

Primer



Fines for Organizations



Prepared by the
Office of the General Counsel

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UNITED STATES SENTENCING COMMISSION


One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov ||  @theusscgov



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I. INTRODUCTION

Chapter Eight of the *Guidelines Manual* sets forth the guidelines and policy statements that apply when the defendant being sentenced is an organization, rather than an individual.¹ An “organization” means “a person other than an individual” and includes “corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.”² The Chapter Eight guidelines 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.”³

As noted in the Introductory Commentary, the Chapter Eight guidelines reflect several general principles relating to the sentencing of organizations. First, “the court must, whenever practicable, order the organization to remedy any harm caused by the offense.”⁴ The court may issue a restitution order, a remedial order, an order of probation requiring restitution or community service, or an order of notice to victims.⁵ Second, when the court determines the appropriate fine to impose on the organization,⁶ if the organization operated primarily for a criminal purpose or primarily by criminal means, the court should set the fine sufficiently high to divest the organization of all its net assets.⁷ Third, for all other organizations, the court should base the fine range on the “seriousness of the offense and the culpability of the organization.”⁸ 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 future criminal conduct.”⁹

This primer focuses exclusively on the second and third general principles noted above—both concerning the way 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*.¹⁰ Although this primer identifies some of the key cases and concepts relating to organizational fines, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

¹ U.S. SENT’G COMM’N, *Guidelines Manual*, Ch.8, intro. comment. (Nov. 2021) [hereinafter USSG].

² USSG §8A1.1, comment. (n.1) (quoting 18 U.S.C. § 18).

³ USSG Ch.8, intro. comment.

⁴ *Id.*

⁵ See USSG Ch.8, Pt.B, intro. comment.; USSG §8A1.2(a).

⁶ See USSG §8A1.2(b).

⁷ USSG Ch.8, intro. comment.; see also USSG §8C1.1.

⁸ USSG Ch.8, intro. comment.

⁹ *Id.*

¹⁰ See USSG §8A1.2(b).

II. FINE CALCULATION FOR ORGANIZATIONS OPERATING PRIMARILY FOR A CRIMINAL PURPOSE OR BY CRIMINAL MEANS (§8C1.1)

To calculate the fine, the court applies §8C1.1 if, upon consideration of the nature 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.”¹¹ Examples of organizations 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.”¹² An example of an organization that operates primarily by criminal means would be “a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste.”¹³

Where an organization operates primarily for a criminal purpose or primarily by criminal means, the court shall set the fine at an amount, subject to the statutory maximum, sufficient to divest the organization of all its net assets.¹⁴ “Net assets” means “the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.”¹⁵ 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.¹⁶ When §8C1.1 applies, Chapter Eight, Part C, Subpart 2 (Determining the Fine – Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply.¹⁷

III. 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)

As explained in §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

¹¹ USSG §§8C1.1, 8A1.2(b)(1).

¹² USSG §8C1.1, comment. (backg’d.).

¹³ *Id.*

¹⁴ USSG §8C1.1; *see also, e.g.*, *United States v. Najjar*, 300 F.3d 466, 486 (4th Cir. 2002) (upholding as not excessive a “death penalty fine under §8C1.1” that divested a corporate defendant of all its assets where the corporate defendant was “conceived in crime and performed little or no legitimate business activity”).

¹⁵ USSG §8C1.1, comment. (n.1).

¹⁶ USSG §8C1.1, comment. (backg’d.).

¹⁷ USSG §8C1.1.

be more readily quantified, such as fraud, theft, and tax offenses.¹⁸ 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 guidelines, 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 (covering RICO offenses), 2X1.1 (Attempt, Solicitation, or Conspiracy), 2X2.1 (Aiding and Abetting), 2X3.1 (Accessory after the Fact), and 2X4.1 (Misprision of Felony), but only for 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).¹⁹ For example, if an organizational defendant is found guilty of aiding and abetting a fraud, §2X2.1 directs that the organization's offense level is the same level as that for the underlying offense,²⁰ which would be determined under §2B1.1, a guideline section listed at §8C2.1(a). Similarly, 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.²¹ For example, if an organizational defendant is found guilty of conflict of interest, §2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation), a guideline not listed in §8C2.1(a) or (b), normally would apply. However, if the offense involved a bribe, §2C1.3(c) establishes §2C1.2 as an applicable guideline.²² Because §2C1.2 is a listed guideline at §8C2.1(a), the provisions of §§8C2.2 through 8C2.9 would apply.

