

Chapter Eight Fine Primer: Determining the Appropriate Fine Under the Organizational Guidelines



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Chapter Eight Fine Primer: Determining the Appropriate Fine Under the Organizational Guidelines

Chapter Eight of the *Guidelines Manual* sets forth the guidelines and policy statements that are applicable when the convicted defendant is an organization and which provide the criteria by which organizations convicted of federal criminal offenses will be punished. These guidelines, which were initially promulgated by the U.S. Sentencing Commission in 1991, were developed after extensive consultation with industry representatives, private defense attorneys, federal judges, prosecutors, and federal probation officers. They are “designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” *See* USSG, Ch.8, intro. comment.

As noted in the Introductory Commentary, the Chapter Eight guidelines reflect a number of general principles relating to the sentencing of organizations. First, when the convicted defendant is an organization, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. *See* USSG, Ch.8, intro. comment. The harm caused by the offense may be remedied through a restitution order, a remedial order, an order of probation requiring restitution or community service, or an order of notice to victims. *See* USSG, Ch.8, Pt.B, intro. comment. Second, the court determines the appropriate fine to be imposed on the organization. *See* USSG §8A1.2(b). If the organization operated primarily for a criminal purpose or primarily by criminal means, the sentencing court should set the fine sufficiently high to divest the organization of all its assets. *See* USSG, Ch.8, intro. comment.; USSG §8C1.1. For all other organizations, the sentencing court should base the fine range on the seriousness of the offense and the culpability of the organization. *See* USSG, Ch.8, intro. comment. Finally, the court may order probation for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of further criminal conduct. *Id.*

This primer focuses exclusively on the second step noted above — the manner in which a sentencing court calculates the appropriate fine for an organizational defendant. This determination is made pursuant to Chapter Eight, Part C of the *Guidelines Manual*.

I. FINE CALCULATION FOR ORGANIZATION OPERATING PRIMARILY FOR CRIMINAL PURPOSE OF BY CRIMINAL MEANS (§8C1.1)

As noted above, in calculating the fine, the sentencing court applies USSG §8C1.1 if, upon consideration of the offense and history and characteristics of the organization, it determines that the organization operated primarily for a criminal purpose or primarily by criminal means. *See* USSG §§8A1.2(b)(1), 8C1.1. Examples of an organization operating primarily for a criminal purpose include a front for a scheme that was designed to commit fraud

or an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance. *See* USSG §8C1.1, comment. (backg'd.). Examples of an organization that operates primarily by criminal means include a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste. *Id.*

In such a case, the fine is set at an amount, subject to the statutory maximum, sufficient to divest the organization of all its net assets. *See* USSG §8C1.1. “Net assets” means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors. *See* USSG §8C1.1, comment. (n.1). If the extent of the assets of the organization is unknown, the court is to impose the maximum fine authorized by statute, absent innocent bona fide creditors. *See* USSG §8C1.1, comment. (backg'd.). When USSG §8C1.1 applies, Part C, Subpart 2, regarding determining the fine for all other organizations, and USSG §8C3.4, regarding fines paid by owners of closely held organizations, do not apply. *See* USSG §8C1.1.

II. FINE CALCULATION FOR ALL OTHER ORGANIZATIONS (§§8C2.1-8C2.10)

Sections 8C2.1 through 8C2.10 guide the court’s determination of a fine range for those organizations that do not operate primarily for a criminal purpose or primarily by criminal means.

A. Applicability of Fine Guidelines (§8C2.1)

The rules for calculating the fine range in §§8C2.2 through 8C2.9 are limited to specifically-enumerated offenses for which pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax offenses. *See* USSG §8C2.1. The applicable Chapter Two guidelines covered by §§8C2.2 through 8C2.9 are listed in §8C2.1(a). As discussed in more detail below, in organizational cases involving offenses referenced to the enumerated Chapter Two guideline sections, the fine calculation first requires computation of the applicable Chapter Two offense level. In addition, §§8C2.2 through 8C2.9 apply to offenses sentenced pursuant to §§2E1.1, 2X1.1, 2X2.1, 2X3.1 and 2X4.1, but only with respect to those cases in which the offense level for the underlying offense is determined under one of the guideline sections in the list at §8C2.1(a). *See* USSG §8C2.1(b). For example, if an organizational defendant is found guilty of aiding and abetting a fraud, the court is directed by §2X2.1 that the organization’s offense level is the same level as that for the underlying offense, which in this case would be determined pursuant to §2B1.1, a guideline section listed at §8C2.1(a). Similarly, the application notes explain that the provisions of §§8C2.2 through 8C2.9 apply if the Chapter Two offense is not listed in §8C2.1, but the applicable guideline results in the determination of the offense level by use of a listed guideline. *See* USSG §8C2.1, comment. (n.2).

