

Special Needs Offenders

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BULLETIN



White-collar Crime

by
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According to the U.S. Sentencing Commission, embezzlement, forgery/counterfeiting, bribery, money laundering, tax offenses and other fraud and nonfraud white collar crimes accounted for almost 20% of cases sentenced under U.S. Sentencing Guidelines in fiscal 1999. The Commission received information on 255 organizations sentenced under the guidelines that same year.

White-collar crimes pose unique challenges to the federal judiciary. How do the courts distinguish between “situational” and “career” white-collar defendants and offenders? How do probation officers develop strategies for collecting monetary penalties? How do both probation and pretrial services officers determine a defendant’s or offender’s financial status and formulate appropriate special conditions? How do officers supervise white-collar defendants and offenders?

Particularly daunting are complex economic crimes involving multiple defendants, multiple victims, intricate transaction records, and high economic stakes. Several of these complex white-collar crimes have gained attention in the past decade.

Power on probation

In 1989 a steam pipe exploded in Manhattan killing three people and spewing 200 pounds of asbestos over a wide area. ConEd, the utility company responsible for the pipe, denied that asbestos had been released during the explosion.

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In November 1994 ConEd pleaded guilty to conspiracy, failure to notify authorities of the asbestos threat, making false and fraudulent statements, and deceiving the Environmental Protection Agency and the National Recovery Center. Former ConEd executive Constantine Papakrasas pleaded guilty to failure to report the asbestos release to a federal agency.

In April 1995 Federal Judge John Martin sentenced ConEd to three years of probation under the supervision of a court-appointed monitor and fined the company \$2 million. In 1998 Judge Martin approved an agreement requiring ConEd to continue environmental compliance programs, support of a telephone hotline for confidential complaints, and periodic reporting to the government on compliance. The former executive had faced a maximum of three years in prison. Judge Martin, after learning of Papakrasas's failing health, ordered him to pay a \$5,000 fine.

Price of conspiracy

In 1996 Archer Daniels Midland Corp. (ADM), one of the largest food- and farm-ingredient producers in the world, pleaded guilty in the Northern District of Illinois to two felony counts of price-fixing and was ordered to pay a \$100 million fine. Although the fine was almost seven times larger than any previous antitrust fine, it amounted to only 14% of ADM profits in 1996 and less than 1% of its \$13.3 billion in cash.

Two company executives were convicted of price-fixing

and sentenced to two years in prison. Michael Andreas (vice chairman of the board and executive vice president of sales and marketing) and Terrence Wilson (president of the ADM corn-processing division) were found guilty of conspiring to violate section 1 of the Sherman Antitrust Act, barring conspiracy or combination to restrain trade.

A panel of the U.S. Court of Appeals for the Seventh Circuit held that the sentencing judge should have enhanced the prison terms. The court indicated that USSG §3B1.1 calls for an enhanced sentence for the leader or organizer of a criminal activity that involved at least five participants.

Parole payback

In 1998 Henry Gherman was released on parole in the Southern District of Florida after serving almost 10 years in federal prison. Gherman was incarcerated after pleading guilty to seven felony counts, including mail fraud and embezzlement from employee pension funds.

Beginning in 1982, Gherman, founder of First Financial Planning Inc., a financial services company for doctors, embarked on a scheme to defraud investors out of approximately \$10 million in pension and other funds. Gherman's clients believed their funds had been placed in certificates of deposit. In truth all of the money was deposited in First Financial's accounts and converted by Gherman for his own use. First Financial had maintained 183 brokerage accounts and 120 bank accounts.

Gherman's sentence included an order to make restitution of \$12,903,250, pursuant to his pending bankruptcy proceedings.

Island fun(d)s—and fines

In 1987 Cecil H. Butcher Jr. pleaded guilty in the Eastern District of Tennessee to conspiracy, bankruptcy fraud, misapplication of bank loan funds, tax fraud, and money laundering.

Butcher had built a \$1.5 billion, 22-bank empire across east Tennessee and Kentucky. His older brother Jake, a co-defendant, earlier had been convicted of bank and tax fraud in the failure of his United American Bank, at the time the third worst bank failure since the Great Depression.

To conceal assets and defraud bankruptcy creditors, Cecil set up accounts and businesses on Grand Cayman and Grand Turk in the British West Indies (both offshore banking havens), where assets were transferred and laundered before being brought back into the United States. At one bank on Grand Cayman, he transferred \$1.65 million from a trust account at a Miami bank to the account of United Southern Ltd., a shell corporation.

Sentenced to 20 years, and fined over \$300,000, Cecil was released on parole in the Northern District of Georgia in the early 1990s. The probation office, working closely with the U.S. attorney's financial litigation unit, conducted a financial audit of Butcher's assets, resulting in a lump sum fine payment exceeding \$300,000.

Phony clean-up

In 1993 in the Central District of California, Barry Minkow was released on parole after serving one-third of his 25-year sentence for fraud. Minkow was the founder of ZZZZ Best carpet cleaning.

A publicly traded company, ZZZZ Best was worth over \$300 million in 1987. Just before the company's planned merger with another company twice its size, a newspaper article appeared indicating that ZZZZ Best was a fraud. The merger was cancelled, and a criminal investigation confirmed the fraudulent nature of ZZZZ Best.

