conditions of probation.

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, (2) do not require the defendant to refrain from engaging in any lawful occupation, business, or profession (18 U.S.C. § 3563(b)(6)), and (3) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing, including the need to secure the defendant's obligation to pay any deferred portion of a fine or order of restitution. Recommended conditions are set forth in § 8D2.4 below.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or an order of community service.

(d) If the court is apprised of the existence of victims of the defendant's criminal conduct who would be eligible to receive restitution if a sentence of probation were imposed and the court declines to impose such a sentence or to make restitution a condition thereof, the court shall state its reasons on the record for declining to do so.
Commentary

Subsection (a) is derived from 18 U.S.C. § 3563(a)(1), which provides that it is a mandatory condition of probation that the defendant not commit "another federal, state or local crime during the term of probation." This mandatory language is not, however, sensitive to the unique status of the large publicly held corporation, particularly the conglomerate, which may operate through numerous and unrelated subsidiaries. The fact that such a firm commits one violation in a banking subsidiary and another in a construction subsidiary, several years apart, may not necessarily signify anything more than that it controls several billion dollars in assets and operates on a sizable scale. Hence, § 8D2.3(a)’s final clause reminds the court that revocation of probation is discretionary. See Rule 32.1 of the Federal Rules of Criminal Procedure and § 3564(a)(1). Of course, even when the court does not revoke probation, it may extend its term or modify its conditions in light of the new violation or other information. See §§ 3563(c) and 3564(d).

Subsection (b) essentially tracks the language of § 3563(b), including the implicit restraint set forth in § 3563(b)(6), applicable only to organizations, that the court not prevent an organization "from engaging in a specified occupation, business, or profession. . . ."

Subsection (c) is mandated by § 3563(a)(2). Subsection (d) parallels the requirement in § 3663(a)(2), which specifies that if the court does not order restitution, or orders only partial restitution, it "shall state on the record the reasons therefor." Consistency requires that a similar obligation to state reasons be recognized when restitution is imposed only as a condition of probation, which alternative method is necessary when the crime of conviction does not fall within those referred to in § 3663(a)(1).

§ 8D2.4 Recommended Conditions of Probation (Policy Statement)

(a) The following “standard” conditions are generally recommended:

(1) the organization shall answer in writing truthfully, completely, and promptly all requests for information, financial data, or reports on business operations made by the court or the probation officer and shall use its best efforts to cause its officers, employees, and agents to execute and deliver such written assurances and certifications, which may be required to be sworn under oath, as the court or the probation officer shall direct; provided, however, that no individual should be required to sacrifice
the privilege against self-incrimination, and neither the organization nor any individual should be required to produce materials protected by the attorney-client privilege or to provide information that the court finds not to be related to any probation condition or sentencing purpose;

(2) the defendant shall provide the probation officer, or the agents thereof, with immediate access to the defendant’s offices, facilities, and other properties, shall promptly submit for examination any books or records, and shall provide such further written assurances, in each case as the court or probation officer deems necessary to monitor compliance with any probation condition;

(3) the defendant shall notify the probation officer promptly of the filing of any indictment or information charging it, or a subsidiary, with criminal conduct, whether in local, state, or federal court, and of any conviction on, or plea entered with respect to, such charge or charges.

(b) The following “special” conditions of probation are recommended in particular cases, as described below:

(1) Compliance Plan. If the court finds pursuant to § 8D2.1(a)(ii)(A) that management policies or practices encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, the court should require (A) the filing by defendant or, if necessary, the probation officer of a compliance plan, satisfactory to the court, detailing the specific procedures that will be implemented to correct such policies, practices, or inadequacies at or prior to the date of sentencing, and (B) the communication of the terms of such plan and the conditions of probation to relevant personnel. Compliance with such plan should, itself, be a condition of probation. Such plan may require:

(A) the conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;

(B) the appointment of independent counsel or the use, if available, of a special committee of independent directors;

(C) the hiring and use of special consultants;

(D) the adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;
(E) the designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offense;

(F) the revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including the board of directors.

(2) **Internal Investigation.** If, pursuant to § 8D2.1(a)(ii)(B), the court finds that clarification of the circumstances of the crime, including the possible involvement of any officers or agents of the organization, is appropriate, the court should require the preparation of a special study, to be conducted, as the court shall direct, either by agents of the corporation approved by the court or by special counsel appointed by the court, which report shall set forth a factual account of the criminal behavior, the involvement of corporate personnel therein, and an evaluation of existing and possible internal control systems. When completed, such report shall be filed with the court as a public document, except to the extent that the court permits the substitution of a factual summary therefore in order not to expose the corporation or others to unjustified injury;

(3) **Restitution.** If the court finds, whether pursuant to § 8D2.1(a)(ii)(C), or otherwise, that victims of the crime should receive restitution, it should specify procedures for the conduct of a restitution hearing, including, when permitted under 18 U.S.C. § 3555, procedures for the giving of an order of notice to victims, and should require the organization to make restitution in compliance therewith and provide the court with detailed reports as to all claims made upon the organization for restitution or damages with respect to the criminal behavior and all payments made by it or on its behalf.