The organizational guidelines do not contain fine provisions for most offenses involving environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice, and perjury), and national defense. Those counts for which the applicable guideline is not listed in either §8C2.1(a) or (b) are fined pursuant to USSG §8C2.10 (Determining the Fine for Other Counts), which is discussed below.

B. Preliminary Determination of Inability to Pay Fine (§8C2.2)

The court need not make a complete determination of the guideline fine range in a case in which the organizational defendant lacks the ability to pay restitution or the minimum fine called for by USSG §8C2.7(a). *See* USSG §8C2.2, comment. (backg'd.). Where it is readily ascertainable that the organization cannot and is not likely to become able to pay the restitution required under USSG §8B1.1, a determination of the fine range is unnecessary since, pursuant to §8C3.3 (Reduction of Fine Based on Inability to Pay), no fine would be imposed. *See* USSG §8C2.2(a). Moreover, where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range that the organization cannot and is not likely to become able to pay such a minimum guideline fine, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3. *See* USSG §8C2.2(b).

C. Offense Level (§8C2.3)

For those counts covered by the guideline sections listed at §8C1.1, the court first determines the total offense level by calculating the base offense level and any applicable enhancements contained in the applicable Chapter Two guideline. *See* USSG §8C2.3(a). Where there is more than one count, the court applies the same rules from Chapter 3, Part D (Multiple Counts) that are used for individual defendants to determine the combined offense level. *See* USSG §8C2.3(b).

In determining the offense level, the court must apply the provisions from §§1B1.2 through 1B1.8, but should not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction), and E (Acceptance of Responsibility). *See* USSG §8C2.3, comment. (n.2).

D. Base Fine (§8C2.4)

Under this section, the court determines the base fine in one of three ways: (1) by using the fine amount from the table set forth at §8C2.4(d) that corresponds to the offense level determined under §8C2.3¹; (2) by using the pecuniary gain to the organization from the offense; or (3) by using the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. *See* USSG §8C2.4(a)(1)-(3), comment. (backg'd.). Whichever method results in the greatest base fine amount is applied.

In relation to the three above methods, the guidelines provide two exceptions. First, if the applicable offense guideline in Chapter Two contains a special instruction for organizational fines, the court shall apply that special instruction. *See* USSG §8C2.4(b). For example, the

¹ The offense level fine table at §8C2.4(d) lays out the fine amount associated with each offense level, which, when combined with the multipliers derived from the culpability score in §8C2.5, results in the applicable guideline fine range. *See* USSG §§8C2.4(d), 8C2.5, 8C2.6.

sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations. *See* USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d). Second, to the extent that the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, the court shall not use the pecuniary gain or loss for the determination of the base fine. *See* USSG §8C2.4(c).

E. Culpability Score (§8C2.5)

After calculating the base fine, the sentencing court must determine the organization's culpability score. The court starts with a culpability score of five points and thereafter adds or subtracts points for certain aggravating and mitigating factors. *See* USSG §8C2.5(a)-(g).

The guideline lists four aggravating factors that increase the culpability score. The first aggravating factor concerns high-level or substantial authority personnel in organizations of varying sizes who participate in, condone, or are willfully ignorant of criminal activity. *See* USSG §8C2.5(b)(1)-(5). The organization's culpability score is increased by between one and five points depending on the number of employees in the organization or unit of the organization and the involvement of individuals who are either within high-level personnel or substantial authority personnel. *Id.*

The commentary to the guidelines define the terms "high-level personnel" and "substantial authority personnel." "High-level personnel" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization, such as directors, executive officers, individuals in charge of sales, administration, or finance, and individuals with substantial ownership interests. *See* USSG §8A1.2, comment. (n.3(B)). "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization, such as plant managers, sales managers, individuals with authority to negotiate or set price levels, or individuals authorized to negotiate or approve significant contracts. *See* USSG §8A1.2, comment. (n.3(C)).

The second aggravating factor involves the organization's prior history of misconduct. *See* USSG §8C2.5(c). The court adds one or two points to the organization's culpability score if the organization committed the instant offense within a specified time after a criminal adjudication based on similar misconduct or a civil or administrative adjudication based on two or more separate instances of similar misconduct. *See* USSG §8C2.5(c)(1)-(2).