Minkow had built the company through a combination of check kiting, loan fraud, bribery, and fictitious record keeping that duped shareholders, accountants, and investment bankers. He created phony documents including loan files, check registers, general journals, and accounts receivables invoices.

In addition to his prison sentence, Minkow was ordered to pay \$26 million in restitution. Since his release from prison, Minkow has been making money by speaking to various groups – including bank executives and the FBI – about his scheme and how it could have been prevented.

Two levels of behavior

As the cases cited above well illustrate, white-collar crime often involves investigation, sentencing, and supervision not just of individuals but of organizations and requires officers to understand corporate behavior as well as human behavior.

WHITE-COLLAR CRIME: WHAT IT IS, WHO COMMITS IT

The term “white-collar crime” was coined in 1939 by criminologist Edwin Sutherland, who defined it as “crime in the upper, white collar class, which is composed of respectable, or at least respected, business, and professional men.”

To many, white-collar crime is defined by the nature of the offense. According to the FBI, white-collar crime consists of

those illegal acts which are characterized by fraud, concealment, or a violation of trust and which are not dependent upon the application of force or threat of physical force or violence. These acts are committed by individuals, at all levels of the economic spectrum, and organizations to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure a personal, political, or business advantage.

One study categorizes white-collar offenses by their complexity, based on pattern, use of organizational resources, number of conspirators, and length of perpetration. Antitrust and securities fraud are in the “high” complexity category; mail fraud, false claims, and bribery in the “moderate” category; and tax fraud, credit fraud, and bank embezzlement in the “low” category.

Perpetrators range from situational to career offenders.

Situational offenders have relatively benign motives. They need to pay bills, maintain a certain lifestyle, or support a substance abuse problem, or they want to get back at an employer. They have jobs that offer opportunities for unlawful transactions, and their crimes are relatively unsophisticated. Career offenders are swindlers—their “job” is engaging in unlawful business transactions. Studies indicate that the bulk of the white-collar caseload in the federal judiciary is composed of situational offenders and those who fall somewhere between the two ends of the situational-career continuum. The more sophisticated defendants and offenders affect the system disproportionately, however, because of the degree of harm they inflict and the staff time required to investigate and supervise them.

Organizational perpetrators of white-collar crime can be classified much like individuals. Corporate criminal liability stems from the tort law doctrine which generally holds an employer liable for acts committed by employees within the scope of their employment. Over the years, courts have expanded corporate criminal liability to situations where employees act contrary to express corporate policy, where a number of agents or employees acting together satisfy all the ele-

ments of an offense (“collective knowledge”), where a corporation fails to investigate facts that point to criminal conduct (“willful blindness”), or, in the case of public health and safety, where the organization commits criminal acts but had no specific criminal intent to do so. Thus, some corporations can be thought of as situational offenders.

Likewise, some organizations are “career offenders” in that they exist to facilitate criminal activity. The commentary to USSG §8C1.1 defines “criminal purpose organizations” as those that, for example, serve as “a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance . . . [or] a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste.” Such organizations can either act alone or be connected to larger criminal organizations.

The FBI emphasizes the importance of corporate organization in white-collar crime. Indeed, studies have shown (and the probation and pretrial services officers interviewed for this bulletin agree) that “[t]he most consequential white collar crimes—in terms of their scope, impact and cost in dollars—appear to require for their commission that the perpetrators operate in an environment that provides access to both money and the organizations through which money moves. The status or prestige of the or-

Characteristics of Individual Offenders

As always, officers should avoid generalizing about defendants and offenders and evaluate each case on its own merits. Officers should be aware of the characteristics common to the two main white-collar offender categories, however.

Career Offenders

- ⇒ are good salespeople—articulate, seemingly well-informed, believable, and continually pitching the “deal”
- ⇒ are good storytellers and conversationalists who seek to engender confidence
- ⇒ know how to psychologically manipulate others
- ⇒ create the impression of authority and leadership
- ⇒ vent anger and frustration under a generally cool and controlled exterior
- ⇒ are often friendly and charming
- ⇒ can easily adapt to different social situations to “blend in”
- ⇒ become obsessed with the scam they are executing, often fudging figures on financial statements, falsifying corporate credentials, and fabricating strategic plans
- ⇒ often enjoy taking risks and living on the edge
- ⇒ often enjoy a lavish lifestyle that gives them a sense of importance
- ⇒ feel no remorse or guilt

Situational Offenders

- ⇒ do not have a significant criminal record, pending criminal charges, or an instant offense involving a controlled substance
- ⇒ do not have a history of mental illness, significant emotional instability, or violent behavior
- ⇒ do not engage in patterns of criminal conduct, maintain gang affiliation, or have a history of criminal association
- ⇒ often are ashamed of their actions
- ⇒ often have money problems or a history of substance abuse

ganization, or the individual who inhabits it, is only an incidental feature, for the key factor is location in the organization where money is to be

found.” The degree of harm inflicted by either type of offender usually depends on the organization and the individual’s position within it. ♦

ISSUES AND TOOLS FOR INVESTIGATION AND SUPERVISION

Investigation and supervision of white-collar defendants and offenders must begin with the AO's *Criminal Monetary Penalties: A Guide to the Probation Officer's Role* (Monograph 114) and the Center's *Financial Investigation Desk Reference for Probation and Pretrial Services Officers*. The tools described in this bulletin merely supplement those two essential resources.

