



A Basic Introduction to the Organizational Guidelines

2017 National Seminar Series



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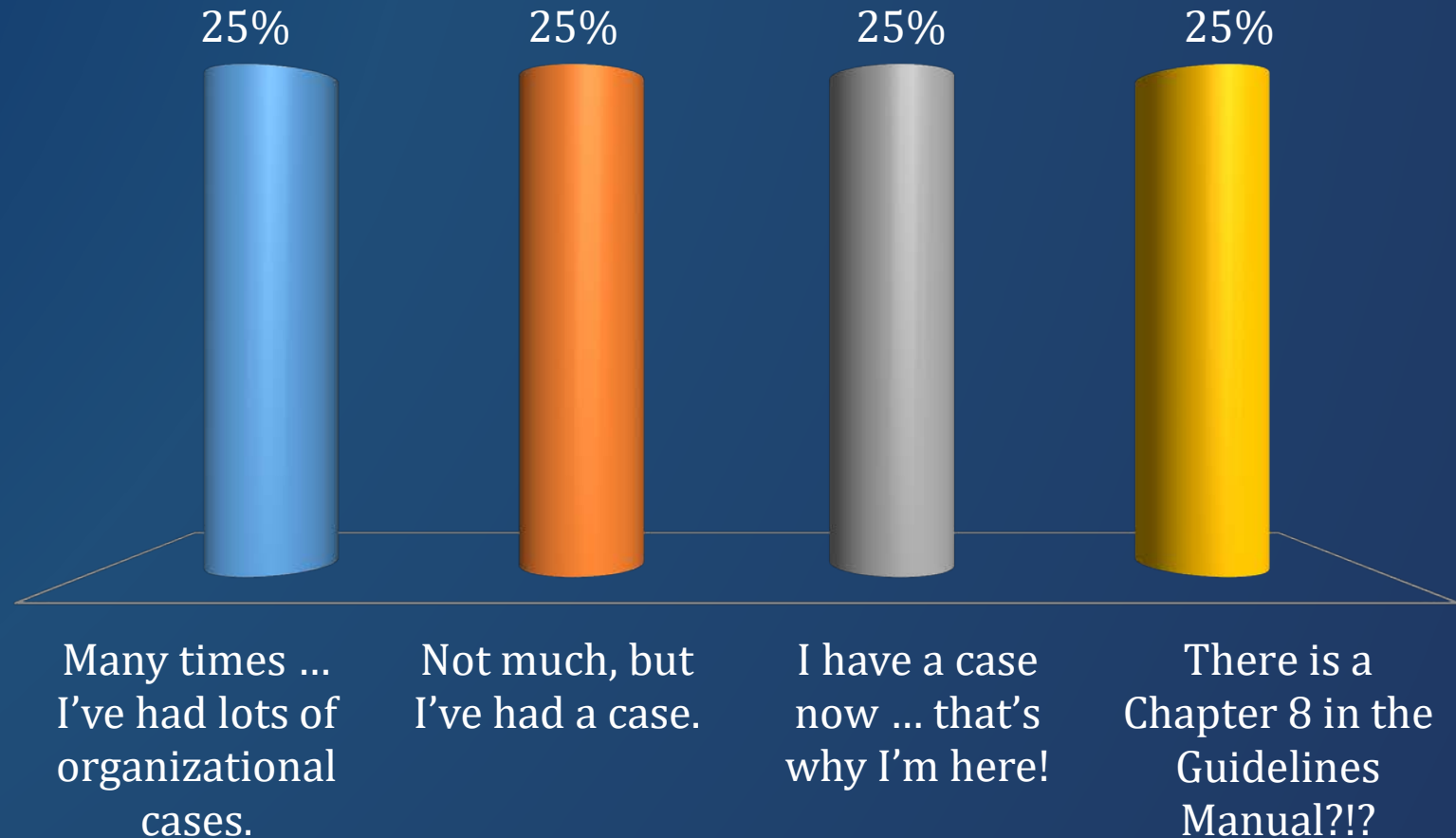


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There Are Organizational Guidelines???

In my previous experience, I have used Chapter 8 of the *Guidelines Manual*

- A. Many times ... I've had lots of organizational cases.
- B. Not much, but I've had a case.
- C. I have a case now ... that's why I'm here!
- D. There is a Chapter 8 in the *Guidelines Manual*!?



Organizational Guidelines Session Outline

- Why do I need to know this?
- How does Chapter 8 work?
 - An organization can't go to jail? What types of sentences are we talking about?
 - When do the Chapter 8 fine provisions apply?
 - How do I evaluate the culpability of an organization?
 - How do I calculate the fine range?
- How does probation work in these cases?





Why Do I Need To Know About Chapter 8?



Why Do I Need to Know About Chapter 8?

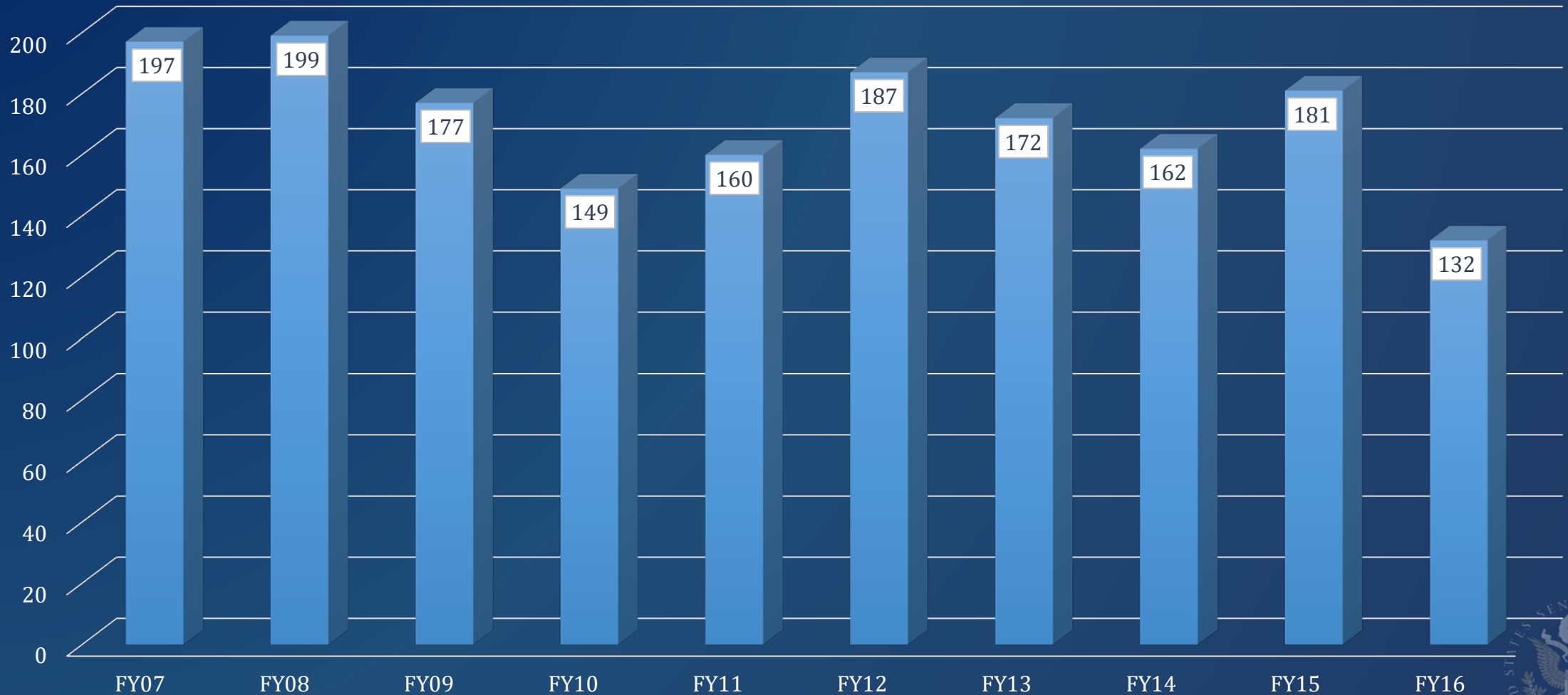
- Authorization: **The Sentencing Reform Act of 1984**
 - U.S. Sentencing Commission to develop sentencing guidelines for individuals and organizations
 - Like other GL calculations, courts must consider the guideline sentence where applicable.
- Chapter 8 has some difference from your typical GL calculations – Avoid the common mistakes.
- While there aren't that many cases each year, they do come up.



Number of Organizational Cases

Fiscal Years 2007-2016

7



SOURCE: United States Sentencing Commission, 2007-2016 *Sourcebooks of Federal Sentencing*



How Does Chapter 8 Work?

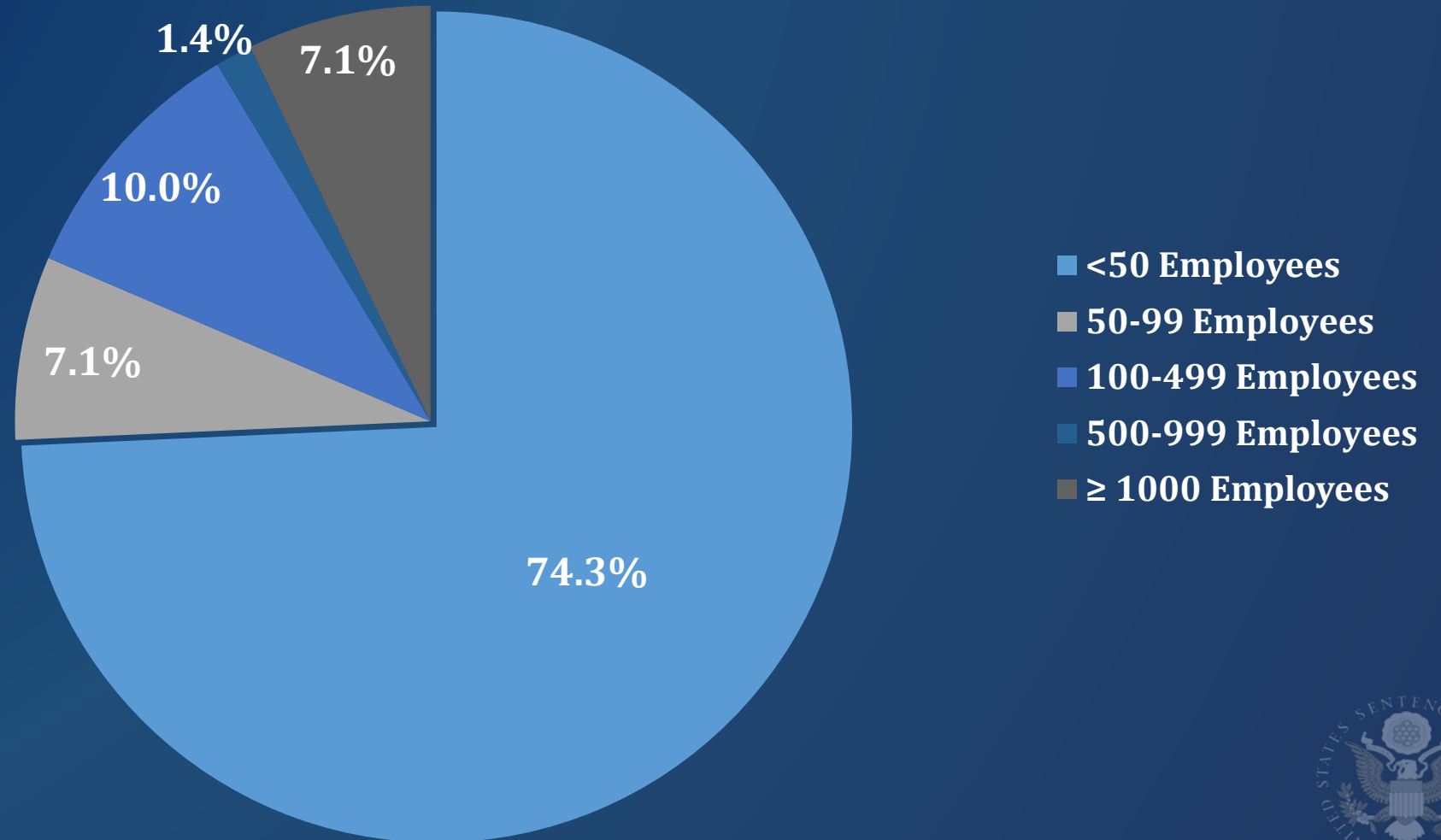


When Do I Turn To Chapter 8?