The organizational guidelines do not contain fine provisions for most offenses that involve environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice, and perjury), or national defense.²³ Under §8C2.10 (Determining the Fine for Other Counts), the court should determine the appropriate fine based on the general statutory provisions governing sentencing, 18 U.S.C. §§ 3553 and 3572, for those counts for which the applicable guideline is not listed in either §8C2.1(a) or (b).²⁴

¹⁸ See USSG §8C2.1.

¹⁹ USSG §8C2.1(b).

²⁰ USSG §2X2.1.

²¹ USSG §8C2.1, comment. (n.2).

²² USSG §2C1.3(c).

²³ See USSG §8C2.1(a); USSG §8C2.1, comment. (backg'd.).

²⁴ USSG §8C2.10; *see also infra* Section III.J. In fiscal year 2021, 64.4% of the organizational offenders were sentenced under §8C2.10, while 35.6% were sentenced under §§8C2.1 through 8C2.9. U.S. SENT'G COMM'N, QUICK FACTS ON ORGANIZATIONAL OFFENDERS (2021), https://www.uscg.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY21.pdf.

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 §8C2.7(a).²⁵ Where it is readily ascertainable that the organization cannot and is not likely to become able to pay the restitution required under §8B1.1 (Restitution – Organizations), a determination of the fine range is unnecessary because, pursuant to subsection (a) of §8C3.3 (Reduction of Fine Based on Inability to Pay), no fine would be imposed.²⁶ 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 §8C3.3.²⁷

C. OFFENSE LEVEL (§8C2.3)

For counts covered by the guideline sections listed at §8C2.1, the court first determines the total offense level by calculating the base offense level and any appropriate adjustments contained in the applicable Chapter Two guideline.²⁸ Where there is more than one count, the court applies the rules from Chapter Three, Part D (Multiple Counts) to determine the combined offense level.²⁹

In determining the offense level, the court applies the provisions of §§1B1.2 through 1B1.8 (relating to general guideline application, such as the determination of the applicable guideline(s), relevant conduct rules, and the significance of commentary) but does not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility).³⁰

D. BASE FINE (§8C2.4)

Under §8C2.4, the court determines the base fine in one of three ways: (1) by using the fine amount from the Offense Level Fine Table in §8C2.4(d) that corresponds to the

²⁵ See USSG §8C2.2; USSG §8C2.2, comment. (backg'd.); see also, e.g., *United States v. Acambaro Mexican Rest., Inc.*, 631 F.3d 880, 884–85 (8th Cir. 2011) (upholding the district court’s findings, pursuant to the two-part test in §8C2.2(b), that it was “not readily ascertainable” from the record that the corporate defendant was unable to pay the minimum fine and, even if it could not presently pay the fine, it was likely to become able to pay it).

²⁶ USSG §8C2.2(a).

²⁷ USSG §8C2.2(b).

²⁸ USSG §8C2.3(a).

²⁹ USSG §8C2.3(b).

³⁰ USSG §8C2.3, comment. (n.2).

offense level determined under §8C2.3;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.”³² “Pecuniary gain” means “the additional before-tax profit to the defendant resulting from the relevant conduct of the offense” and includes additional revenue or cost savings.³³ “Pecuniary loss” is equivalent to the term “loss” as it is used in Chapter Two (Offense Conduct).³⁴ In order to deter organizations from seeking financial reward through criminal conduct and to ensure that organizations will seek to prevent losses, the method resulting in the greatest base fine is applied.³⁵

The guidelines provide two exceptions to these methods. First, if the applicable offense guideline in Chapter Two contains a special instruction for organizational fines, the court shall apply that special instruction.³⁶ For example, the offense guidelines for antitrust violations and most bribery and kickback offenses include specific formulations for calculating fines for organizations.³⁷ 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.³⁸

E. CULPABILITY SCORE (§8C2.5)

As noted above, one principle in sentencing organizations is that the fine range should be based on the culpability of the organization. Thus, 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 then adds or subtracts points for certain aggravating and mitigating factors.³⁹

The guideline lists four aggravating factors that increase the culpability score. The first aggravating factor concerns (1) high-level personnel in organizations (or units of organizations) who participate in, condone, or are willfully ignorant of criminal activity, or (2) pervasive tolerance of an offense by substantial authority personnel in organizations

³¹ USSG §8C2.4(a)(1). The Offense Level Fine Table at §8C2.4(d) outlines the fine amount associated with each offense level. When combined with the multipliers in §8C2.6, which are derived from the culpability score in §8C2.5, the applicable guideline fine range results. *See* USSG §§8A1.2(b)(2), 8C2.4(d), 8C2.5, 8C2.6; *see also infra* Sections III.E, III.F.