Pretrial investigation

Identification of white-collar defendant type is perhaps the single most important aspect of the pretrial services officer's job. As with any defendant, identification helps the officer determine dangerousness and risk of nonappearance and formulate recommendations for special bond conditions.

Certain aspects of investigation of white-collar defendants can complicate these tasks. To begin with, defendants often have left convoluted paper trails and officers often have only a short time to interview and investigate before the initial appearance. Consequently, verification can be difficult. In addition, the pretrial services officer is not permitted to ask the defendant about the circumstances of the alleged offense.

For these reasons, officers should keep in mind that, in

cases where facts indicate that a defendant may have difficulty complying with release conditions or where other supervision issues are present, investigation need not stop with the initial appearance and release decision. Rather, the officer should continue investigating. If any "red flags" pointing toward a heightened risk of danger or nonappearance are discovered, the officer should consider asking the court to add or modify special bond conditions.

Specific investigative techniques and tools that may assist the officer in identifying the defendant as "situational" or "career" prior to initial appearance include

- looking beyond certain behavioral characteristics while keeping others in mind. The officer must remember that white-collar defendants of all types often have common characteristics, such as high education levels, quality legal representation, knowledge of business and finance, values similar to those who enforce the law, and high social status evidenced through wealth, occupation, community standing, or personal and business connections. (See box, opposite.)
- contacting the case agent

and assistant U.S. attorney early in order to understand the defendant's actions underlying the indictment

- using proprietary databases such as ChoicePoint and Lexis/Nexis to access information on the defendant's real estate holdings, credit history, assets, liens, child support and other court orders, etc.
- asking a defendant about employment, keeping in mind the relationship between an individual's job and his or her opportunity to commit a crime
- asking a self-employed defendant about his or her business, being aware of indications that a business is being used to conduct unlawful activity (see box, p. 6)

Presentence investigation

By the time a case reaches the presentence stage, the type of white-collar offender the court is dealing with should be apparent. However, presentence investigators can go much further than pretrial services officers in obtaining and piecing together personal and financial information, enabling them to provide a synopsis of the offender type and an overview of the offender's finances that will help the court during sentencing.

"Top 11" Potential Questions for Self-employed* Defendants and Offenders

1. Who are the officers, shareholders, and members of the board of directors of the organization, and how many shares are held by each?
2. What products or services does the organization sell?
3. Where are the assets of the organization located (e.g., offices, warehouses, equipment, inventory, etc.)?
4. What type of records does the organization keep, and who is responsible for them?
5. What is the method of accounting: cash or accrual? What is the basis for accounting: calendar or fiscal?
6. Has the organization ever been audited by a certified public accountant? If so, who was the accountant?
7. How is the account organized? What is the line of responsibility, and what are the duties of the accounting/bookkeeping personnel?
8. Has the organization ever received property other than money for compensation? If so, please describe.
9. Were any funds borrowed? If so, how much, when, and from whom? From a financial institution, stockholders, a person, or an entity? What is the repayment agreement?
10. What kind of bank accounts does the organization have, and where are they?
11. What is a typical business transaction like? (Note: Flow-chart the procedure for future reference from inception to completion, including all paperwork generated.)

* Currently self-employed or seeking to become self-employed while under supervision. The original list consists of 63 questions. For more information, contact the District of New Hampshire Probation Office at (603) 225-1515.

Assuming defense counsel will permit the offender to discuss the case and answer questions, the officer should have the offender map out a flow chart showing how he or she makes money—especially if the offender is self employed. The offender should “walk through” a typical business transaction from start to finish with the officer and explain the types of

books and records kept for his or her business. The offender should agree to provide access to all business records. By forcing the offender to document these issues, the officer will make it difficult for the individual to explain any diversions from those practices should the officer uncover irregular practices down the road. In addition, when the offender floods

the officer with financial and business documentation, the officer will be better able to understand it.

The presentence investigator should consult pretrial services reports and contact the case agent and assistant U.S. attorney to obtain supplemental information. Uncovering assets and victims becomes more difficult with time. The trail of assets is warmest at the pretrial stage, when a defendant wants to convince the court that he or she has sufficient assets to post bond. By the presentence stage the offender is looking to reduce his or her financial standing in order to limit liability for fines and restitution. To do this, offenders often will hide assets by transferring them out of their legal control but within their operational control (i.e., to a relative, business associate, corporate shell, etc.). On the other hand, the offender will not want to be viewed as uncooperative in providing financial information.

In addition to using the tools available at the pretrial stage, presentence investigators should have the offender sign releases that permit the officer to obtain access to bank and brokerage accounts and to tax information from the offender's certified public accountants and from the Internal Revenue Service. Transcripts of Account from the IRS can provide information on the offender for the previous five years. This information can be used to verify the offender's employment, income, and property ownership history.

The officer should obtain transcripts of all relevant IRS forms. For publicly held corporations, the officer should obtain documents filed with the U.S. Securities and Exchange Commission and state-based depositories of corporate information (i.e., the state secretary of state's office). The Social Security Administration can confirm an offender's name, address of employer, and salary. The probation office may wish to seek a court order under the All Writs Act, 28 U.S.C. §1651, to obtain financial documents from third parties.