- Applies to “Organizations”
 - Corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions, and non-profit organizations
- Applies to felony and Class A misdemeanors (§8A1.1)



Size of Organizations Sentenced By Number of Employees Fiscal Year 2016



SOURCE: United States Sentencing Commission, 2016 Datafile, CORP16

General Principles

- Organizations should remedy harm caused by offense (§§8B1.1 - 8B1.4)
- Organizations with criminal purpose should be divested (§8C1.1)
- “Carrot and Stick Approach” - Fine ranges determined by seriousness of offense and culpability (§§8C2.1 - 8C2.10)
- Probation to implement sanctions and reduce recidivism (§§8D1.1 – 8D1.4)



General Application Principles

- Apply Chapter 8 in order (§8A1.2)
 - Part B – Remedying Harm from Criminal Conduct
 - Part C – Fines
 - Part D – Probation
 - Part E – Special Assessments, Forfeitures, and Costs



What Types of Remedies/Penalties Apply to an Organization?

- Remedying Harm from Criminal Conduct
 - Restitution (§8B1.1)
 - Remedial Order (§8B1.2)
 - Community Service (§8B1.3)
 - Notice to Victims (§8B1.4)
- Fines



Restitution

§8B1.1

- Requires identifiable victim
- If so, court shall either
 - Enter restitution order if authorized by specified statute
 - OR
 - Impose term of probation or supervised release with condition requiring restitution if offense meets criteria for restitution order in § 3663(a)(1)
- Restitution paid before fine



Remedial Order

§8B1.2

- Imposed as a condition of probation
- Remedy harm caused by offense and eliminate or reduce risk that the instant offense will cause future harm
- Examples include a product recall for a food and drug violation or a cleanup order for an environmental violation



Community Service

§8B1.3

- Ordered as a condition of probation
- Must be reasonably designed to repair harm caused by the offense
- Must be preventive or corrective action directly related to the offense and serving one of the purposes of sentencing



Order of Notice to Victims

§8B1.4

17

- Court may order defendant to pay cost of giving notice to victims
- Cost may be set off against fine imposed if imposition of both sanctions is excessive





Determining the Fine



Organizational Fines

- Fine provisions are found in **Part C** of Chapter 8
- The step-by-step process for determining the guideline fine range is found in §§8C2.3 – 8C2.9

But Don't Jump Right In

- Before calculating the fine range, there are a series of decision points.



Organizational Fines

Decision Point #1

Did the organization operate primarily for a criminal purpose or by criminal means?



Criminal Purpose Organizations

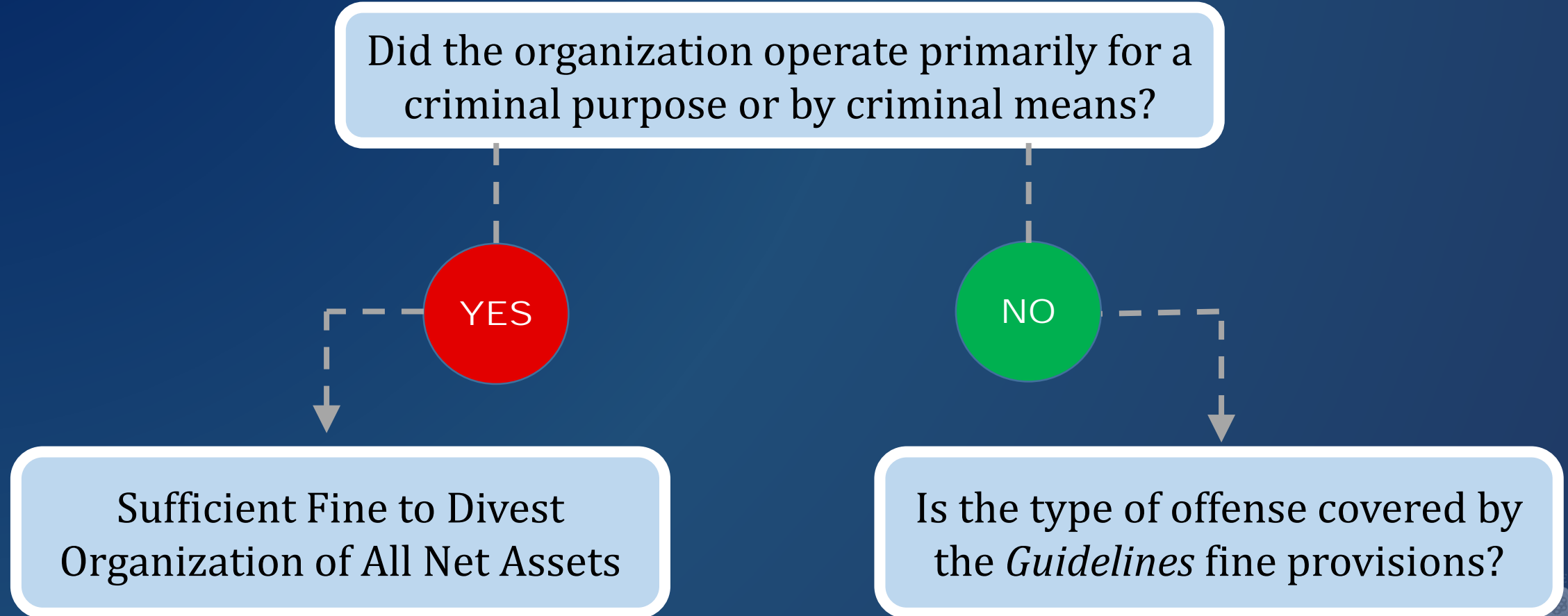
§8C1.1

- If court determines that organization operated primarily
 - For a criminal purpose, or
 - By criminal meansthen set the fine in an amount sufficient to divest the organization of all net assets
- Net assets means all assets remaining after payment of all legitimate claims by known innocent bona fide creditors



Organizational Fines

Decision Point #1



Organizational Fines Decision Point #2

NO

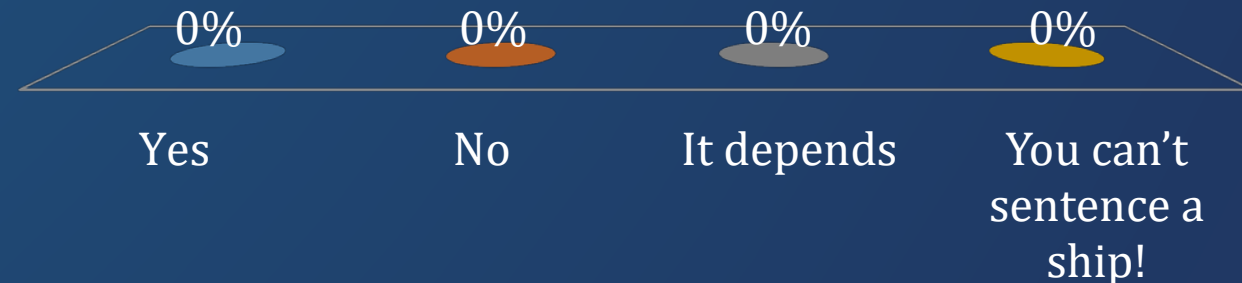
Is the type of offense covered by
the *Guidelines* fine provisions?



Scenario: Applicability of Fine Range Provisions

The Defendant company, a multi-million dollar business, operated cargo ships that knowingly operated in U.S. waters without required equipment to separate oil and other waste from bilge water before being pumped into open waters. Company was charged with failure to maintain an accurate oil record book and unlawful discharge in violation of 33 U.S.C. § 1908(a)). Is it necessary to calculate a fine range under the guidelines?

- A. Yes
- B. No
- C. It depends
- D. You can't sentence a ship!



Applicability of Fine Guidelines

§8C2.1

- Apply §§8C2.2 through 8C2.9 to each count for which the offense level is determined under either
 - One of the Listed Chapter Two Guidelines
 - or*
 - RICO violations, attempts, solicitations, or conspiracies, aiding and abetting, accessory after the fact, and misprision of felony if offense level for underlying offense is determined under one of the Listed Chapter Two Guidelines

Note: Cross-references to or from one of the Listed Chapter Two Guidelines will affect this determination



Types of Chapter Two Offenses Not Covered by Guidelines Fine Provisions

Environmental

Food, Drugs, Agricultural and Consumer Products

Civil/Individual Rights

Administration of Justice (*e.g.*, contempt, obstruction of justice, and perjury)