³² USSG §8C2.4, comment. (backg’d.); *see* USSG §8C2.4(a)(1)–(3).

³³ *See* USSG §8A1.2, comment. (n.3(H)).

³⁴ *See* USSG §8A1.2, comment. (n.3(I)); *see also* USSG §2B1.1, comment. (n.3); USSG §2T1.1, comment. (n.1).

³⁵ *See* USSG §8C2.4(a); USSG §8C2.4, comment. (backg’d.).

³⁶ USSG §8C2.4(b).

³⁷ *See, e.g.*, USSG §§2R1.1(d), 2B4.1(c), 2C1.1(d), 2C1.2(c), 2E5.1(c); *see also* USSG §8C2.4, comment. (n.5).

³⁸ USSG §8C2.4(c).

³⁹ USSG §8C2.5(a)–(g).

(or units of organizations).⁴⁰ 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.⁴¹

"High-level personnel of the organization" 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 "a director; an executive officer; an individual in charge of . . . sales, administration, or finance; and an individual with a substantial ownership interest."⁴² "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, and individuals authorized to negotiate or approve significant contracts.⁴³

An individual "condoned" an offense if "the individual knew of the offense and did not take reasonable steps to prevent or terminate" it.⁴⁴ An individual was "willfully ignorant of the offense" if the individual "did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred."⁴⁵ Pervasiveness "will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense."⁴⁶ "Pervasiveness can occur either within an organization as a whole or within a unit of an organization," and fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority.⁴⁷

The second aggravating factor relates to the organization's prior history of misconduct. 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

⁴⁰ USSG §8C2.5(b)(1)–(5). An individual is "willfully ignorant" of the offense if that individual did not investigate possible unlawful conduct despite having "knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred." USSG §8A1.2, comment. (n.3(J)).

⁴¹ USSG §8C2.5(b)(1)–(5); *see also, e.g.*, *United States v. Electrodyne Sys. Corp.*, 147 F.3d 250, 255–56 (3d Cir. 1998) (vacating and remanding for district court to, among other things, make factual finding relating to the number of employees that the corporate defendant had during the relevant time period).

⁴² USSG §8A1.2, comment. (n.3(B)). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means "agents within the unit who set the policy for or control that unit." USSG §8C2.5, comment. (n.3).

⁴³ USSG §8A1.2, comment. (n.3(C)).

⁴⁴ USSG §8A1.2, comment. (n.3(E)).

⁴⁵ USSG §8A1.2, comment. (n.3(J)).

⁴⁶ USSG §8C2.5, comment. (n.4).

⁴⁷ *Id.*

adjudication based on similar misconduct or a civil or administrative adjudication based on two or more separate instances of similar misconduct.⁴⁸

The third aggravating factor relates to an organization’s violation of a court order. The court adds two points to the organization’s culpability score if (A) “the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation,” or (B) “the organization (or separately managed line of business) violated a condition of probation by engaging in . . . misconduct similar to that for which it was placed on probation.⁴⁹ The court adds one point to the culpability score if the commission of the instant offense violated a condition of probation.⁵⁰

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.⁵¹ This three-point enhancement also applies if the organization knew of such obstruction or impedance, or attempted obstruction or impedance, and failed to take reasonable steps to prevent it.⁵²

The guideline further 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(Effective Compliance and Ethics Program)) in place at the time of the offense.⁵³ This reduction should be denied, however, if (1) the organization “unreasonably delayed reporting the offense to [the] appropriate governmental authorities,” or (2) under specified instances, if high-level or substantial authority personnel or individuals with day-to-day operational responsibility for the compliance and ethics program participated in, condoned, or were willfully ignorant of the offense.⁵⁴ Note, however, that the involvement of high-level or substantial authority personnel is not an absolute bar to this reduction.⁵⁵

⁴⁸ USSG §8C2.5(c)(1)–(2). “Similar misconduct” is defined as prior conduct similar in nature to the underlying conduct in the instant offense, whether or not the prior conduct violated the same statutory provision. USSG §8A1.2, comment. (n.3(F)). “Prior criminal adjudication” is defined to mean convictions by trial, guilty plea, or plea of *nolo contendere*. USSG §8A1.2, comment. (n.3(G)).