The officer should also take advantage of services offered by state or national professional or trade associations such as the Association of Certified Fraud Examiners and the National Association for Bank Security. Finally, the officer should obtain background information on the offender by inquiring with federal regulatory agencies such as the Federal Reserve and Federal Deposit Insurance Corporation if the offender is a bank, the U.S. Secret Service's Financial Crimes Division if the offender was convicted of counterfeiting or credit card fraud, and the Federal Trade Commission and Securities and Exchange Commission, both of which prosecute civil actions for fraud and securities violations, and their state-level counterparts.

Background information on publicly held corporations can be obtained from Dun & Bradstreet Inc. Officers should also consult federal, state, and private licensing entities, such

as the National Association of Securities Dealers if the offender is a broker-dealer or brokerage firm, state bar associations if the offender is a lawyer or law firm, state institutes of certified public accountants if the offender is an accountant or accounting firm, and state insurance regulatory agencies if the offender is an insurance agent or firm.

Investigation/Supervision Checklist*

- ✓ Has the offender provided detailed information on all personal and business checking or savings accounts?
- ✓ Does the officer have the information necessary on all accounts over which the offender has signatory authority?
- ✓ Does the offender have a safe deposit box? If so, what are the contents?
- ✓ Does the offender maintain canceled checks and bank statements?
- ✓ Is the offender an officer of, or does he or she own stock or have any interest in, any corporation or partnership?
- ✓ Is the offender a grantor, grantee, trustor, trustee, or beneficiary of any trust? (Obtain consent for access to records.)
- ✓ Does the officer have a complete description of bookkeeping, records, or documentation of the offender's business?
- ✓ Who maintains the books of the offender's business?
- ✓ To what degree is the offender responsible, if at all, for maintaining or reviewing business records?
- ✓ Where are the business records located?
- ✓ Has the offender executed appropriate release forms?
- ✓ What is the date of the offender's last Net Worth and Cash Flow statements?
- ✓ Has the officer instructed the offender to provide copies of federal and state income tax returns, including all schedules and attachments?
- ✓ Does the offender hold a professional license? If so, what is the status of that license?
- ✓ Has the offender been the subject of civil or regulatory actions? If so, what is the nature of those actions and what is their status?
- ✓ What are the current, identified supervision issues?
- ✓ Are there any third-party risk issues? Has the officer received confirmation of notification? (supervision only)
- ✓ Do special conditions require modification? (supervision only)
- ✓ Are special instructions needed?

* This checklist is intended to supplement, not to replace, information provided by Monograph 114.

IRS Documents for Basic Investigation of Individuals and Organizations

- \$ Form 1040 U.S. Individual Income Tax Return with Schedules A-E and SE
- \$ Form 1120, 1120S U.S. Corporate Income Tax Return
- \$ Form 1065 (Schedule K-1) Partner's Share of Income, Credits, Deductions, etc.
- \$ Form 2441 Child and Dependent Care Expenses
- \$ Form 4797 Sales of Business Property
- \$ Form 4562 Depreciation and Amortization
- \$ Form W-2 Wages, Salary, Tips
- \$ Form 1099 Other Income

Interviewing Techniques for Investigation and Supervision *

Advise the offender.

Truthful information is required pursuant to conditions of release and 18 U.S.C. §§1001 and 1503.

Ask general versus specific questions.

Start with general questions, then follow up with specific questions. This technique will enable the officer to determine what the offender knows before the officer indicates, by the specific questions, what he or she knows and does not know.

Do's and Don'ts

- ✗ Don't interrupt the offender when he or she is answering. Allowing the offender to wander within reasonable limits may provide useful information.
- ✗ Don't ask hostile questions.
- ✗ Don't ask compound questions. Make sure each question requires only one answer.
- ✓ Do give the offender time to answer each question.
- ✓ Do understand the offender's response. Ask for clarification if necessary.
- ✓ Do confront the offender (when appropriate) with the fact that he or she has lied. Ask why he or she lied, and study the offender's reaction to being confronted.
- ✗ Don't accept general answers or statements. Use the "who, what, where, when, how, and why" technique.
- ✓ Do control all aspects of the interview, maintain order, and control the tempo of questions.
- ✗ Don't permit "off-the-record" discussion if the interview is being recorded.
- ✗ Don't ask leading questions that require a one-word response. Ask concise questions that are easy to understand and answer.
- ✓ Do increase the degree of firmness if the offender's responses indicate a pattern of evasiveness, but never become sarcastic, belittle the offender, or show emotion.
- ✓ Do ask the offender if he or she maintains a personal or business checking or savings account or if he or she has signatory authority over any bank account or safe deposit box. If so, ask whether the offender maintains canceled checks and bank statements and what property is contained in the safe deposit box. Ask the offender if he or she is the officer of, or owns stock in, any corporation or partnership. Ask the offender if he or she is the grantor, trustor, trustee, or beneficiary of any trust.

* Developed by the District of Oregon Probation Office.

Restitution

Payment and collection of restitution are often necessary in white-collar cases. The restitution responsibilities of a presentence investigator include notifying victims, compiling financial information, writing victim impact statements, and preparing accurate judgment orders.

Although collection is generally dealt with during supervision, any amount collected prior to or at sentencing would benefit the victims, the offender, and those responsible for managing the offender (i.e., the court and the supervision officer). In some cases, the officer may encourage the offender to pay restitution before sentencing. The officer should explain that the court may look favorably upon an offender's early payments in deciding issues such as the amount of reduction for acceptance of responsibility under USSG §3E1.1, where the offender will be sentenced within the guideline range, and whether a sentence of probation is appropriate (if applicable).