National Defense

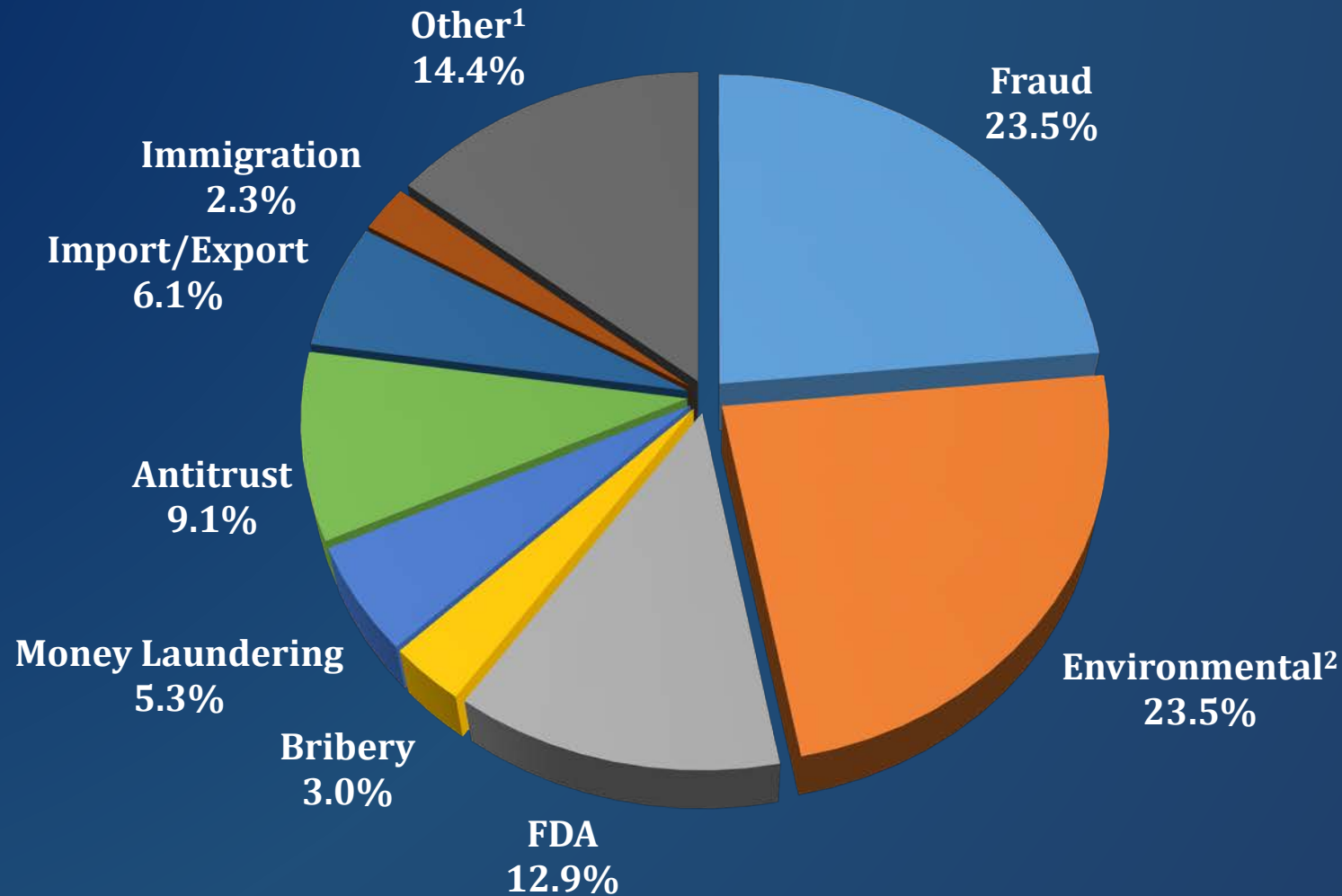
Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

Fraud (§2B1.1)	Certain offenses involving criminal enterprises or racketeering (§§2E3.1, 2E4.1, 2E5.1, 2E5.3)
Insider Trading (§2B1.4)	Obscenity offenses (§2G3.1)
Trespass (§2B2.3)	Certain offenses involving explosive materials or firearms (§§2K1.1, 2K2.1)
Commercial Bribery (§2B4.1)	Smuggling, Transporting or Harboring an Unlawful Alien (§2L1.1)
Criminal Infringement of Copyright or Trademark (§2B5.3)	Odometer Laws and Regulations (§2N3.1)
Offenses involving altering or removing motor vehicle identification numbers (§2B6.1)	Antitrust (§2R1.1)
Certain offenses involving public officials (§§2C1.1, 2C1.2, 2C1.6)	Money laundering and structuring offenses (§§2S1.1, 2S1.3)
Offenses involving drug paraphernalia and drug regulatory offenses (§§2D1.7, 2D3.1, 2D3.2)	Certain tax offenses (§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1)

Primary Offense of Organizational Cases

Fiscal Year 2016

28



¹ The Other category includes the following offense types: Copyright/Trademark Infringement, Drugs (not FDA), Firearms, Food Stamps, Gambling, Obstruction of Justice, Racketeering, Tax, and Other.

² The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.

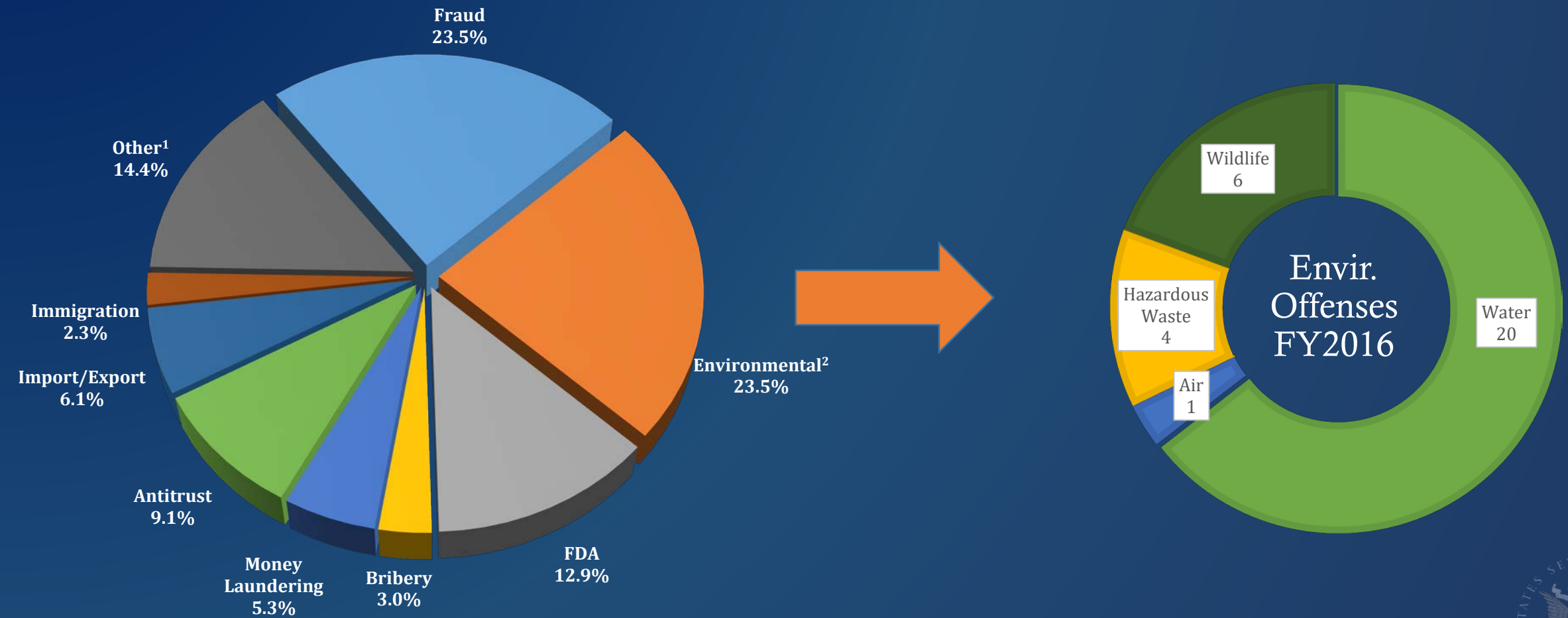
SOURCE: United States Sentencing Commission, 2016 Datafile. CORP16.



Number of Environmental Organizational Cases

Fiscal Years 2016

29

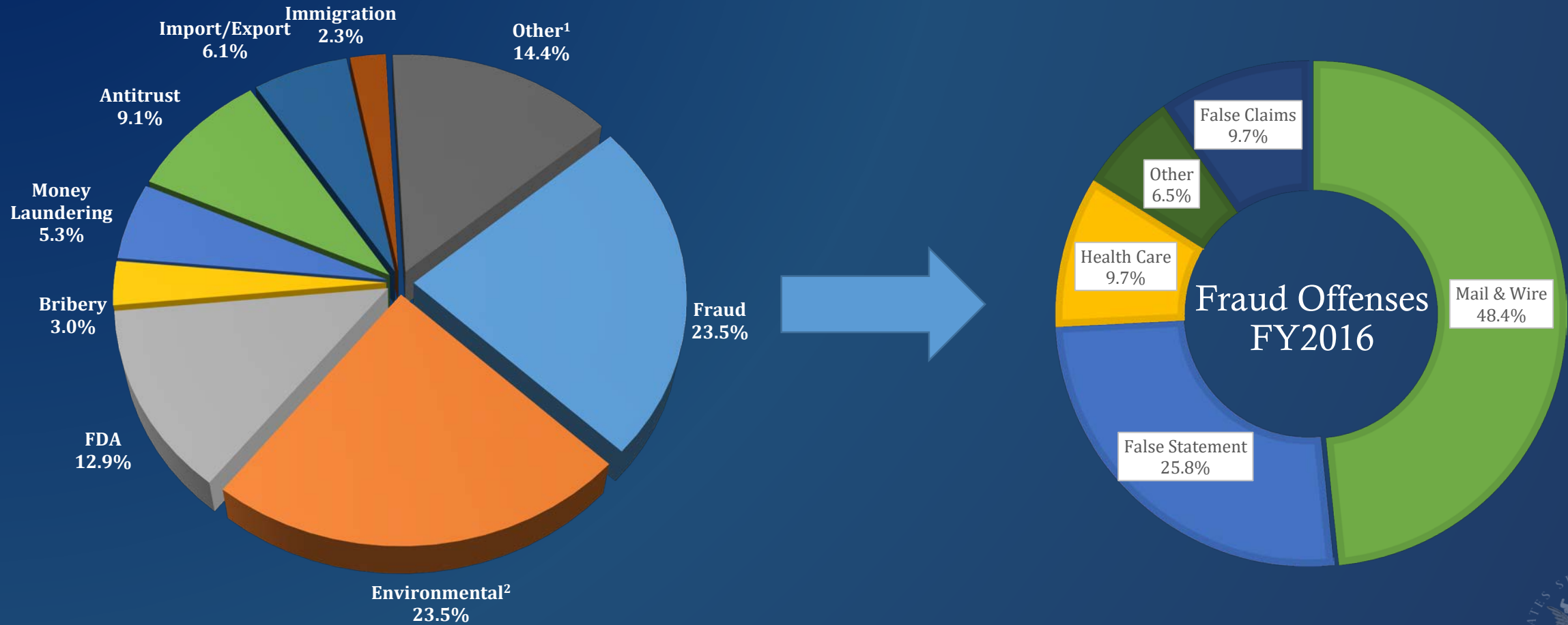


SOURCE: United States Sentencing Commission, 2016 *Sourcebook of Federal Sentencing Statistics*.



