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July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment

Via email

To the U.S. Sentencing Commission:

Public Citizen applauds the U.S. Sentencing Commission's work setting guidelines and providing data that helps ensure a fact-based perspective on sentencing decisions. As a consumer group dedicated to combatting corporate misconduct, we are particularly interested in the Commission's work with regards to Organizational Offenders (a category we refer to somewhat more colloquially as corporate criminals). The public's understanding of corporate crime in large part is thanks in large part to the data the Commission tracks and provides, and for that we are grateful.

Tracking corporate crime is difficult. The Commission's annual reports are currently among the best data available for understanding trends in federal corporate crime prosecutions in the U.S. However, because the U.S. Department of Justice routinely resolves many criminal investigations of corporate misconduct through pretrial diversion – deferred and non-prosecution agreements, or what we refer to collectively as leniency agreements – the picture of corporate crime provided by Commission reports is, unfortunately, incomplete.

The U.S. Sentencing Commission recognized the incomplete picture provided in its annual reports in its 2022 report on organizational sentencing guidelines.[1] The report

[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf

notes, "Because criminal prosecutions resulting in a sentencing are only one method by which an organization's violations of the law can be addressed by the authorities, Commission sentencing data cannot fully measure the prevalence of corporate crime."[2] In a footnote, the report notes that private third parties, such as the law firm Gibson Dunn, provide supplementary information to provide a fuller picture of the federal government's effort to enforce the law when corporations commit crimes. Public Citizen also publishes annual reports[3] that combine the Commission's data with third-party sources, such as the Violation Tracker[4] project of Good Jobs First and the Duke University/University of Virginia Corporate Prosecution Registry,[5] to facilitate public understanding of corporate crime and enforcement.

In response to the Commission's request for comments from the public on future policy priorities, Public Citizen proposes that the Commission provide a more complete picture of corporate crime enforcement as it is carried out by federal law enforcement by including criminal cases against corporate offenders that are resolved through pretrial diversion.

Adding the criminal cases that are resolved through deferred prosecution agreements, non-prosecution agreements, and other resolutions involving organizations that violate the law would significantly enhance the Commission's reports. The key enhancement for the public interest would be to allow for increased understanding and scrutiny of how the federal government enforces criminal law against the largest corporations, which historically have routinely received leniency deals for serious offenses that resulted in harms that were far more widespread than offenses committed by smaller corporations.

The Commission's data shows that in 2023, about 76% of the corporations the Department of Justice prosecuted had only 50 employees or less, while only about 12% had 1,000 employees or more. The data also shows that this is the continuation of a longstanding trend – about 70% of the 4,946 corporations the federal government prosecuted between

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[2] Ibid 12 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf
[3] For the most recent, see https://www.citizen.org/article/enforcement-uptick-corporate-prosecutions-report-2023/
[4] https://violationtracker.goodjobsfirst.org/
[5] https://corporate-prosecution-registry.com/

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1992 and 2021 were small businesses with fewer than 50 employees, while only about 6% employed 1,000 or more.

The inverse is true as well – leniency deals that allow corporate defendants to escape prosecution tend to benefit bigger corporations. Most corporate offenders that receive leniency agreements from the Department of Justice are large multinationals.[6] Of the 14 corporations that received leniency deals in 2023, the majority (10, or 71%) had at least 5,000 employees or more. The largest, ABB,[7] has over 100,000. The leniency deal it received follows multiple prior criminal enforcement actions against the corporation over similar misconduct.

While adding organizations that resolve criminal investigations through pretrial diversion would be a significant public interest enhancement to the Commission's work, the relatively small number of cases against these large corporations means that it is an enhancement that would be unlikely to be excessively burdensome. Over the past 25 years, the largest number of these leniency deals were offered in fiscal year 2015, when there were 73, largely because of the Justice Department's Swiss Bank Program.[8] This is in part because of how few criminal investigations against corporate misconduct the Justice Department brings. In fiscal year 2023, there were just 14.

We understand that in requesting that data on organizational pretrial diversion agreements be included in the Commission's reports and analysis, we are requesting that the Commission treat organizations differently from individual offenders. But organizations – especially the largest corporations – *are* different, and they are already treated differently. Our request is for a small enhancement that would make a big difference.

As long as the DOJ continues to overemphasize offering the carrot of leniency to corporate criminals to encourage cooperation, these agreements are likely to continue to be overused, especially in resolving criminal cases against the largest corporations. The current approach risks rewarding systemically criminogenic corporations for

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[6] https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/
[7] https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case
[8] https://www.justice.gov/tax/swiss-bank-program

scapegoating supposed bad apple employees when effective criminal enforcement often requires systemic corporate discipline and court supervision.

To deter corporate crime, the DOJ should charge both culpable individuals and offending corporations. But as long as the DOJ continues to over-rely on agreements that frequently enable the biggest corporations to avoid prosecution and its consequences, the small number of big corporations that disproportionately benefit from these deals should not escape the scrutiny of the Commission's analysis.

We thank the Commission again for its ongoing reports and provision of data that are the gold standard for corporate crime enforcement, and hope you find our suggestion to be useful and constructive. Should you wish to discuss our comment any further, we would be more than happy to continue the conversation.

Sincerely,

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