⁴⁹ USSG §8C2.5(d)(1).

⁵⁰ USSG §8C2.5(d)(2).

⁵¹ USSG §8C2.5(e).

⁵² *Id.*

⁵³ USSG §8C2.5(f)(1). A “compliance and ethics program” means “a program designed to prevent and detect criminal conduct.” USSG §8B2.1, comment. (n.1).

⁵⁴ USSG §8C2.5(f)(2), (3)(A).

⁵⁵ *See* USSG §8C2.5(f)(3)(C).

The second mitigating factor decreases the organization’s culpability score by five points if the organization, “prior to an imminent threat of disclosure or government investigation” and “within a reasonably prompt time after becoming aware of the offense,” 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 criminal conduct.”⁵⁶ If the organization did not self-report, but fully cooperated in the investigation and accepted responsibility for its conduct, the organization’s culpability score is reduced by two points.⁵⁷ Finally, if the organization did not self-report or cooperate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the organization’s culpability score is reduced by one point.⁵⁸

F. MINIMUM AND MAXIMUM MULTIPLIERS (§8C2.6)

Once the court has determined the culpability score at §8C2.5, it next looks to the table in §8C2.6 to identify the minimum and maximum multipliers that correspond to that culpability score.⁵⁹ For instance, a culpability score of ten or more results in a minimum multiplier of 2.00 and a maximum multiplier of 4.00, while a culpability score of three results in a minimum multiplier of 0.60 and a maximum multiplier of 1.20.⁶⁰ The minimum and maximum multipliers then are used to calculate the guideline fine range under §8C2.7.⁶¹ Note that a special instruction for an organizational 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.”⁶²

G. GUIDELINE FINE RANGE — ORGANIZATION (§8C2.7)

The guideline fine range then is 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.⁶³ For example, if the base fine is \$85,000 and the culpability score is five, the base fine is multiplied by 1.00 to

⁵⁶ USSG §8C2.5(g)(1).

⁵⁷ USSG §8C2.5(g)(2).

⁵⁸ USSG §8C2.5(g)(3).

⁵⁹ USSG §8C2.6.

⁶⁰ *Id.*

⁶¹ USSG §8C2.7.

⁶² USSG §8C2.6, comment. (n.1). Specifically, §2R1.1(d)(2) provides that when applying §8C2.6, “neither the minimum nor [the] maximum multiplier shall be less than 0.75.” USSG §2R1.1(d)(2).

⁶³ USSG §8C2.7(a)–(b); *see also* United States v Bradley, 644 F.3d 1213, 1303 (11th Cir. 2011) (any error in the calculation of the guideline fine range was harmless where the court imposed the statutory maximum fine, an amount far below the correct minimum guideline fine range).

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 court to consider certain required 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 within the applicable guideline range in a particular case, such as any nonpecuniary 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.⁶⁴ 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.⁶⁵

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.⁶⁶ Section 8C2.9 typically will apply in cases where, although the organization received a gain from the offense, the offense did not result in harm to identifiable victims.⁶⁷ Examples include money laundering, obscenity, and regulatory reporting offenses.⁶⁸ “Money spent or to be spent to remedy the adverse effects of the offense . . . should be considered as disgorged gain,” so if the “cost of remedial efforts made or to be made by the organization equals or exceeds the gain from the offense, this section will not apply.”⁶⁹

J. DETERMINING THE FINE FOR OTHER COUNTS (§8C2.10)

The Commission has not promulgated guidelines for determining the fines for counts not covered by §8C2.1, such as environmental pollution offenses.⁷⁰ For such counts, the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572.⁷¹ In a case that has a count or counts not covered by §8C2.1 in addition

⁶⁴ USSG §8C2.8(a)(1)–(11); *see also* USSG §8C2.8, comment. (backg’d.).

⁶⁵ USSG §8C2.8(b); *see also* USSG §8C2.8, comment. (n.7).