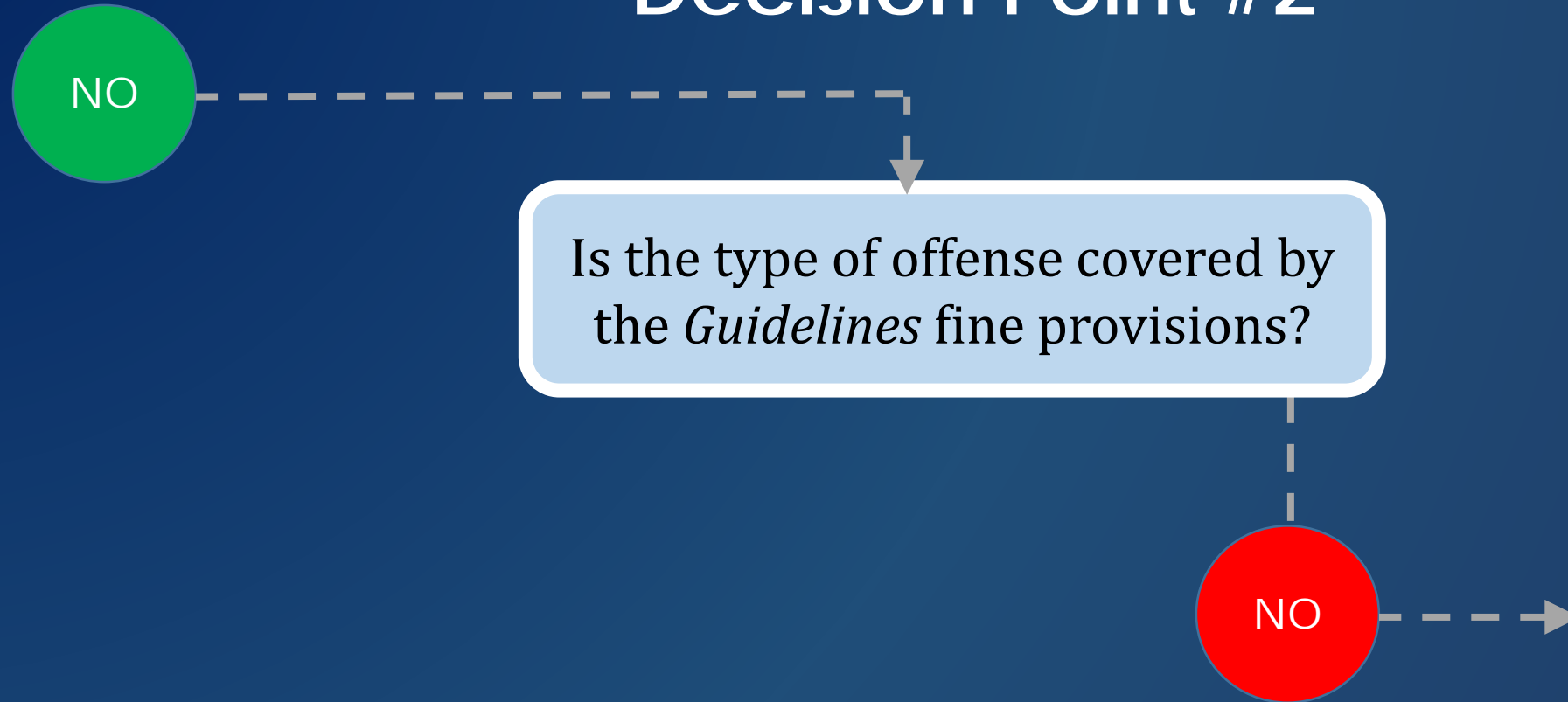
Fraud Offenses in Organizational Cases

Fiscal Year 2016



SOURCE: United States Sentencing Commission, 2016 Datafile, CORP16.

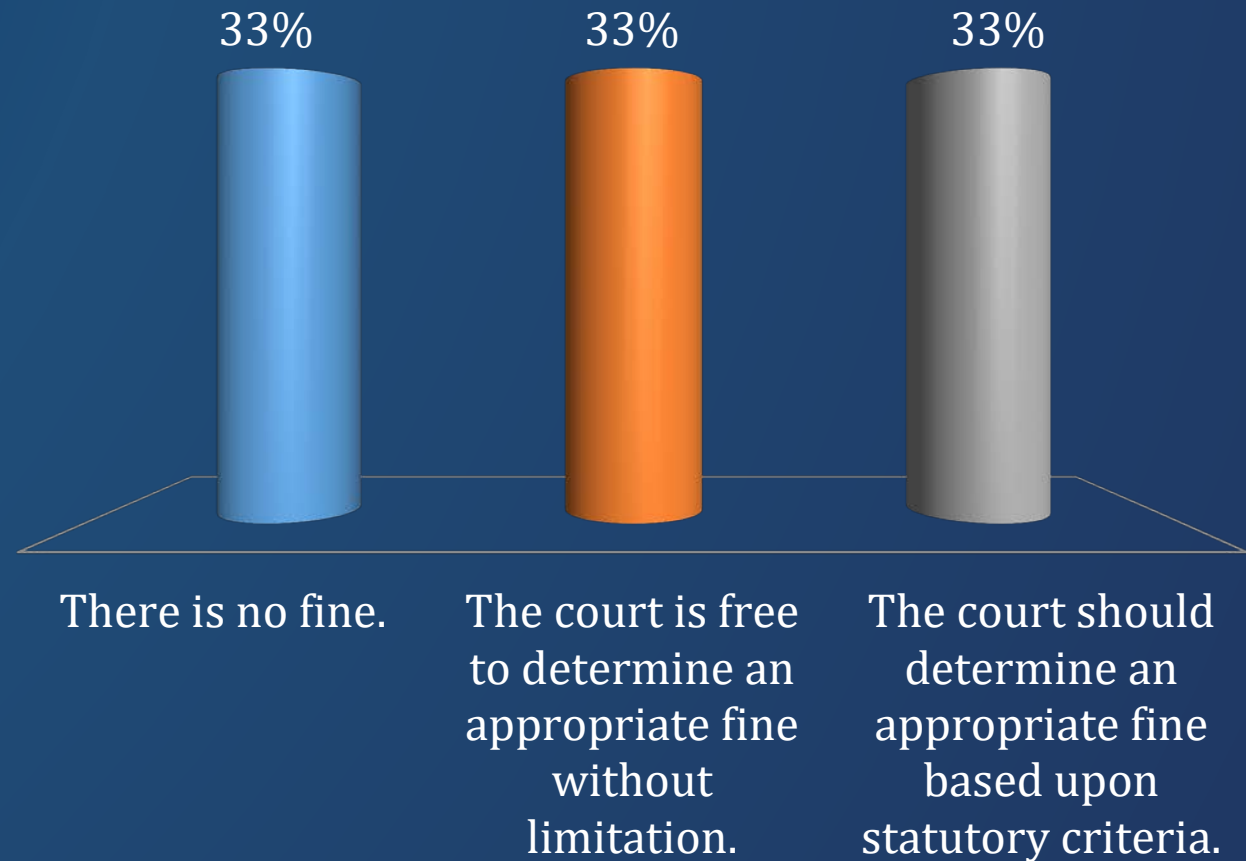
Organizational Fines Decision Point #2



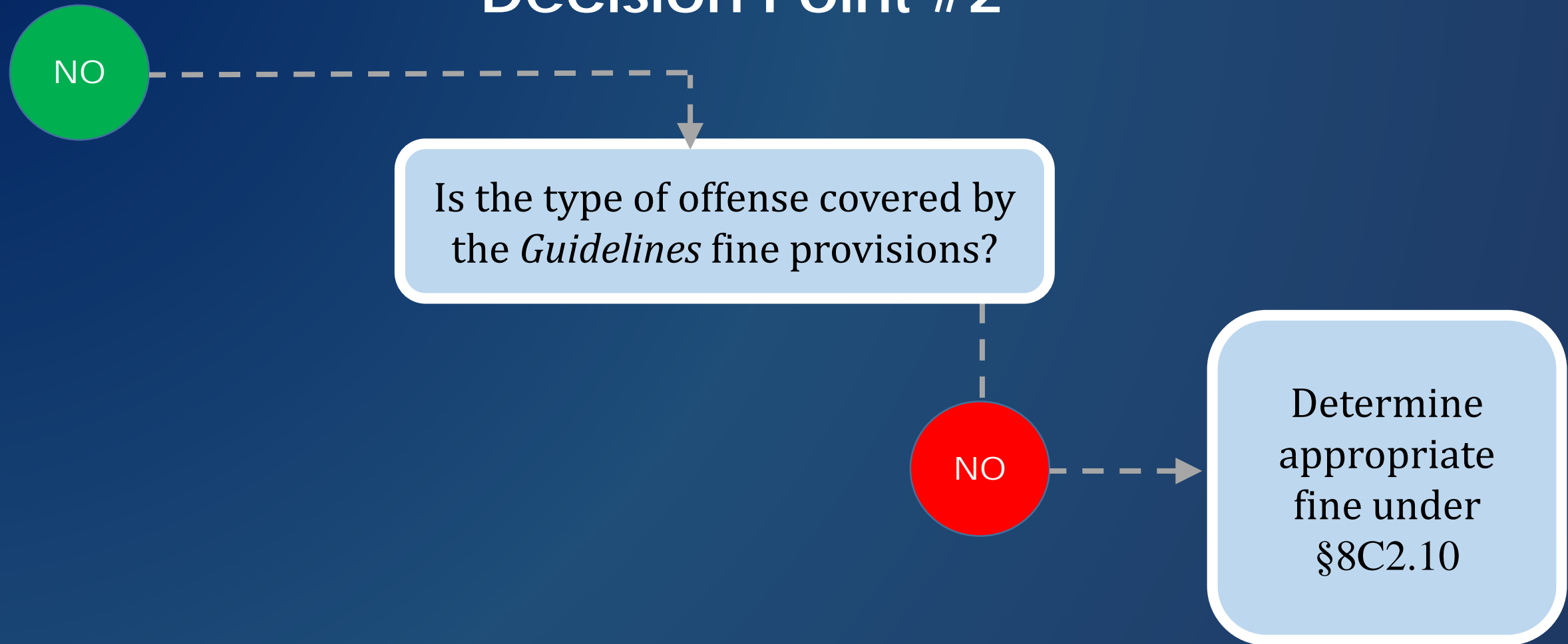
Scenario: Applicability of Fine Range Provisions

Now that we know the court does not have to determine a fine range, how does the court proceed?

- A. There is no fine.
- B. The court is free to determine an appropriate fine without limitation.
- C. The court should determine an appropriate fine based upon statutory criteria.