(4) **Security Provisions.** If the organization is unable to pay (or otherwise satisfy) immediately any fine, order of restitution, order of notice, or criminal forfeiture imposed by the court, the organization may be prohibited from engaging in any of the following transactions or activities without prior notice to, and approval by, the court: (A) paying dividends or making any other distribution to its equity holders; (B) issuing new debt or
equity securities or commercial paper, or otherwise obtaining substantial new financing outside the ordinary course of business; or (C) entering into any merger, consolidation, sale of substantial assets, reorganization, refinancing, dissolution, liquidation, bankruptcy, or other major transaction. In addition, all employment compensation or other payments or property transfers by the organization to any equity holder, director, officer, subsidiary affiliated corporation, or managing agent may be made subject to prior review and approval by the court.

(5) Community Services. If the court finds, pursuant to § 8D2.1(a)(ii)(D), that the organization is able to provide essential community service or interim relief, or to repair or restore specific harms or injuries, for which an order of restitution is either not feasible or not an adequate substitute, the court should specify the specific services that the organization is to provide and require performance of such services for the benefit of its victims as a condition of probation; provided, however, that the costs of such services should not be disproportionate to the maximum fine imposable for the offense.

(6) Expenses. The defendant shall pay the reasonable fees and expenses of any special counsel or probation officer, and any agents thereof, appointed by the court pursuant to § 8D2.5 and any other expenses incident to preparation of the reports described in special probation conditions (3), (4) and (5) above.

(c) Preventive probation conditions (i) should be imposed only to reduce the likelihood of future criminal violations similar or related to the instant offense, (ii) should be limited in their scope to those portions of the organization's operations or management involved in the offense or responsible for its detection, and (iii) should principally seek either to increase the probability of detection of future criminal behavior or the monitoring capacity of internal organizational organs. Conditions of the following type are not authorized for an organization and shall be considered inconsistent with 18 U.S.C. § 3563(b):

(1) Conditions requiring the dismissal or demotion of organizational personnel or infringing on the shareholders' right to elect directors;

(2) Conditions that unduly burden or constrain the legitimate financial, investment, or business discretion of organizational officials, such as by restricting the opening, closing, or relocation of plants, the hiring or dismissal of employees, changes in products, or other business operations;
(3) Conditions that impose unreasonable costs or delay on the organization in relation to the potential social harm from the offense; and

(4) Conditions that require the making of charitable or other financial contributions to any person or organization that is not a victim of the crime entitled to receive restitution or community service.

Commentary

The "standard" conditions set forth in subsection (a) of § 8D2.4 parallel those typically required of individual probationers, with necessary adjustments. Although it might be constitutionally permissible to require the organization to waive the attorney-client privilege, § 8D2.4(a)(1) does not permit such a compelled waiver in the belief that this might expose the organization to increased civil litigation, because the waiver could create rights in third parties. The corporation (and other business entities) has no constitutional right against self-incrimination.

The "special" conditions of probation set forth in subsection (b) of § 8D2.4 directly correspond to the triggering criteria for the imposition of a sentence to probation set forth in § 8D2.1. Several different limitations are set forth in § 8D2.4. First, when a compliance plan is ordered, a specific plan must be approved by the court under § 8D2.4(b)(1). This requirement responds to the concerns expressed in United States v. Atlantic Richfield, 465 F.2d 58 (7th Cir. 1972), where the sentencing court had instead ordered the defendant to "set up a program within forty-five (45) days to handle oil spillage into the soil and/or stream." Id. at 61 and n.1. The lack of specificity of such an order was found objectionable by the appellate court, because it left the defendant with an inadequate basis for knowing whether it had complied with the probation conditions.

Before determining whether to order an internal investigation under § 8D2.4(b)(2), the court should first review the presentence report. If adequate clarification is obtained in that document and such information has been presented to the board, a special probation condition ordering an internal investigation should be imposed only if necessary to maintain "respect for the law" under § 8D2.1(a)(ii)(B). This approach also creates a positive incentive for early disclosure to the probation officer, because the presentence report is a confidential document. See § 8D2.6(b).
Subparagraph (b)(6) of § 8D2.4 requires the defendant to pay the reasonable expenses of probation. Courts have approved the fairness of a rule requiring probationers to repay costs of their prosecution or state-provided defense. See, e.g., Fuller v. Oregon, 417 U.S. 40 (1974); 79 A.L.R. 3d 1025 (1977); Comment, Charging Costs of Prosecution to the Defendant, 59 Geo. L.J. 991 (1971).