⁶⁶ USSG §8C2.9.

⁶⁷ *See* USSG §8C2.9, comment. (n.1).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* USSG §8C2.10, comment. (backg’d.).

⁷¹ USSG §8C2.10.

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.”⁷²

IV. 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 Chapter Eight guidelines with the maximum fine allowed by statute and any minimum fine required by statute.⁷³ Where the minimum guideline fine is greater than the maximum fine authorized by statute, the court must impose the maximum fine authorized by statute.⁷⁴ Where the maximum guideline fine is less than the minimum fine required by statute, the court must import the minimum fine required by statute.⁷⁵ 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.⁷⁶

In *Southern Union Co. v. United States*, the Supreme Court held that the principle set forth in *Apprendi v. New Jersey*⁷⁷—that the Sixth Amendment reserves to juries the determination of any fact (other than the fact of prior conviction) that increases a criminal defendant’s maximum potential sentence—applies to criminal fines levied against a corporation.⁷⁸ Southern Union was convicted under the Resource Conservation and Recovery Act (RCRA), which provides for penalties of “a fine of not more than \$50,000 for each day of violation.”⁷⁹ At trial, the jury returned a general verdict convicting Southern Union of violating the RCRA during the entire time period alleged in the indictment.⁸⁰

⁷² USSG §8C2.10, comment. (backg’d.); see also *United States v. Oceanic Illsabe Ltd.*, 889 F.3d 178, 200 (4th Cir. 2018) (“[S]pecific findings as to each factor in § 3572(a) are unnecessary, and a court ‘may satisfy [the requirements of § 3572(a)] if it adopts a defendant’s presentence investigation report . . . that contains adequate factual findings to allow effective appellate review . . .’” (quoting *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995))).

⁷³ USSG §8C3.1(a). The general statutory provisions that govern a sentence of a fine are found in 18 U.S.C. § 3571.

⁷⁴ USSG §8C3.1(b).

⁷⁵ USSG §8C3.1(c).

⁷⁶ See USSG §8C3.1, comment. (backg’d).

⁷⁷ 530 U.S. 466 (2000).

⁷⁸ *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012).

⁷⁹ *Id.* at 347 (quoting 42 U.S.C. § 6928(d)(7)).

⁸⁰ *Id.*

At sentencing, the PSR calculated a maximum fine of \$38.1 million based on Southern Union violating the RCRA for 762 days.⁸¹ Southern Union objected, arguing that this calculation violated *Apprendi* because the jury was not asked to determine the exact duration of the violation and only returned a general verdict listing an approximate start date of the violation.⁸² The government argued that *Apprendi* does not apply to fines.⁸³

The district court held that *Apprendi* does apply to fines but concluded that the “content and context of the verdict all together” demonstrated that the jury did in fact find that the duration of the violation was 762 days; thus, no judicial fact-finding was necessary to establish a maximum fine of \$38.1 million.⁸⁴ Ultimately, the district court imposed a \$6 million fine and a \$12 million “community service obligation.” The First Circuit rejected both findings of the district court, holding that the jury did not find a violation for each day and that *Apprendi* did not apply to criminal fines.⁸⁵

The Supreme Court granted certiorari to resolve a circuit split on the question of whether *Apprendi* applies to the calculation of criminal fines and determined that it does.⁸⁶ The Court explained that criminal fines, like other punishments, are penalties inflicted by the sovereign and are frequently imposed based on “reference to particular facts.”⁸⁷ The Court found that whenever a jury must find certain facts that increase maximum punishments beyond a reasonable doubt, it is “necessary to implement *Apprendi*’s ‘animating principle’: the ‘preservation of the jury’s historic role as a bulwark between the State and the accused at the trial for an alleged offense.’ ”⁸⁸ The Court also rejected the government’s argument that because fines are less onerous than incarceration, they do not trigger the protections of the Sixth Amendment.⁸⁹

B. PAYMENT OF THE FINE — ORGANIZATIONS (§8C3.2)

For organizations that operated primarily for a criminal purpose or primarily by criminal means, the court must order immediate payment of the fine.⁹⁰ In any other case,

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 348–50, 360.

⁸⁷ *Id.* at 349.

⁸⁸ *Id.* at 350 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)); *see also, e.g.*, *United States v. W. Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 994 (9th Cir. 2001) (affirming the defendant corporation’s fine because the fine amount actually imposed remained below the statutory maximum and, thus, did not violate the rule in *Apprendi*).