In the District of Iowa, if the defendant can pay restitution at the time of sentencing but does not, the probation office will not recommend that the court waive restitution interest. The probation office advises its officers to remind the offender that early discharge from probation or supervised release pursuant to 18 U.S.C. §§ 3564(c) and 3583(e)(1) will almost never be considered if the defendant has outstanding restitution. The probation office further advises

its officers to consider impressing on the offender that early and complete restitution will allow the offender to gain more financial freedom due to decreased pressure from the probation office.

Finally, in rare instances, courts have departed below the guideline range based on extraordinary payment of restitution pursuant to *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991). The district advises its officers not to promise or agree to recommend any such departure, however.

The officer should formulate special conditions that facilitate control of the offender's financial and employment situation. In the pretrial services context, recommended special conditions must be justified, as with any defendant, in terms of how they reduce the risk of danger, the risk of nonappearance, or both, and they must be the least restrictive. In the probation context they must be enforceable, reduce the risk of danger to the community, and contribute to correctional treatment.

Potential special conditions

The presentence investigator can recommend a number of special conditions, depending on the issues presented by the offender. These special conditions include searching the offender and his or her belongings (where less invasive alternatives would be ineffective), restricting employment, restricting travel, prohibiting the offender from opening new credit lines, disclosing finances, paying an IRS debt, and pro-

A Collaborative Approach for Collecting Monetary Penalties

Probation officers from the Northern District of Georgia participated on a committee composed of representatives from probation, the U.S. attorney's office, and the clerk of court to develop an efficient method for collecting monetary penalties. The result was a Memorandum of Understanding (MOU) regarding certain procedures each agency would use. The judges in the district reviewed and approved the MOU, which brought the district into compliance with *Monograph 114*.

Another cooperative effort developed in the district involves the Financial Investigation Team (FIT) chaired by the

district's Special Offender Specialist. The team consisted initially of presentence and supervision line officers, specialists, and supervisors. The members worked together on complex fraud cases, brainstorming approaches to specific financial challenges and assisting one another in conducting laborious tasks such as tracking down assets (e.g., real property searches). Partially as a result of the MOU, the probation office recently developed relationships with other agencies to support the FIT's efforts. Supporters include the chief assistant U.S. attorney for the district's FLU, an IRS agent, and an FBI agent.

hibiting the offender from visiting specific places or associating with certain individuals.

The District of Oregon Probation Office recommends the following special conditions for white-collar offenders where restitution or a fine is being recommended:

- The offender shall authorize release to the U.S. probation officer of any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer.
- The offender is prohibited from incurring new credit charges or opening additional lines of credit without

the approval of the probation officer.

In cases where an offender represents a financial risk or is self-employed, the probation office suggests the following special conditions:

- The offender shall maintain a single checking account or savings account in his or her name. The offender shall deposit into this account all income, monetary gains, or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other accounts must be disclosed to the probation officer.
- The offender shall disclose all assets and liabilities to the probation officer.

BADGES OF FRAUD*

- ♥ procrastinating in responding to requests for financial information
- ♥ routinely using cash, cashier's checks, or money orders
- ♥ filing tax returns late or not at all
- ♥ serving as the director or officer of three or more companies, particularly with similar names or business purposes (possible money laundering)
- ♥ maintaining a lifestyle or purchased goods clearly exceeding reported income
- ♥ consistently reporting monthly expenses exceeding or equaling reported income
- ♥ transferring property with little or no consideration
- ♥ transferring the entirety of his or her assets
- ♥ maintaining a close relationship with a transferor or transferee of assets
- ♥ engaging in secret or hurried transactions
- ♥ departing from the usual method of doing business
- ♥ retaining an ownership benefit from transferred assets
- ♥ using a post office box or mailbox without reporting it, or without a specific need
- ♥ submitting incomplete monthly reports
- ♥ making excessive toll calls, maintaining several bank accounts, or engaging in excessive banking activities
- ♥ engaging in businesses such as general business broker or telemarketer, businesses with no identifiable capital source or an offshore source, or businesses involving questionable partners; maintaining an inactive corporation
- ♥ maintaining computers, connected devices, or business telephone/fax numbers or electronic mail accounts in the home for no stated or reasonable purpose
- ♥ making bank deposits or transactions inconsistent with reported income or pay schedule
- ♥ failing to keep proper books and records, especially if instructed to do so
- ♥ making false, misleading, or inconsistent statements
- ♥ serving as the grantor, trustee, beneficiary, or administrator of a trust
- ♥ working for a business that pays salary or wages in cash only
- ♥ making claims of acting as a "financial consultant" or similar occupation
- ♥ working with or operating a business with principals, associates, partners, clients, or customers located offshore or identified as foreign entities

* Developed by the District of Oregon Probation Office.

- The offender shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500.00 without the approval of the probation officer.
- The offender shall not make application for any loan, enter into any credit arrangement, or enter into any residential or business lease agreement without approval of the probation officer.
- The offender shall maintain proper debit, credit, and receipt ledgers for all business transactions. These records shall be made available as requested by the probation officer.