Subsection (c) of § 8D2.4 specifies certain impermissible conditions. Under subparagraph (c)(1), the court may require neither the dismissal of a senior officer nor the election of new directors; these choices properly belong to the shareholders, and any contrary rule would visit a penalty on persons who had not been convicted of any crime. Under 18 U.S.C. § 3563(b)(7), a probation condition may require the probationer to refrain from “associating unnecessarily with specified persons.” In the case of organizations, the provision should be read narrowly and applied only to convicted individual felons. Thus, if a corporate president were convicted and resigned from office, it would be permissible to bar the corporation from hiring him in any capacity for the term of probation.

Under § 8D2.4(c)(4), charitable contributions may not be ordered as a condition of probation. Although a few courts have done so (see, e.g., United States v. Mitsubishi Intern. Corp., 677 F.2d 785 (9th Cir. 1982)), most have disapproved. Courts are not well positioned to act as foundations, and judges may also have strong preferences for local charities that can sway their judgment. To be sure, organizations can still make charitable contributions, and this may sometimes cause the court to reduce the fine imposed, but the adoption of guidelines for fines should reduce the use of this technique for evasion.

Subparagraph (c)(2) of § 8D2.4(c) essentially fleshes out the restriction implicit in § 3563(b)(6), which authorizes only an individual to be restrained from “engaging in a specified occupation, business, or profession. . . .” As explained in Senate Report No. 98-225, because of “business concerns [about] . . . inappropriate use [of this condition] to put a legitimate enterprise out of business, that part of the provision has been modified to relate only to individual offenders. This deletion should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law.” (Id. at 97). The Senate Report also notes the propriety of a probation condition directed at requiring an organization convicted of executing a fraudulent scheme “to operate that part of the business in a
manner that was not fraudulent.” (Id. at 96). In this light, the watershed between permissible and impermissible conditions appears to be that preventive probation conditions are not precluded by § 3653(b)(6), so long as they are specific and reasonable, while prophylactic or punitive restrictions are improper if they bar the organization from participating in legitimate business activities, markets, or lines of commerce.

§ 8D2.5 Special Probation Officers

(a) An organization sentenced to probation shall be monitored by a probation officer during the term imposed to the degree specified by the sentencing court.

(b) The sentencing court may appoint one or more qualified persons to serve, with or without compensation, as special probation officers to oversee an organizational probationer. A person shall be qualified to serve as a probation officer for an organizational probationer if the person has sufficient training or experience to effectively monitor the conformity of the organization’s conduct to its terms of probation.

(c) A probation officer appointed to monitor an organizational probationer should:

1. inform officers of the organization as to the probation conditions specified by the sentencing court, and provide them with a written statement clearly setting forth all such conditions;
2. keep informed concerning the organization’s conduct, condition, and compliance with the conditions of probation, including the payment of a fine or restitution, and report thereon, as necessary or appropriate, to the sentencing court;
3. review and comment on, as appropriate, any reports prepared by the organization for transmittal to the sentencing court in connection with its probation sentence;
4. perform any other duty that the sentencing court may designate.

Commentary

This section describes the qualifications and duties of persons appointed to serve as probation officers for organizational probationers. These duties include the monitoring of the organization’s compliance with its terms of probation, but do not extend to monitoring or control over other aspects of organizational activities. The monitoring powers of probation officers for organizational probationers are constrained by the
conditions of probation; such officers do not have the power to indirectly modify conditions of probation specified by the court through excessive monitoring.

Because of the diversity of organizations potentially sentenced to probation and the wide range of probation conditions that may be involved, it will typically be the case that a special probation officer will be required for each organizational probationer. Persons qualified to serve in this capacity may have diverse backgrounds and training; indeed, in order to assemble the proper expertise to properly monitor organizational compliance with probation terms it may be necessary to appoint a panel of probation officers for a single probationer. For example, an organization convicted of pollution offenses might have its probation overseen by a panel composed of a lawyer, an environmental expert, and an industrial engineer. Insofar as law compliance will be the focus of most probation terms, special counsel will often be appropriate probation officers for organizational offenders, acting either alone or in conjunction with other specialists.