Organizational Fines Decision Point #2



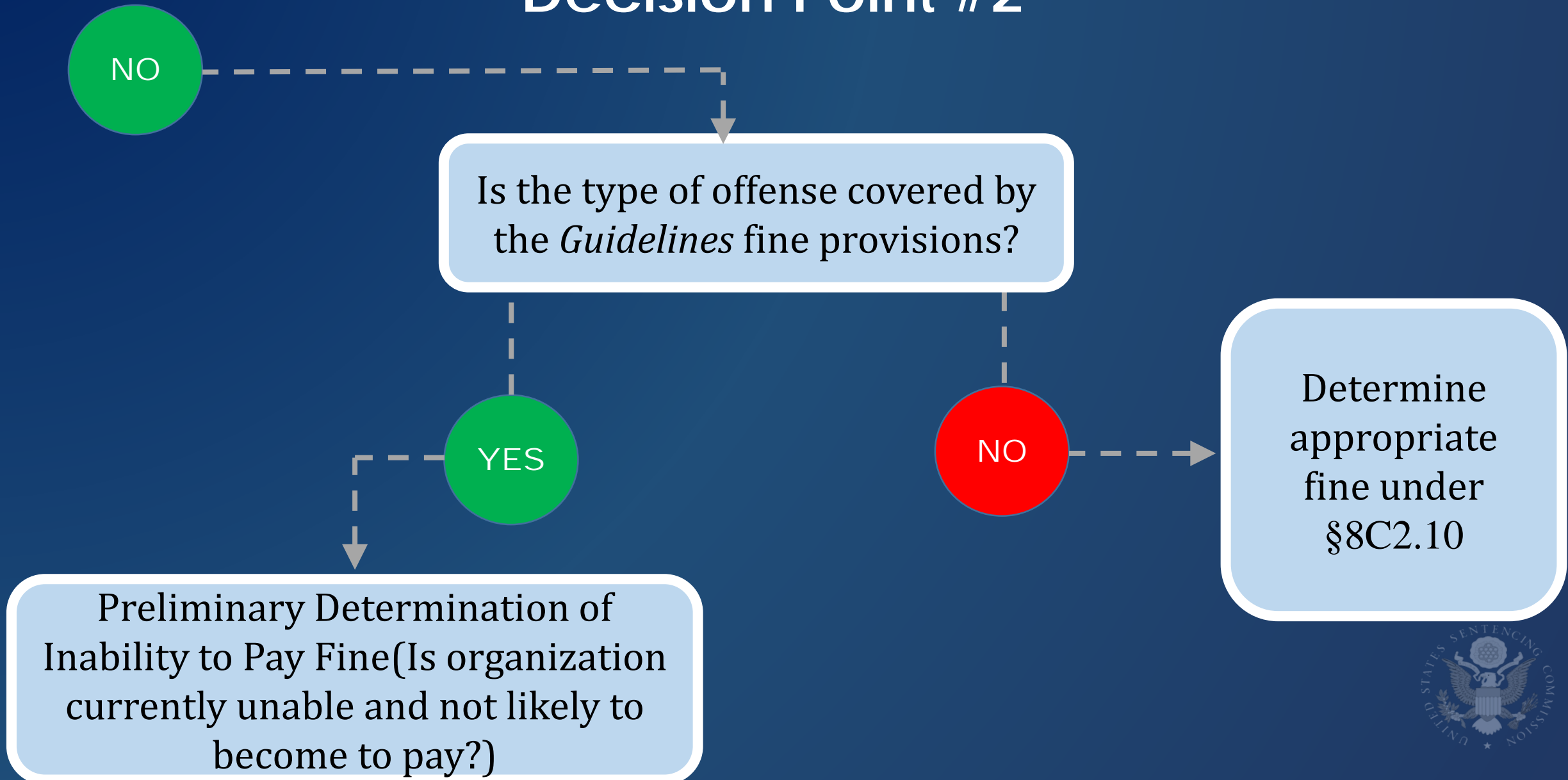
Determining the Fine for Other Counts

§8C2.10

For any count or counts not covered under §8C2.1, the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3572 (Imposition of sentence of fine and related matters).



Organizational Fines Decision Point #2



Preliminary Determination of Inability to Pay Fine

§8C2.2

No need to make guideline fine determination in case where either

- Organization cannot and is not likely to become able to pay restitution required under §8B1.1
- or*
- Organization cannot and is not likely to become able to pay minimum guideline fine



Organizational Fines

Decision Point #3

Preliminary Determination of
Inability to Pay Fine
(Is organization currently unable and
not likely to become to pay?)

YES

No fine or reduced fine
imposed

NO

Determine Guideline Fine
Range



Step One – Determining the Fine Range

Calculate the Chapter Two Offense Level

§8C2.3

For counts covered by §8C2.1

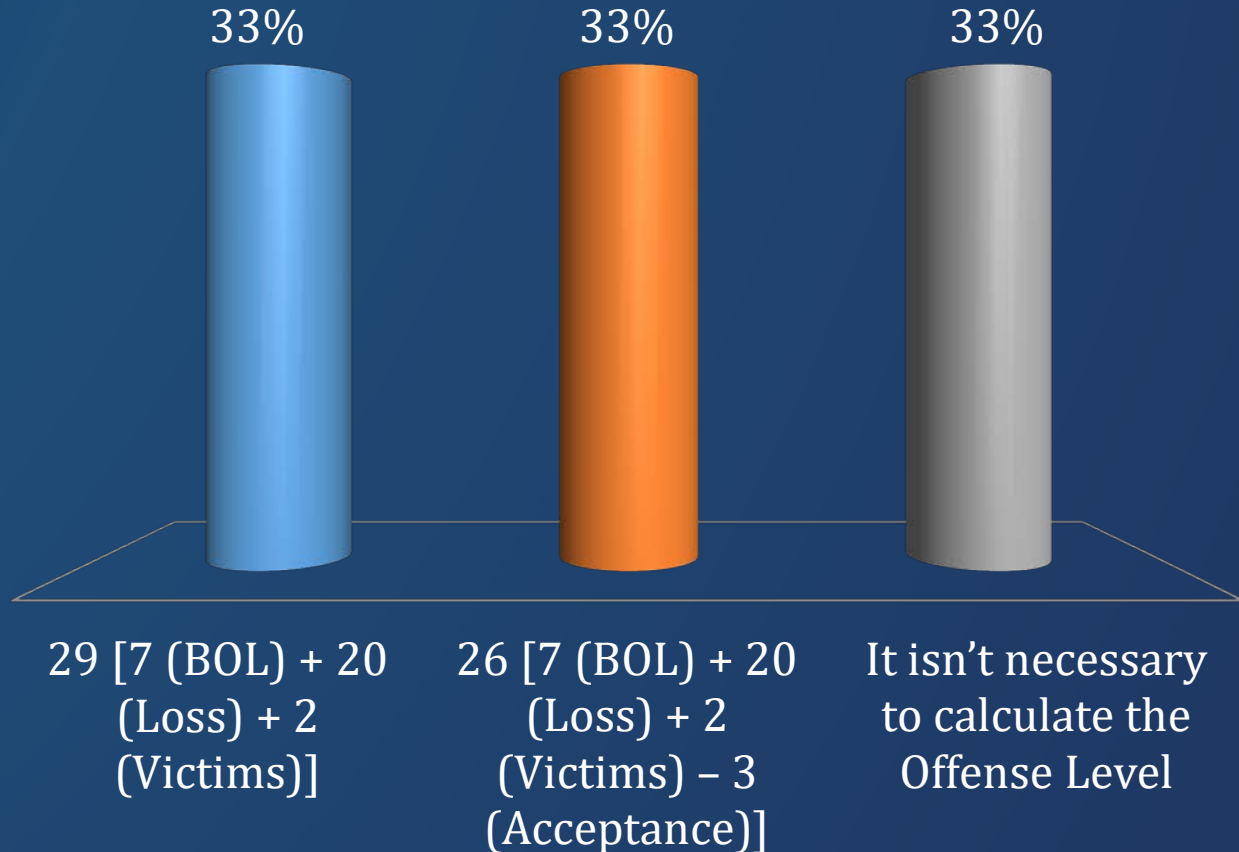
- Use the applicable Chapter Two guideline to determine the offense level (BOL and all applicable SOCs)
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level



Scenario: Determining the Fine Range

The Defendant company, a multi-million dollar business, was convicted of wire fraud (18 U.S.C. §1343) resulting in \$10M in loss to 15 victims. The government notified the court that Defendant fully cooperated and accepted responsibility. What is the offense level for purposes of calculating a fine range under the guidelines?

- A. 29 [7 (BOL) + 20 (Loss) + 2 (Victims)]
- B. 26 [7 (BOL) + 20 (Loss) + 2 (Victims) – 3 (Acceptance)]
- C. It isn't necessary to calculate the Offense Level



Step One – Determining the Fine Range

Calculate the Chapter Two Offense Level

§8C2.3

For counts covered by §8C2.1

- Use the applicable Chapter Two guideline to determine the offense level (BOL and all applicable SOCs)
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level
- **Do not** apply any other parts of Chapter Three (*e.g.*, Acceptance of Responsibility or Obstruction)



Step Two – Determining the Fine Range

Base Fine

§8C2.4

41

Apply the greater of

- Amount from Offense Level Fine Table
- Pecuniary gain to organization, *or*
- Pecuniary loss from offense intentionally, knowingly, or recklessly caused by organization

Unless

- Chapter Two guideline includes special instruction for organizational fines, *or*
- Calculation of pecuniary gain or loss would unduly complicate or prolong sentencing process



Base Fine

§8C2.4 (cont.)

(d)

OFFENSE LEVEL FINE TABLE

Offense Level	Amount
6 or less	\$8,500
7	\$15,000
8	\$15,000
9	\$25,000
10	\$35,000
11	\$50,000
12	\$70,000
13	\$100,000
14	\$150,000
15	\$200,000
16	\$300,000
17	\$450,000
18	\$600,000
19	\$850,000
20	\$1,000,000
21	\$1,500,000
22	\$2,000,000
23	\$3,000,000
24	\$3,500,000



Base Fine

§8C2.4 (cont.)

- Fine Table in this guideline, along with other monetary tables in the *Guidelines Manual*, revised for inflation, pursuant to Amendment 791, which took effect on November 1, 2015.
- Of Note – New Special Instruction
 - “For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than offense level fine table set forth in subsection (d) above.”



Step Three – Determining the Fine Range

Determine Culpability Score

§8C2.5

BASE OFFENSE LEVEL	5 POINTS
Involvement in or Tolerance of Criminal Activity	+5/ +4/ +3/ +2/ +1
Prior History	+2 or +1
Violation of an Order	+2 or +1
Obstruction of Justice	+3
Effective Program to Prevent and Detect Violations of Law	-3
Self-Reporting, Cooperation <u>and</u> Acceptance of Responsibility	-5/ -2/ -1

Effective Compliance Programs

§8B2.1

AN EFFECTIVE COMPLIANCE PROGRAM MUST:

1. Exercise due diligence in fulfilling the seven minimum requirements at §8B2.1(b)(2)
2. Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law



Step Four – Determining the Fine Range

Minimum and Maximum Multipliers

§8C2.6

46

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM MULTIPLIER
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.