Organizations sentenced to probation under the guidelines are also subject to special conditions, such as

- publicity paid for by the offender in media specified by the court detailing the crime, conviction, sentence, and remedial steps taken
- development by the offender, with court approval, of an effective program to prevent and detect future law violations
- notification of employees and shareholders of the offense and of the details of the compliance program
- periodic reports to the court regarding progress in implementing the compliance program examinations of facilities and records, and interviews of employees by the court or a special probation

officer to monitor compliance

The guidelines indicate that regulatory agencies (e.g., the Environmental Protection Agency in cases involving environmental offenses) may be consulted in developing and monitoring probation conditions. Further, supervision might include coordination with regulatory officials. Additionally, probation violations may lead to extension of the probation term, stricter conditions of probation, or revocation and resentencing. In cases of continued intransigence, the court may appoint a special master to ensure compliance with probation conditions.

Sentencing of organizations

While many of the same investigative techniques that apply to individuals also apply to organizations (e.g., documentary investigation, use of past tax returns to uncover assets, etc.), these entities present unique sentencing challenges. Because an organization cannot be imprisoned, other sanctions must be imposed. These often include a term of probation for a period of one to five years pursuant to the guidelines.

A 1997 study sponsored by the U.S. Sentencing Commission found that a majority of 271 organizations sentenced under the guidelines between 1991 and 1996 were closely held companies with 50 employees or less and that most of these organizations were also first-time offenders. (The

USSC's 1999 figures indicate that 89 of the 92 organizations for which data were available had no prior record.) Probation and pretrial services officers interviewed for this bulletin report similar trends. Officers indicate that the organizations they deal with often are mom and pop operations that have fixed their books, or tight-knit companies that refuse to cooperate with officers because company officers might have to inform on co-workers. The 1997 study found that only three firms were deemed to be "criminal purpose organizations."

The vast majority of the defendants (88 percent) were convicted after pleading guilty (including two organizations that pleaded *nolo contendere*). And more than four-fifths of the organizations, most of which cooperated with the authorities, accepted responsibility for their crime(s).

Almost two-thirds of the organizations examined were placed on terms of probation averaging more than three years, and most of those sentenced to probation received fines, which ranged from \$800 to \$15.5 million. Restitution, which several organizations were ordered to pay, ranged from \$429 to \$3.7 million. The most important variable associated with whether organizations were fined was whether the court considered them able to pay the fine without adversely affecting innocent third parties such as victims and employees (USSG §8C3.3).

Most of the organizations examined were convicted of either “equity skimming” (i.e., embezzling funds or property associated with federal housing loans), price fixing, smuggling goods, or money laundering. Other offenses of conviction included kickback schemes, criminal copyright and trademark infringement, racketeering, gambling, regulatory violations involving food and drugs, bank secrecy, and wildlife crime. The most common special condition was requiring the organization to develop a compliance program. Less common were dissolution orders, orders to sell the organization, and debarment from federal contracts.

Where the presentence investigator recommends development of a compliance program as a special condition, the officer may also choose to recommend that supervision be carried out in conjunction with regulatory agency officials according to specific governmental regulations relevant to the offender’s industry.

Note that it is not uncommon for organizations that have been ordered to pay monetary penalties to file for bankruptcy, which can complicate collection efforts. Sometimes this occurs prior to sentencing. A presentence investigator who suspects that an offender intends to file may want to approach the U.S. attorney’s financial litigation unit (FLU) about requesting that the court freeze the offender’s assets pending development of a payment plan. ♦

SUPERVISION TECHNIQUES

Determining that the defendant or offender is career rather than situational will dictate more intense supervision. Regardless of defendant or offender type, the officer should monitor the individual or entity’s money management habits closely during the first 90 to 120 days of supervision. In cases of probation or supervised release, the officer should also develop a payment plan for fines and restitution.

The legwork completed by pretrial services and presentence report writers is important to the probation supervision officer. The information gathered at these two stages is the starting point for the officer’s review of the offender’s financial standing after incarceration. In most cases, probation or supervised release is the stage where offenders are least cooperative. Having served their prison sentences they are unmotivated to pay fines and restitution. Pretrial, presentence, and post incarceration (supervision) financial reviews almost always present two if not three different pictures as the officer begins tracking assets. The probation supervision officer may therefore find it helpful to meet with the pretrial services officer and presentence investigator to get impressions of their interaction with the offender.

The probation supervision officer should note that situ-

ational offenders, though generally at low risk of re-offending, may still require close supervision to help them change the behavior that led to the original offense.

According to retired U.S. Probation Officer Rosemary De More, writing in *Federal Probation*, many low-risk offenders “cling fiercely to old ways and fight mini-battles regarding necessary change.” Officer De More provides the following example of a situational white-collar offender:

One resistant probationer was Y, age 39, who embezzled \$17,303 from the bank where she worked. Y was both forthright (in the probation department) about her offense and ashamed of it. Hence, she disclosed that she got into trouble after playing the lottery and creating too many bills but also that she had kept the matter from her entire family.

Y’s resistance centered on her restitution, with Y skimping on payments while claiming to be ‘strained to the limit’ and tenaciously hiding the facts about sizeable deductions made regularly from her pay. [W]hen pressured by the court and a U.S. attorney and a probation officer seeking answers, Y let the truth emerge: The deductions were for charity, Y had allotted more to that than to the victim.