The third aggravating factor increases the culpability score by one or two points if the commission of the instant offense violated a judicial order or injunction, or the organization violated a condition of probation. *See* USSG §8C2.5(d)(1)-(2).

The fourth aggravating factor concerns obstruction of justice. Under this provision, if the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the

instant offense, the court adds three points to the organization's culpability score. *See* USSG §8C2.5(e). Similarly, this three-point enhancement is also applicable if the organization knew of such obstruction or impedance or attempted obstruction or impedance and failed to take reasonable steps to prevent it. *Id.*

The guideline lists two mitigating factors that decrease the culpability score. The first allows the court to subtract three points from the organization's culpability score if the organization had an effective compliance and ethics program as defined in §8B2.1 in place at the time of the offense. *See* USSG §8C2.5(f)(1). This reduction should be denied, however, if the organization unreasonably delayed reporting the offense to the appropriate governmental authorities or under specified instances in which high-level or substantial authority personnel participated in, condoned, or were willfully ignorant of the offense. *See* USSG §8C2.5(f)(2), (f)(3). It should be noted, however, that the involvement of high-level or substantial authority personnel is not an absolute bar to this reduction. *See* USSG §8C2.5(f)(3)(B)-(C).

The second mitigating factor decreases the culpability score by five points if the organization self-reported the offense to the appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct. *See* USSG §8C2.5(g)(1). If the organization did not self-report, but fully cooperated in the investigation, and accepted responsibility for its conduct, the culpability score is reduced by two points. *See* USSG §8C2.5(g)(2). Finally, if the organization did not self-report or cooperate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the culpability score is reduced by one point. *See* USSG §8C2.5(g)(3).

F. Maximum and Minimum Multipliers (§8C2.6)

Once the court has determined the culpability score, the court looks to the table set forth in §8C2.6 to identify the minimum and maximum multipliers that correspond to that culpability score. *See* USSG §8C2.6. For instance, a culpability score of 10 or more results in a minimum multiplier of 2.00 and a maximum multiplier of 4.00, while a lower culpability score of 3 results in a minimum multiplier of 0.60 and a maximum multiplier of 1.20. *Id.* The maximum and minimum multipliers are then used to calculate the guideline fine range under §8C2.7. Note that a special instruction for a fine in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) sets a floor for minimum and maximum multipliers in cases covered by that guideline. *See* USSG §8C2.6, comment. (n.1).

G. Guideline Fine Range - Organization (§8C2.7)

The guideline fine range is then determined by multiplying the base fine calculated under §8C2.4 by both the minimum multiplier calculated under §8C2.6, which yields the minimum of the guideline fine range, and by the maximum multiplier calculated under §8C2.6, which yields the maximum of the guideline fine range. *See* USSG §8C2.7(a), (b). For example, if the base fine is \$85,000 and the culpability score is 5, the base fine is multiplied by 1.00 to determine the

minimum fine and by 2.00 to determine the maximum fine, resulting in a guideline fine range of \$85,000 to \$170,000.

H. Determining the Fine Within the Range (Policy Statement) (§8C2.8)

The policy statement at §8C2.8(a) instructs the sentencing court that, in determining the appropriate fine, the court must consider certain factors under 18 U.S.C. §§ 3553(a) and 3572(a), as well as additional factors that the Commission concluded may be relevant in determining the appropriate fine in a particular case, such as any non-pecuniary loss caused or threatened by the offense and whether the organization failed to have an effective compliance and ethics program at the time of the offense. *See* USSG §8C2.8(a)(1)-(11); *see also id.*, comment. (backg'd.). In addition, §8C2.8(b) allows a court to consider the relative importance of any factor used to determine the fine range, so that a court is able to differentiate between cases that have the same offense level but differ in seriousness or between two cases with the same aggravating factors but where the factors vary in their intensity. *See* USSG §8C2.8(b); *see also id.*, comment. (n.7).

I. Disgorgement (§8C2.9)

Once the court has determined the fine pursuant to §8C2.8, it must add to that fine any gain that the organization has made from the offense that has not and will not be paid as restitution or through any other remedial measure. *See* USSG §8C2.9. This section typically will apply in cases where, although the organization received gain from the offense, the offense did not result in harm to identifiable victims. *See* USSG §8C2.9, comment. (n.1). Examples include money laundering, obscenity, and regulatory reporting offenses. *Id.*

J. Determining the Fine for Other Counts (§8C2.10)

The Commission has not promulgated guidelines for determining the fines for counts not included in §8C2.1, such as environmental pollution offenses. *See* USSG §8C2.10, comment. (backg'd.). For such counts, the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. *See* USSG §8C2.10. In a case that has a count or counts not covered by §8C1.2 in addition to a count or counts covered by that guideline, the court is to apply the fine guidelines for the count(s) covered by the guidelines and add any additional amount to the fine, as appropriate, for the count(s) not covered. *See* USSG §8C2.10, comment. (backg'd.).