Step Five – Putting the Pieces Together

Guideline Fine Range

§8C2.7

47

= MIN. FINE
§8C2.7(A)

MIN.
X MULTIPLIER
§8C2.6

BASE FINE X
§8C2.4

MAX.
MULTIPLIER =
§8C2.6

BASE FINE
MAX. FINE §8C2.4
§8C2.7(B)



Scenario – Putting the Pieces Together

Defendant A is a successful advertising agency with over \$3 million in assets and has 200 employees. The sole owner of the advertising agency (Owner) was approached by his neighbor (Neighbor) who stated that he needed “help cashing some checks.” Without providing services, Defendant A received \$10,000 checks from Neighbor, returning \$9,000 in cash. Defendant A took in over \$250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

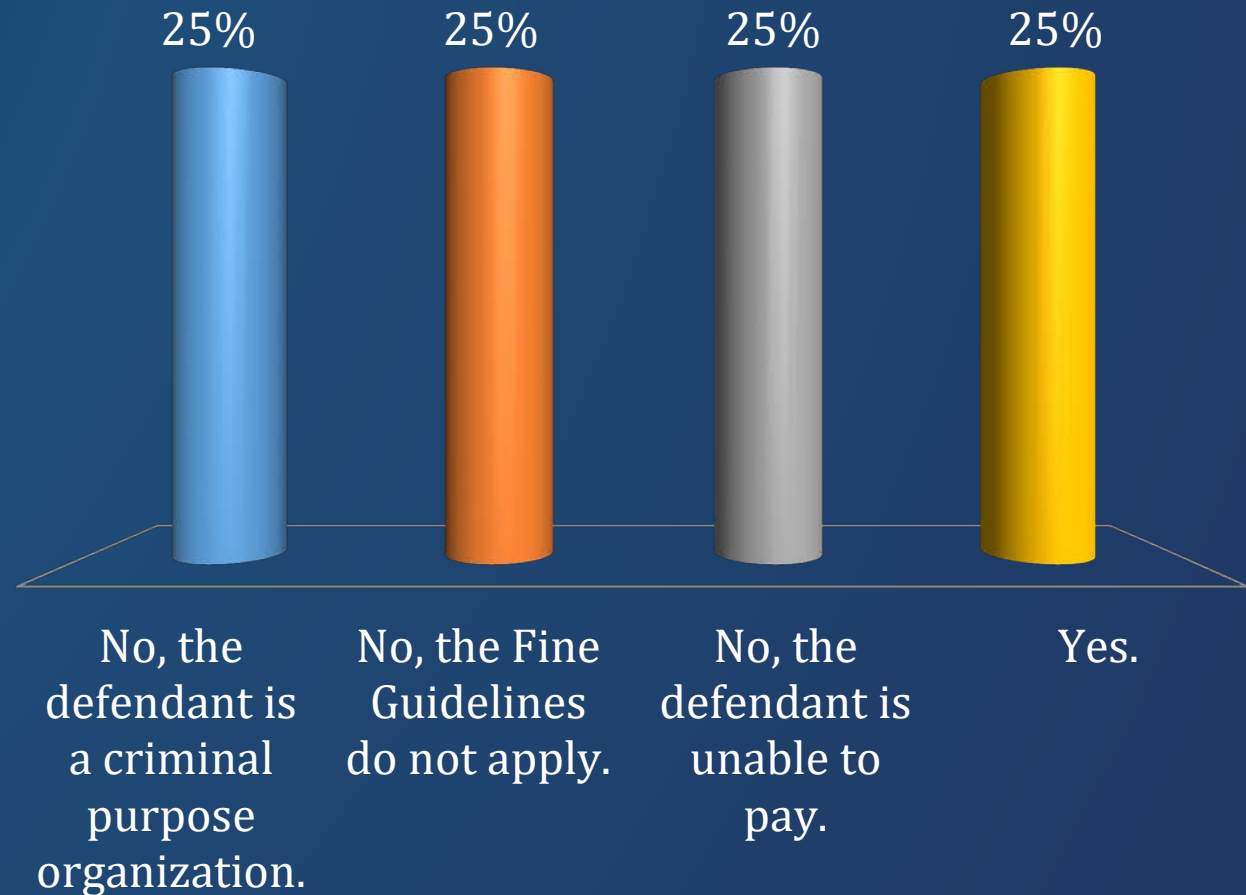
Defendant A was convicted of one count of money laundering in violation of 18 U.S.C. § 1956 (covered under USSC §2S1.1), which carries a statutory maximum fine of \$500,000. Defendant A fully cooperated and accepted responsibility.



Scenario – Putting the Pieces Together (cont.)

Is it necessary to calculate a fine range under the guidelines?

- A. No, the defendant is a criminal purpose organization.
- B. No, the Fine Guidelines do not apply.
- C. No, the defendant is unable to pay.
- D. Yes.

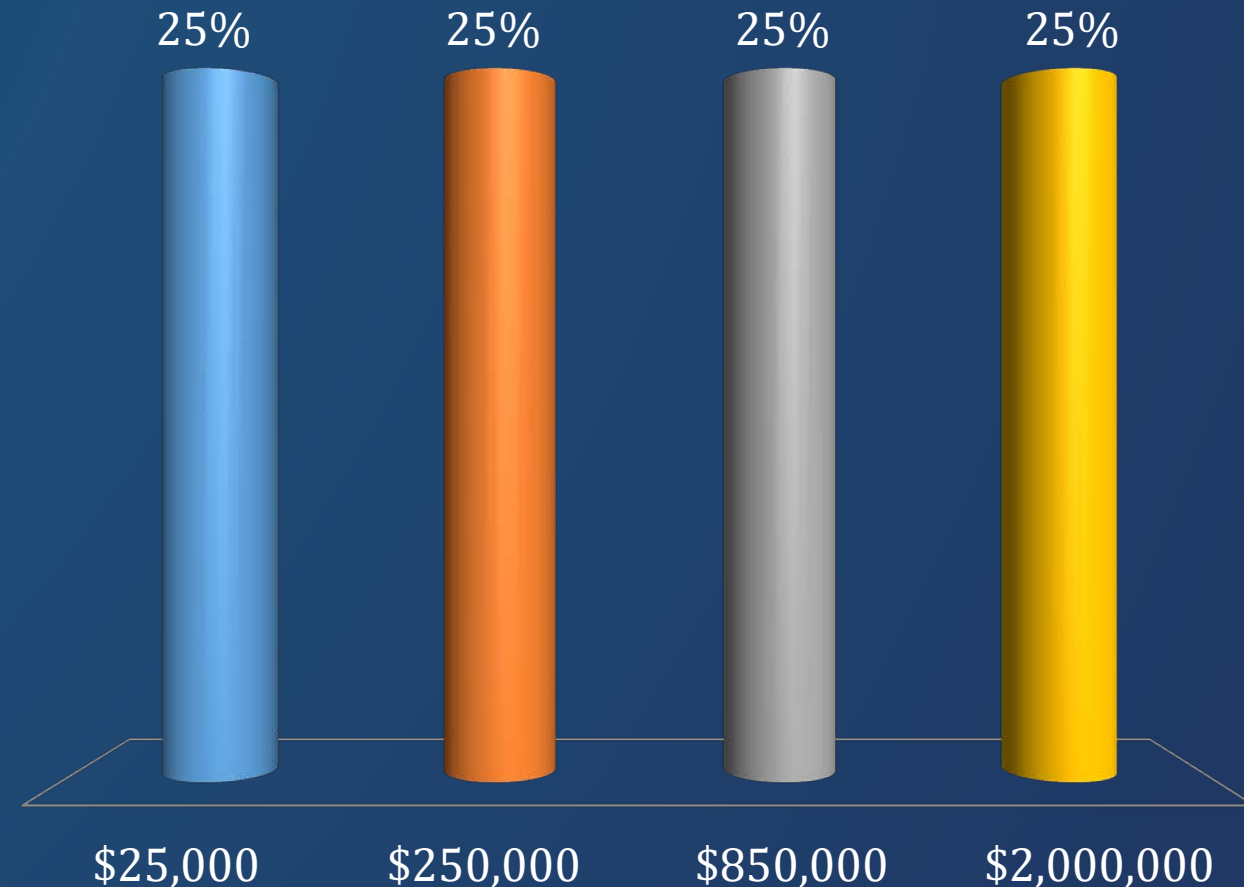


Scenario – Putting the Pieces Together (cont.)

What is Defendant A's base fine under §8C2.4?

*The total Chapter Two offense level under §2S1.1 is **22** [8 (BOL) + 12 (\$250,000 in laundered funds) + 2 (convicted under 18 U.S.C. § 1956)].*

- A. \$25,000
- B. \$250,000
- C. \$850,000
- D. \$2,000,000



Base Fine

§8C2.4 (cont.)

(d)

OFFENSE LEVEL FINE TABLE

Offense Level	Amount
6 or less	\$8,500
7	\$15,000
8	\$15,000
9	\$25,000
10	\$35,000
11	\$50,000
12	\$70,000
13	\$100,000
14	\$150,000
15	\$200,000
16	\$300,000
17	\$450,000
18	\$600,000
19	\$850,000
20	\$1,000,000
21	\$1,500,000
22	\$2,000,000
23	\$3,000,000
24	\$3,500,000

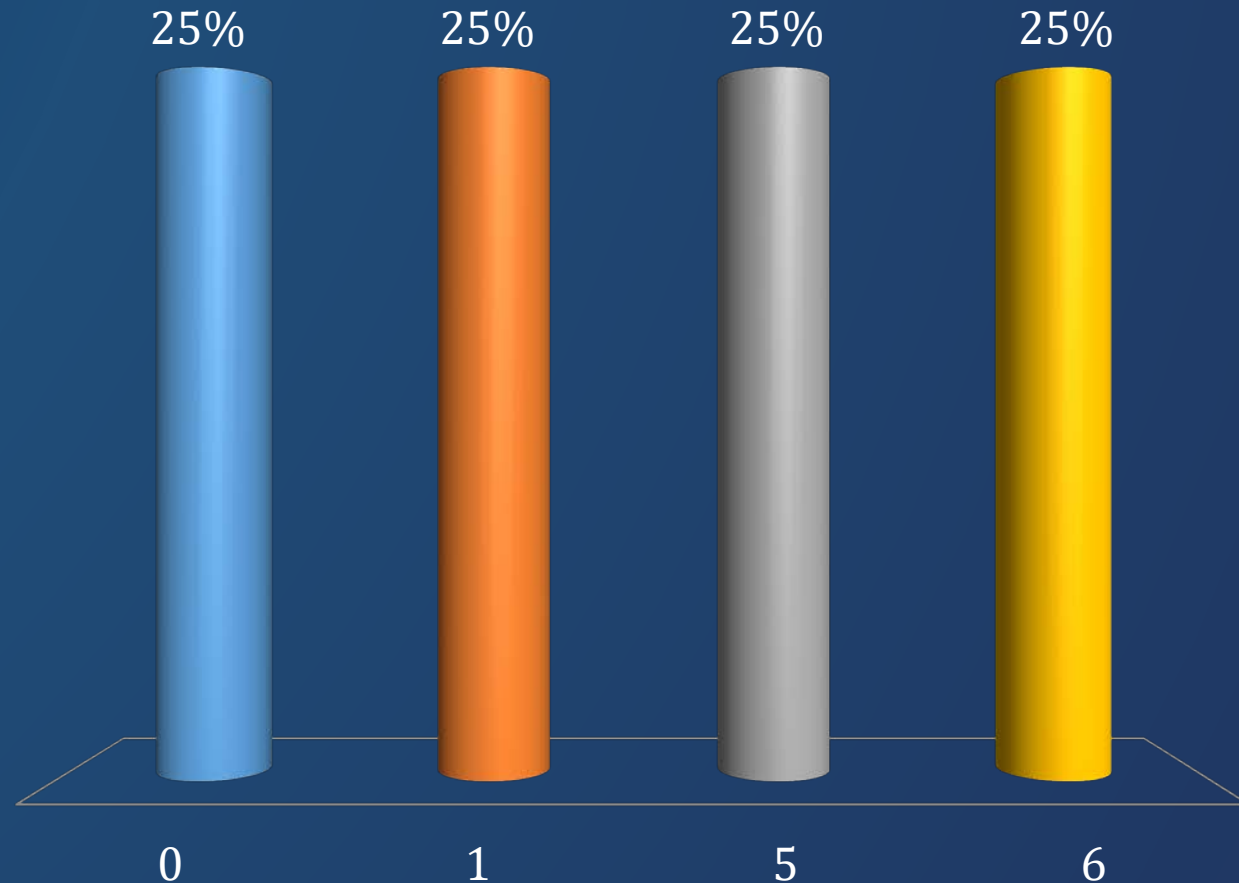


Scenario – Putting the Pieces Together (cont.)