Officer De More concludes that such low-risk supervisees “need to be held accountable, and if they do not hold themselves so, the officer should intervene by putting things in focus and by enforcing the court order.” She stresses that supervisees like Y often have money management problems caused by a failure to think ahead, set goals, and take charge, and that they may feel stuck with self-defeating habits.

De More recommends that officers use the Monthly Supervision Report’s section on earnings and other income with verification (pay stubs) as a way to review finances and money management habits and help the supervisee improve them. Also, by requiring the supervisee to list debts, the Net Worth and Cash Flow statements force the individual to recognize difficulties and the importance of dealing with them effectively, De More points out. Using a more precise money management tool such as a small notebook in which the supervisee keeps track of every penny spent over a one- or two-month period is another good idea, she says.

“Career” cases

Career white-collar offenders (and defendants) present different supervision challenges. These individuals are usually punctual, polite, and friendly, but they will often attempt to bombard the officer with confusing, irrelevant information to avoid answering questions. They may also provide only a

portion of requested documents, produce false documents, or provide unrequested or irrelevant documents.

Another trick is to try to isolate the officer from others who might provide information on their activities or business transactions. Sometimes they will use unwitting or gullible associates to carry out schemes insulating themselves from detection or accountability, or will transfer assets to someone else to hide them. Career offenders are also prone to threatening officers with legal action.

In response, officers should adopt a “detect and deter” approach. Financial investigation should continue during supervision—especially during probation or supervised release. Goals include uncovering unreported assets to be sold or mortgaged, with proceeds going toward fines and restitution; verifying the source and amount of income and true living expenses to increase the monthly payment schedule; and detecting and authenticating new criminal conduct.

One of the biggest challenges in dealing with those who commit fraud is locating hidden assets. In addition to consulting pretrial and presentence reports and financial information developed by investigating agencies (such as the FBI), officers may find it helpful to seek out financial information obtained when the offender was providing it openly or for a purpose that would prompt truthful reporting, such as a residential mortgage application. Comparing this information with the

offender’s current Net Worth and Cash Flow statements can reveal inconsistencies for the officer to pursue.

Because their supervision can be extremely time consuming sophisticated white-collar defendants and offenders should do the legwork whenever feasible. Demand verification and documentation such as bank account statements. Always provide a deadline when a document or information is due. If the defendant or offender does not provide a requested document, demand it again and continue to demand it until the information is satisfactorily produced. Verify it independently.

Officers should staff problem cases with their supervisor and, if necessary, seek out both in-house and outside experts in fields related to the specific issue or concern. Outside expertise can be found in governmental regulatory agencies, law enforcement agencies, and trade and professional organizations. (See back page, “Resources for Technical Assistance”). With the court’s approval, the probation officer may request relevant information about offenders from private fraud examiners. This tactic has been used successfully in the Western District of Texas.

Officers should not take reports of net salary at face value. For example, a defendant or offender who works on commission could be compensated from a special payroll account separate from the normal schedule, or he or she may re-

ceive a bonus. Also, the individual may have the employer withhold more than his or her tax liability, resulting in a large refund at the end of the year. The officer should be skeptical if withholding is more than 25% of gross income. In addition, the defendant or offender may arrange for his or her tax refund to be applied to the next year's estimated tax.

In the probation context, the officer should instruct the offender not to make such application in the future. Close review of tax returns can reveal such activity (see line 64 of IRS Form 1040). Keep in mind that blank IRS forms W-2 and 1099 are easy to obtain. Income information should be scrutinized closely and collateral means used to verify employment and income. Legitimate companies do not pay employees in cash because this makes record keeping difficult.

The officer should likewise be suspicious of defendants or offenders who are "independent contractors," who are in dire financial circumstances but pay their bills on time, or who do not accumulate debt despite minimal reported net income. Finally, the officer should look closely at defendants and offenders who consistently report expenses that exceed reported net income or who appear to be living above their means. In either case, the defendant or offender is over-reporting expenses, is not actually making payments to creditors, or has an undisclosed source of income.

Of course, probation officers should visit offenders at their

place of business. Offenders should be required to submit a written description of proposed self-employment activities to the officer for approval of the self-employment. Defendants should do the same where consistent with special bond conditions. (See box p. x).

Demanding that an offender sell an asset to obtain cash for monetary penalties will likely have tax consequences. It may be more advantageous to require the offender to borrow from or mortgage assets. The officer should never demand that the offender obtain an uncollateralized loan to pay monetary penalties because this may end up substituting one victim with another. If the of-

fender has liquidated assets sufficient to pay monetary penalties in full, the officer should demand immediate payment.

Lump sum payment permits the officer to focus supervision energies elsewhere. Moreover, repayment over several years results in the victim not being made whole due to dollar devaluation over time. Note that incarcerated offenders may try to hide or transfer assets when they come out on furlough. Therefore, the officer should attempt to establish communication with the Bureau of Prisons in order to track furloughed white-collar offenders.