III. IMPLEMENTING THE SENTENCE OF A FINE (§§8C3.1-8C3.4)

A. Imposing a Fine (§8C3.1)

Section 8C3.1 describes the interaction of the fine or fine range determined under the guidelines with the maximum fine allowed by statute and any minimum fine required by statute. *See* USSG §8C3.1, comment. (backg'd.). Where the minimum guideline fine is greater than the maximum fine authorized by statute, the sentencing court must impose the maximum fine

authorized by statute. *See* USSG §8C3.1(b). Where the maximum guideline fine is less than a minimum fine required by statute, the sentencing court must import the minimum fine required by statute. *See* USSG §8C3.1(c).² When an organization is convicted of multiple counts, the maximum fine authorized may increase because the maximum fine for each count of conviction may be added together for an aggregated maximum authorized fine. *See* USSG §8C3.1, comment. (backg'd).

B. Payment of a Fine - Organizations (§8C3.2)

For those organizations that operated primarily for a criminal purpose or primarily by criminal means, the sentencing court must order immediate payment of the fine. *See* USSG §8C3.2(a). In any other case, the court must order immediate payment unless it finds that the organization is financially unable to make immediate payment or that such payment would pose an undue burden on the organization. *See* USSG §8C3.2(b). In this case, the court shall require full payment at the earliest possible date, either by setting a date certain or by establishing an installment schedule. *See* USSG §8C3.2(b). In no event should the period provided for payment exceed five years. *See* USSG §8C3.2, comment. (n.1).

C. Reduction of Fine Base on Inability to Pay (§8C3.3)

The court must reduce the fine below that otherwise required by the guidelines to the extent that imposition of such fine would impair the organizations ability to make restitution to its victims. *See* USSG §8C3.3(a). The court may impose a fine below that otherwise required if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required, provided that the reduction is not more than necessary to avoid substantially jeopardizing the continued viability of the organization. *See* USSG §8C3.3(b).

D. Fines Paid by Owners of Closely Held Organizations (§8C3.4)

The sentencing court may offset the fine for a closely held organization when one or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceedings for the same offense conduct. *See* USSG §8C3.4. An organization is closely held, regardless of its size, when relatively few individuals own it. *See* USSG §8C3.4, comment. (n.1.). The organizational fine is offset by an amount that reflects the percentage ownership interest of the sentenced individuals and the fine amount imposed on those individuals. *Id.* For example, in a case in which five individuals own an organization, each with a twenty percent interest, and three of the individuals are convicted and fined a total of \$100,000,

² In this regard, it is worth noting that the Supreme Court recently held that *Apprendi*'s prohibition against the use of judge-found facts to increase penalties for a crime beyond the statutory maximum (*i.e.*, the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant) applies to fines levied against a corporation. *See Southern Union v. United States*, 567 U.S. ___, 132 S.Ct. 2344 (Jun. 21, 2012).

the fine imposed upon the organization can be offset by up to 60 percent of their combined fine amounts, *i.e.*, by \$60,000. *Id.*

IV. DEPARTURES FROM THE FINE RANGE (§§8C4.1-8C4.11)

Subpart 4 of Part C of Chapter 8 sets forth policy statements for both aggravating and mitigating factors that may not have been adequately taken into consideration in the guidelines for certain offenses. *See* USSG Ch.8, Pt.4, intro. comment. These factors include:

- (1) the organization's substantial assistance to the authorities in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other individuals (§8C4.1);
- (2) the offense resulted in death or bodily injury, or involved the foreseeable risk of death or bodily injury (§8C4.2);
- (3) the offense constituted a threat to national security (§8C4.3);
- (4) the offense presented a threat to the environment (§8C4.4);
- (5) the offense presented a risk to the integrity or continued existence of private or public market (§8C4.5);
- (6) the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to do the same (§8C4.6);
- (7) the organization is a public entity (§8C4.7);
- (8) the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense (§8C4.8);
- (9) the organization has paid or has agreed to pay remedial costs that greatly exceed the gain the organization received from the offense (§8C4.9);
- (10) the organization's culpability score was reduced for having an effective compliance and ethics program, but it had implemented that program in response to a court order or administrative order, or the organization was required to have such a program, but did not (§8C4.10); and
- (11) the organization's culpability score is greater than 10 (§8C4.11).