What is the Defendant's culpability score under §8C2.5?

*Hint: Owner committed the offense;
Company has 200 employees; Defendant
cooperated and Accepted Responsibility*

- A. 0
- B. 1
- C. 5
- D. 6



Step Three – Determining the Fine Range

Determine Culpability Score

§8C2.5

BASE OFFENSE LEVEL	5 POINTS
Involvement in or Tolerance of Criminal Activity	+5/ +4/ +3/ +2/ +1
Prior History	+2 or +1
Violation of an Order	+2 or +1
Obstruction of Justice	+3
Effective Program to Prevent and Detect Violations of Law	-3
Self-Reporting, Cooperation <u>and</u> Acceptance of Responsibility	-5/ -2/ -1

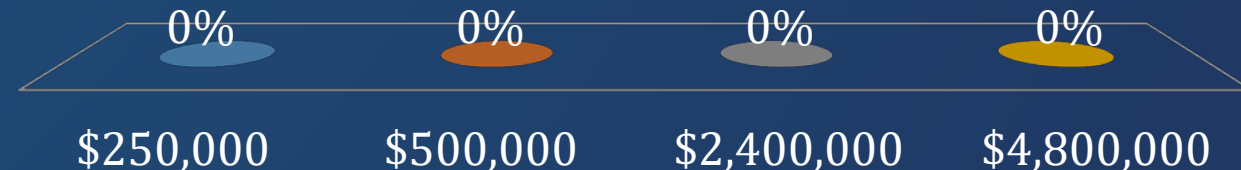
Scenario – Putting the Pieces Together (cont.)

What is the minimum of the Defendant's guideline's fine range?

Hint: Base fine is \$2,000,000

Culpability Score is 6, resulting in a minimum multiplier of 1.20 and maximum multiplier of 2.40

- A. \$250,000
- B. \$500,000
- C. \$2,400,000
- D. \$4,800,000



Imposing a Fine

§8C3.1

- Use guideline fine range as determined under §§8C1.1 and 8C1.9, or §8C1.10 *unless*
 - Guideline minimum fine exceeds statutory maximum fine, in which case statutory maximum fine becomes guideline fine
 - or*
 - Guideline maximum fine is lower than statutory minimum fine, in which case statutory minimum fine becomes guideline fine



Other Guideline Provisions Relating to Calculation of Fine

Determining the Fine Within the Range – §8C2.8

- §8C2.8(a): identifies factors the court should consider
- §8C2.8(b): court may consider the relative importance of any factor used to determine the range

Disgorgement – §8C2.9

- Add to fine any gain that has not or will not be paid as restitution or for other remedial measures





Implementing the Fine



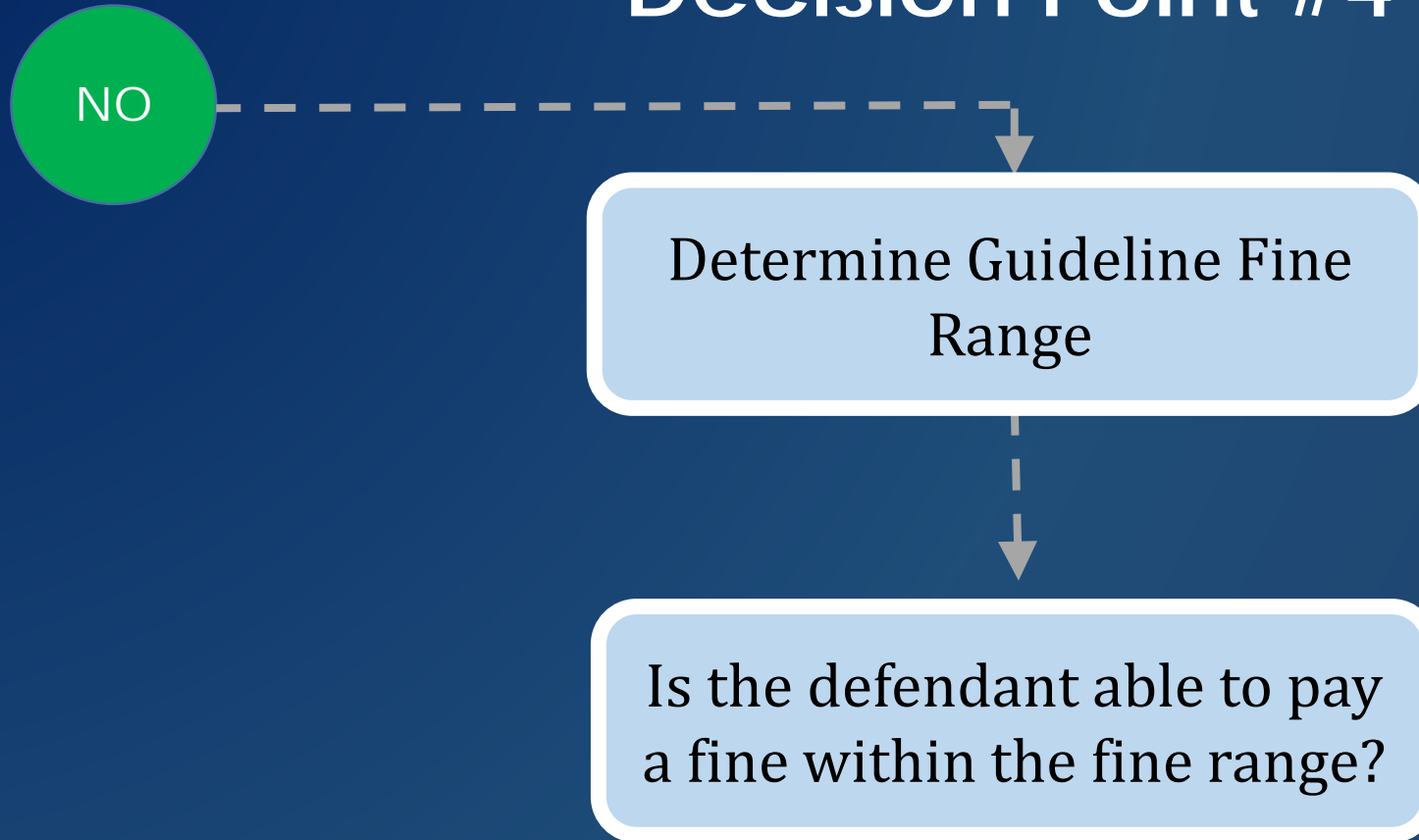
Payment of the Fine

§8C3.2

- Immediate for organizations operating as criminal purpose or by criminal means
- Otherwise, immediate unless organization is financially unable or the immediate payment would pose undue burden on organization; then payment at earliest possible date, either by date certain or installment schedule



Organizational Fines Decision Point #4



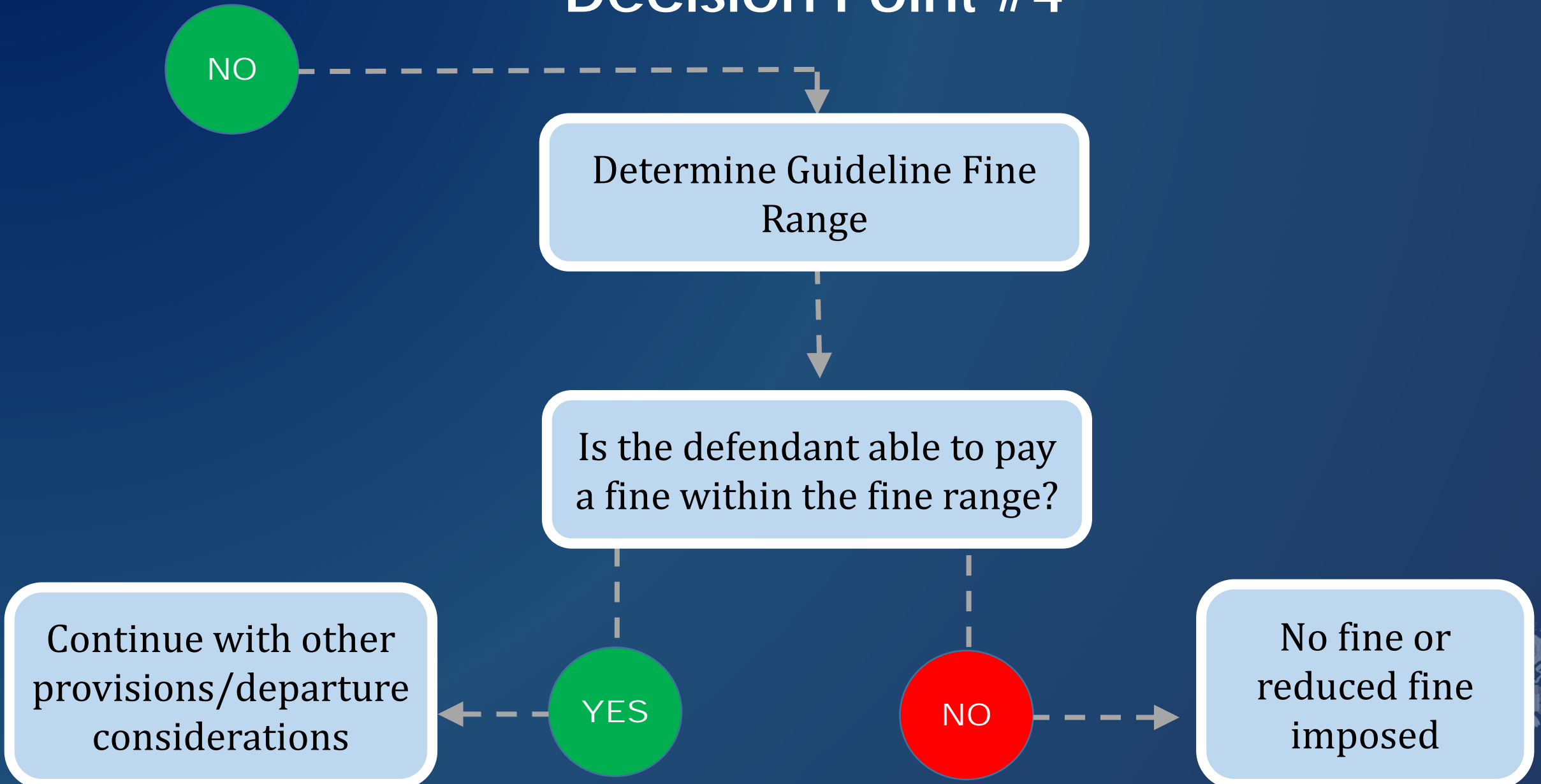
Reduction of Fine Based on Inability to Pay