Organizations

Organizations sentenced to

Tips for Supervising Complex Organizations

- ⇒ Become familiar with the offender's corporate structure, offense conduct, and sentence by closely reviewing the presentence report and order.
- ⇒ Where development of a compliance plan is a special condition, understand the regulatory standards governing the program.
- ⇒ Establish proactive relationships and maintain regular contact with corporate representatives and with regulatory officials.
- ⇒ Maintain close contact with the U.S. attorney's FLU.
- ⇒ Update the court regularly on the offender's compliance with special conditions and any other matters about which the court may be concerned (e.g., payment of monetary penalties, failure to develop or violation of the compliance program, difficulties with corporate representatives or regulatory officials, etc.).

probation with a special condition requiring development of a compliance program can be difficult to supervise, especially if the organization is complex and its work is technical in nature. Depending on the extent of special conditions, the officer will most likely have to conduct supervision in accordance with regulatory standards and in conjunction with court-approved governmental regulatory officials.

The officer will have to work with representatives of the offender to establish the payment plan for monetary penalties. If the offender drags out this process, the court may be required to intervene. Moreover, the offender may file for bankruptcy protection, making collection of monetary penalties still more difficult.

When reviewing bankruptcy records, the officer should check the “summary of schedules,” which will provide an overview of all documents filed in a case. A debtor who fails to list assets on his or her bankruptcy schedules commits crimes of concealment and making false statements. Concealment may take the form of omission of assets or undervaluation of assets.

Finally, the officer should attempt to establish a relationship with the U.S. attorney’s FLU, which can help in uncovering assets by subpoenaing financial and organizational documents, obtaining freeze orders, and providing other assistance related to enforcement of restitution orders and collection of monetary penalties. ♦

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RESOURCES FOR TECHNICAL ASSISTANCE

Federal Agencies

Federal Bureau of Investigation

- Financial Crimes Section
935 Pennsylvania Avenue, N.W.
Washington, DC 20535-0001
(202) 324-5595; www.fbi.gov

Maintains white-collar crime coordinators in field offices throughout the country.

- FBI/National White Collar Crime Center
Internet Fraud Complaint Center (IFCC)
www.ifccfbi.gov

For law enforcement and regulatory agencies at all levels. Offers a central repository for complaints related to Internet fraud, quantifies fraud patterns, and provides timely statistical data of current fraud trends.

U.S. Department of the Treasury

- U.S. Secret Service
Financial Crimes Division
950 H Street, N.W.
Washington, DC 20001
(202) 435-5850; www.treasury.gov/usss
Investigates counterfeiting and credit card fraud.
- Financial Crimes Enforcement Network (FinCen)
Office of Investigative Support
2070 Chain Bridge Road, Suite 200
Vienna, VA 22182-2536
(703) 905-3502; www.treasury.gov/fincen

Maintains databases providing support to law enforcement agencies. The financial database contains statutorily mandated financial institution reports and records of certain transactions, including reports filed pursuant to the Bank Secrecy Act (BSA). BSA records contain information on large currency transactions, suspicious activity, casino transactions, international movements of currency, and foreign bank accounts. Not readily available from any other source, this information is invaluable to investigators because it preserves a financial paper trail they can use to track criminals and their assets. Commercial database products include information such as state corporations, property, people locator records, professional license, and vehicle registration. Law enforcement databases include (through written agreements with each agency) Treasury bureaus, Drug Enforcement Administration, Department of Defense, and Postal Inspection Service. These databases provide the status of current or closed investigations as well as information gathered from informants, surveillance, and other sources.

Internal Revenue Service

- Criminal Investigations Division
1111 Constitution Avenue, N.W.
Washington, DC 20224
(202) 622-3200; www.irs.treas.gov
Conducts criminal investigations and provides transcripts of taxpayer accounts to authorized persons.

Federal Trade Commission

CRC-240
Washington, DC 20580
www.ftc.gov
(202) 326-3300 (Bureau of Competition)
(202) 326-3042 (Bureau of Consumer Protection)

Maintains regional offices across the country and enforces a variety of federal antitrust and consumer protection (anti-fraud) laws.

U.S. Securities and Exchange Commission

- Enforcement Division
450 Fifth Street, N.W.
Washington, DC 20549-0202
(202) 942-4500; www.sec.gov/enforce.htm
Maintains field offices across the country and enforces federal securities laws. Responsibilities include investigating possible violations of federal securities laws and recommending appropriate remedies for consideration by the Commission. Also works closely with criminal authorities in matters of mutual interest. Investigations frequently concern the sale without registration of securities subject to the registration requirements of the 1933 Securities Act, or the misrepresentation or omission of material facts concerning securities offered for sale, whether or not registration is required. Investigations relate to manipulating market prices of securities, misappropriating or illegally pledging customers' funds or securities, conducting a securities business while insolvent, buying or selling of securities by broker-dealers at prices not reasonably related to the current market, and violating broker-dealer responsibilities to treat customers fairly.

Social Security Administration

6401 Security Boulevard
Baltimore, MD 21235
(800) 772-1213; www.ssa.gov
Provides employment verification information.

Federal Deposit Insurance Corporation

- Division of Compliance and Consumer Affairs
550 17th Street, N.W.
Washington, DC 20429
(202) 942-3454; www.fdic.gov
Investigates and supervises failing banks.

Private Organizations

NASD Regulation

Public Disclosure Program
9513 Key West Avenue
Rockville, MD 20850
(800) 289-9999; www.nasdr.com

The regulatory subsidiary of the National Association of Securities Dealers, NASDR provides an effective mechanism for investors and others to obtain information about and verification of NASD member firms and their associated persons.

Association of Certified Fraud Examiners

(800) 245-3321; (512) 478-9070
www.cfenet.com

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