Some of the duties of a probation officer overseeing an organizational probationer are specified in the guidelines, with allowance for further duties specified by the sentencing court. The enumerated duties require that the probation officer maintain surveillance of only those organizational operations related to the instant offense. Direct management of organizations by probation officers or monitoring of organization activities that are irrelevant to the offense leading to probation are not authorized.

In performing the specified duties, a probation officer may seek the aid of agents acting on his or her behalf. Thus, for example, a probation officer wishing to confirm the chemical analysis of samples of plant discharge might engage a chemical testing laboratory to provide expert chemical analyses. The reasonable costs of such studies, as well as the fees of the probation officers themselves, will normally be imposed on the defendant organization as a condition of its probation. See § 8D2.4(b)(6).

§ 8D2.6. Procedures (Policy Statement)

(a) Preparation of Report. The probation officer or other person appointed by the court to prepare the presentence report (the “Preparer”) on a convicted organization should include in such report (the “Report”) recommendations regarding the desirability of a sentence to probation and any particular terms of probation believed appropriate.
(b) Preparation of Compliance Plan. If the Preparer proposes a requirement of a Compliance Plan, as described in § 8D2.4(b)(1), the Preparer should normally provide the organization with an opportunity to propose its own Compliance Plan for inclusion in the Report. Such a proposed Compliance Plan should conform to the following:

(1) Proposed Compliance Plan. The organization's proposed Compliance Plan should set forth the names of the organizational officers responsible for its preparation and describe the investigation and other procedures employed in its development.

(2) Proposed Compliance Plan, Undertakings. The proposed Compliance Plan should be signed by the chief executive, the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate the terms of the Compliance Plan and the court's sentence to all organizational members whose conduct is to be affected thereby. A certified copy of the minutes of the board of directors of the company, indicating that they have been informed of the proposed Compliance Plan, should be filed along with it.

(3) Proposed Compliance Plan, Objections by Preparer. Informal Conference. If the Preparer objects in any respect to the organization's proposed Compliance Plan, the Preparer should attempt to resolve differences with the organization informally, making due allowance for the presumed expertise of the organization in establishing internal management procedures.

(c) Filing of Report. The Preparer should file its final Report with the Court and with both parties, and, at the discretion of the sentencing court, with agencies having a legitimate interest in the information contained therein. Such disclosure should be made sufficiently prior to the imposition of sentence to afford a reasonable opportunity to prepare responses and to comment thereon, and in no case less than 10 days before sentencing, as required by 18 U.S.C. § 3552(d). No portion of the Report shall otherwise be made available to the public. On filing of the Report, either party may file with the court, on notice to their adversary, objections to the Report, and a motion for a Hearing thereon.

(d) Pre-Sentence Hearing. If objections have been filed and motion for a hearing made, or of its own motion, the Court, on notice to all parties and to any appropriate agencies, should hold a hearing at which parties are entitled to call witnesses and present evidence to the same extent as in a hearing for a civil injunction. After considering
the recommendations in the Report, the court should adopt such prob­
orationary conditions, if any, as appear by a preponderance of the evi­
dence to be reasonably related to the goals of criminal sentencing.

Commentary

This section describes a recommended procedure for the assessment
of the desirability of probation in organizational sentencing, and for the
development of related probation terms. In each instance where an
organization is sentenced and a presentence report is prepared, this sec­
tion recommends that the report address the desirability of a probation
sentence in light of the prerequisites for such a sentence under § 8D2.1.
The preparer of the presentence report may be either a probation officer
(including a special probation officer appointed as described in § 8D2.5)
or another expert appointed by the court to prepare the presentence

If the Preparer determines that any of the criteria for probation
specified in § 8D2.1 are met, the Preparer should so notify the defend­
ant and should prepare a corresponding recommendation regarding
particular probation terms as part of the presentence report. Where the
probation recommendation involves a Compliance Plan, the defendant
organization should be given an opportunity to prepare a proposed Com­
pliance Plan as described in § 8D2.6(b). The Preparer may incorporate
all or part of any proposed Compliance Plan in the presentence report,
as well as comments on any portions not so incorporated. The Preparer
may also consider and recommend further Compliance Plan provisions;
however, the Preparer should give due weight to the organizational
expertise of officers of the defendant in evaluating both the costs and
benefits of additional Compliance Plan terms. Some negotiation over
terms of the Compliance Plan is contemplated by this section. Of
course, in the absence of cooperative participation by the defendant
organization when it is given the opportunity to develop a proposed Com­
pliance Plan, the Preparer should, itself, develop such a plan, calling on
the advice of organization specialists or other experts as needed.