⁸⁹ *S. Union Co.*, 567 U.S. at 350–51.

⁹⁰ USSG §8C3.2(a).

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.”⁹¹ If such a finding is made, the court shall require full payment at the earliest possible date, either by setting on a date certain or by establishing an installment schedule.⁹² In no event should the period provided for payment exceed five years.⁹³

C. REDUCTION OF FINE BASED ON INABILITY TO PAY (§8C3.3)

The court must reduce the fine below the guideline fine if imposition of such fine would impair the organization’s ability to make restitution to its victims.⁹⁴ However, organizations with a criminal purpose are not authorized to remain in business in order to pay restitution to its victims.⁹⁵ The court may impose a fine below the guideline fine if the court finds that the organization is not able to pay and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required.⁹⁶ Such a reduction “shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.”⁹⁷

D. FINES PAID BY OWNERS OF CLOSELY HELD ORGANIZATIONS (§8C3.4)

The 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 proceeding for the same offense conduct.”⁹⁸ An organization is closely held, “regardless of its size, when relatively few individuals own it.”⁹⁹ 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.¹⁰⁰ For example, in a case in which five individuals own an organization, each with a 20 percent interest, and three of the individuals are convicted and fined a total of \$100,000, the fine

⁹¹ USSG §8C3.2(b).

⁹² *Id.*

⁹³ USSG §8C3.2, comment. (n.1) (citing 18 U.S.C. § 3572(d)).

⁹⁴ USSG §8C3.3(a).

⁹⁵ USSG §8C3.3, comment. (backg’d.).

⁹⁶ USSG §8C3.3(b).

⁹⁷ USSG §8C3.3(b); *see also* United States v. Bradley, 644 F.3d 1213, 1304 (11th Cir. 2011) (“A defendant’s financial hardship does not make a fine substantively unreasonable even if the defendant cannot pay the entire fine or if the fine would drive the defendant into bankruptcy.” (citing United States v. Eureka Lab., 103 F.3d 908, 912, 914 (9th Cir. 1996))).

⁹⁸ USSG §8C3.4.

⁹⁹ USSG §8C3.4, comment. (n.1).

¹⁰⁰ USSG §8C3.4, comment. (backg’d.).

imposed upon the organization can be offset by up to 60 percent of their combined fine amounts, *i.e.*, by \$60,000.¹⁰¹

V. DEPARTURES FROM THE GUIDELINE FINE RANGE (§§8C4.1–8C4.11)

Sections 8C4.1 through 8C4.11 set forth some of the factors that may constitute grounds for departure from the applicable guideline fine range in Chapter Eight cases. This list of factors is not exhaustive. Departures may be warranted if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”¹⁰²

The factors that may warrant departure 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 organizations, upon motion of the government stating same;¹⁰³
- (2) the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury;¹⁰⁴
- (3) the offense constituted a threat to national security;¹⁰⁵
- (4) the offense presented a threat to the environment;¹⁰⁶
- (5) the offense presented a risk to the integrity or continued existence of a private or public market;¹⁰⁷
- (6) the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to do so;¹⁰⁸
- (7) the organization is a public entity;¹⁰⁹

¹⁰¹ *Id.*

¹⁰² USSG Ch.8, Pt.C, Subpt. 4, intro. comment. (quoting 18 U.S.C. § 3553(b)).

¹⁰³ USSG §8C4.1.

¹⁰⁴ USSG §8C4.2.

¹⁰⁵ USSG §8C4.3.

¹⁰⁶ USSG §8C4.4.

¹⁰⁷ USSG §8C4.5.

¹⁰⁸ USSG §8C4.6.

¹⁰⁹ USSG §8C4.7.

- (8) the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense;¹¹⁰
- (9) the organization has paid or has agreed to pay remedial costs that greatly exceed the gain the organization received from the offense;¹¹¹
- (10) the organization's culpability score was reduced under §8C2.5(f) for having an effective compliance and ethics program, and 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;¹¹² and,
- (11) the organization had exceptionally high or low culpability.¹¹³

¹¹⁰ USSG §8C4.8.

¹¹¹ USSG §8C4.9.

¹¹² USSG §8C4.10.

¹¹³ USSG §8C4.11.