Disclosure of the Report to both parties is authorized under this
section in accordance with 18 U.S.C. § 3552. Further disclosures to
interested agencies are provided for at the discretion of the court. This
procedure will allow agencies having continuing regulatory responsibili­
ties concerning a convicted organization an opportunity to comment to
the court, the prosecution, or the probation officer on the terms of proba­
tion and to assess how those terms pertain to the agency’s subsequent
regulatory activities.
§ 8D2.7 Enforcement (Policy Statement)

(a) If an organization violates a condition of probation at any time prior to the expiration or termination of its probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure and after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable —

(1) continue the organization on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available at the time of sentencing.

(b) The court should exercise all other authority provided it by law to require compliance with the conditions of probation, including its authority to hold in contempt any person who willfully violates any undertaking or other representation provided by such person to the court or any person who prevents, obstructs, impedes, or interferes with the due performance of any probation condition or who intentionally hinders or delays the communication of any probation violation to the court or the probation officer through threats, harassment, or misleading conduct.

Commentary

This section clarifies the sanctions available for violations of organizational probation terms and for related misconduct by organization members or other related parties. Where a probation violation is established through a hearing meeting the requirements of Federal Rule of Criminal Procedure 32.1, a sentencing court may either impose new, more stringent terms of probation or resentence the organizational defendant to any harsher sentence that would have been available at the original time of sentencing. This latter approach preserves the option of imposing a maximum fine, an option that courts formerly achieved by suspending the imposition of a sentence during probation under prior law.

If a probation violation is present, the choice between a new probation sentence or some other sentence should be based on the court's assessments of whether the goals of probation sentencing as specified in these guidelines might still be achieved through more stringent and extensive probation restrictions on the defendant organization. The organization's role in disclosing the violation, remedying any associated harm to others, and in adopting internal reforms independent of court compulsion should be weighed by the sentencing court in considering
continued probation. Where the good faith of the organization's management towards probation compliance is in doubt, either a substantial revision of its probation terms or a complete revocation of probation and resentencing to a maximum fine would be warranted.

Because the Sentencing Reform Act of 1984 does not authorize the use of the contempt power to enforce probation conditions, a potential enforcement problem exists if the organization is prepared to openly resist the probation conditions and accept the maximum fine. Although this problem deserves legislative attention, it should also be noted that the Sentencing Reform Act does not limit the existing contempt powers of the court. By definition, a sentence of probation is an order of the court, and under 18 U.S.C. § 1509, any person who, "by threats or force, willfully prevents, obstructs, impedes, or interferes with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States" commits a crime; such conduct also may be enjoined under § 1509. In addition, 18 U.S.C. § 1512(b) covers not only force and intimidation directed at any other person (including organizational personnel seeking to comply with a probation condition or report its violation), but also "misleading conduct toward another person, with intent to . . . hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of . . . a violation of conditions of probation. . . ." the term "law enforcement officer" includes both employees of the United States Probation Service and private persons acting as probation officers. See 18 U.S.C. § 1515(4). Section 1512 also reaches misleading conduct intended "to cause or induce any person to withhold a record, document, or other object, from an official proceeding." Finally, under 18 U.S.C. § 1514, the sentencing court, upon application by the attorney for the government, may issue a temporary restraining order prohibiting harassment of any witness or victim, and § 1514(c) defines the term "harassment" broadly to include "a course of conduct directed at a specific person that . . . causes substantial emotional distress in such person; and serves no legitimate purpose." Threatened reprisals, including demotions or dismissals, would seem to satisfy this standard if they lack a legitimate basis.

Because one of the terms of a sentence to probation will require that all probation conditions be broadly disseminated to corporate officials and employees (see §§ 8D2.5(c)(1) and 8D2.6(c)(2)), these criminal provisions become applicable and provide ample authority to deal
with conduct that attempts to hide or conceal information about a proba-
bation violation; moreover, the existence of these criminal provisions
should be prominently noted in the document summarizing the proba-
tion conditions that is disseminated.

Finally, the court's contempt power clearly reaches any willful
breach of any undertaking or representation made by an organizational
official to the court. Thus, corporate officials agreeing to undertakings
at the time the sentence to probation is imposed can be punished by
contempt penalties if subsequently these undertakings are willfully
breached. See § 8D2.6(c)(2) and § 8D2.4(a)(1) (requiring organization
to "use best efforts" to provide written assurances and undertakings by
officers). For example, if a corporate president undertakes in writing at
the time sentence to probation is imposed to inform the court of any
probation violation that becomes known to him, a willful failure to do so
could trigger such a penalty. Accordingly, the enforcement problem
caused by the absence of contempt or other penalties in the statute can
be substantially rectified by use of model form undertakings, which
would be delivered by senior organizational personnel at the time sen-
tence to probation is imposed.