§8C3.3

- If fine would impair ability to make restitution
- or*
- If organization unable and unlikely to become able to pay fine



Organizational Fines Decision Point #4



Fines Paid by Owners of Closely Held Organizations

§8C3.4

Organization's fine may be offset by owners' fines for same offense conduct

- *“The court may offset the fine imposed upon 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 for which the organization is being sentenced.”*





Departures from the Guideline Fine Range



Upward Departure Provisions

- Substantial Assistance - §8C4.1
- Risk of Death or Bodily injury - §8C4.2
- Threat to National Security - §8C4.3
- Threat to Environment - §8C4.4
- Threat to a Market - §8C4.5
- Official Corruption - §8C4.6
- Mandatory Program to Prevent and Detect Violations of the Law - - §8C4.10
- Exceptional Organizational Culpability - §8C4.11 (if culpability score > 10)



Downward Departure Provisions

- Public Entity - §8C4.7
- Members or Beneficiaries of Organization as Victims - §8C4.8
- Remedial Costs that Greatly Exceed Gain - §8C4.9
- Exceptional Organizational Culpability - §8C4.11 (if no substantial authority involved and had effective program)





Organizational Probation



Imposition of Probation

§8D1.1

Court shall order probation

- If necessary to secure any remediation required by court (restitution, remedial order, community service)
- If payment of monetary penalty is required, which is not paid in full at sentencing
- If organization has 50 or more employees, is required to have E&C program, and does not
- If within five years, organization engaged in similar criminal misconduct and instant offense occurred after adjudication



Imposition of Probation

§8D1.1

Court shall order probation (cont.)

- If high level personnel involved in offense engaged in similar criminal misconduct within five years of instant offense and instant offense occurred after adjudication
- To ensure changes made within organization to reduce likelihood of future criminal conduct
- **If sentence does not include fine**
or
- If necessary to accomplish one or more of the purposes of sentencing



Term of Probation

§8D1.2

For Felony Offenses

One – Five years

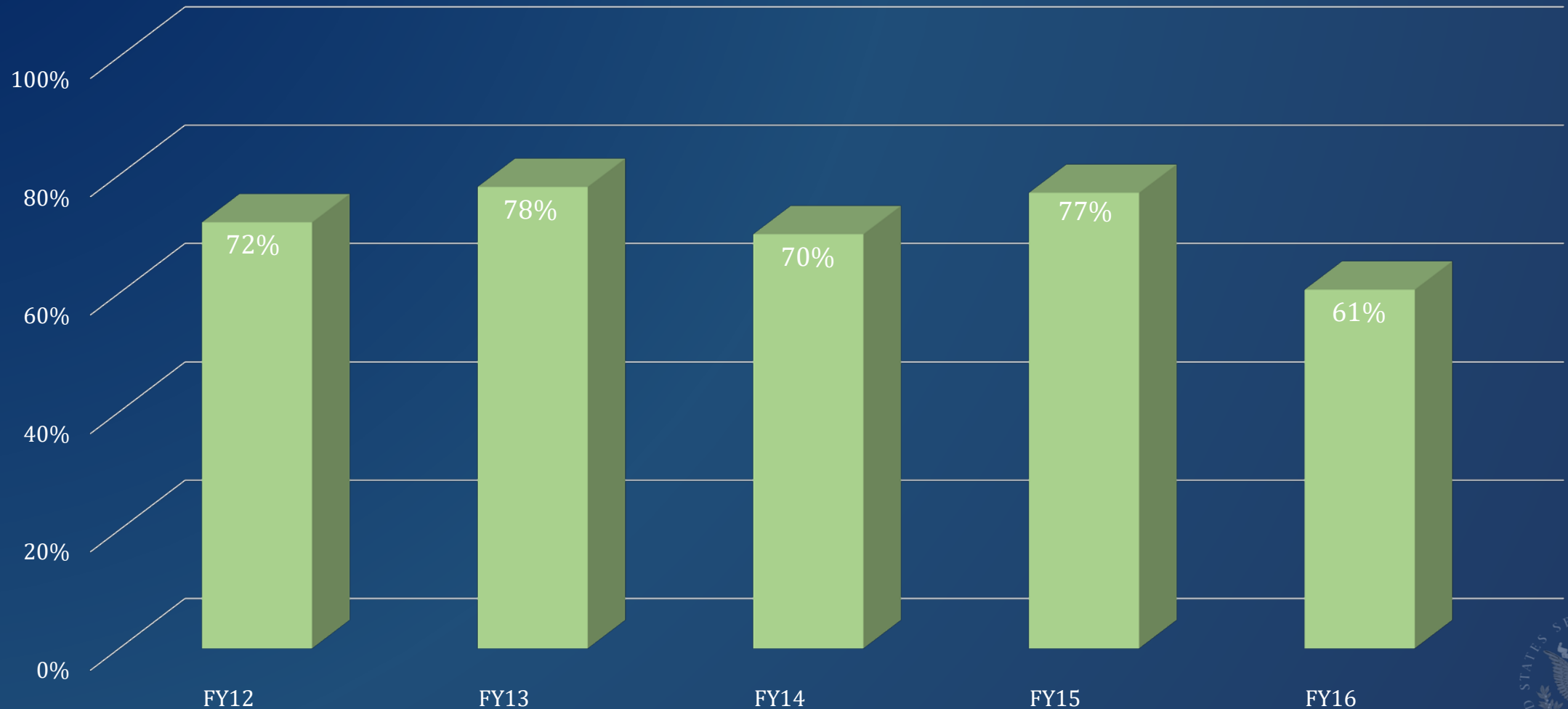
For Class A misdemeanors

No more than five years



Percentage of Organizational Cases Receiving Probation

Fiscal Years 2012-2016



SOURCE: United States Sentencing Commission, 2012-2016 *Sourcebooks of Federal Sentencing*

Mandatory Conditions of Probation

- §8D1.3(a): No new federal, state or local crimes
- §8D1.3(b): Unless fine is imposed or court makes finding that condition is plainly unreasonable, impose at least one of the following conditions for felony offenses:
 - Restitution, *or*
 - Community service



Recommended Conditions of Probation

§8D1.4

- §8D1.3(c): Other conditions reasonably related to
 - nature and circumstances of offense or history or characteristics of organization; and
 - involving only deprivation of liberty and property necessary to effect purposes of sentencing
- §8D1.4: provides a list of recommended conditions





Resources Available



UNITED STATES SENTENCING COMMISSION

ORGANIZATIONAL GUIDELINES

Chapter Eight Overview

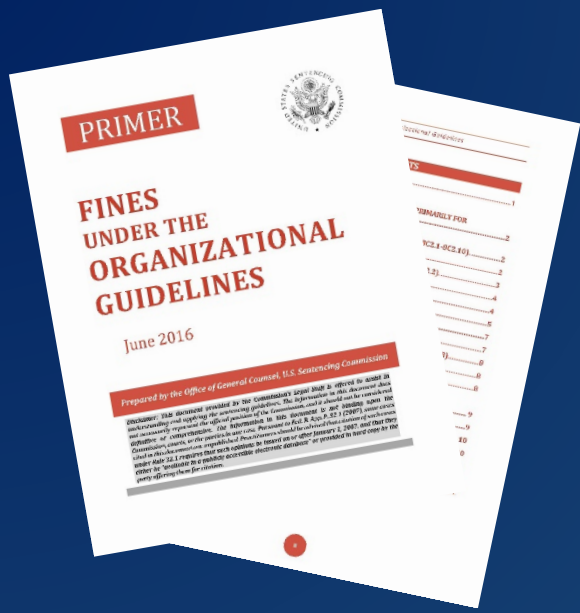
- Overview of the Organizational Guidelines PDF
- Chapter Eight of the Current Guidelines Manual
- Primer on the Organizational Guidelines Fines
- Guideline Application Worksheets for Organizational Offenses

Organizational Offender Sentencing Statistics

- Quick Facts on Organizational Offenders
- Datafiles for Organizational Offenders
- Sourcebook Tables and Figures

Additional Resources

- Chair Saris Remarks Annual Compliance and Ethics Institute (October 2013) PDF
- Public Meeting Panel Discussion (November 2005)
- Ad Hoc Advisory Group on Organizational Guidelines (October 2003)
- The Sentencing Commission's Implementation of the Sarbanes-Oxley Act (2003) PDF
- 2001 Conference Paper by Vice Chair John R. Steer on the Organizational Sentencing Guidelines (February 2002) PDF
- The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics (January 2002) PDF
- Corporate Crime Symposium Proceedings Book (September 1995) PDF
- Food & Drug Working Group Final Report (February 1994)
- Report from Advisory Group on Environmental Sanctions (December 1993) PDF
- Supplementary Report on Sentencing Guidelines for Organizations (August 1991) PDF
- Discussion Materials on Organizational Sanctions (July 1988) PDF



ORGANIZATIONAL WORKSHEET A OFFENSE LEVEL

Defendant: _____

Offense: _____

Guideline Manual Section: _____

Preliminary Determination of Inability to Pay Fine

If it is found that the defendant is unable to pay the fine, the court shall determine the appropriate level of the fine based on the defendant's financial resources.

INSTRUCTIONS

The court shall determine the offense level for the defendant based on the following instructions:

- Identify the applicable guideline for the offense.
- Determine the base offense level.
- Apply any applicable adjustments.
- Calculate the final offense level.

Offense Level (Guideline)

Guideline	Description	Level
2A1.1	Base offense level	
2A1.2	Adjustment for multiple offenses	
2A1.3	Adjustment for acceptance of responsibility	
2A1.4	Adjustment for victim's conduct	
2A1.5	Adjustment for defendant's role in the offense	
2A1.6	Adjustment for defendant's criminal history	
2A1.7	Adjustment for defendant's acceptance of responsibility	
2A1.8	Adjustment for defendant's victim's conduct	
2A1.9	Adjustment for defendant's role in the offense	
2A1.10	Adjustment for defendant's criminal history	
2A1.11	Adjustment for defendant's acceptance of responsibility	
2A1.12	Adjustment for defendant's victim's conduct	
2A1.13	Adjustment for defendant's role in the offense	
2A1.14	Adjustment for defendant's criminal history	
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2A1.31	Adjustment for defendant's acceptance of responsibility	
2A1.32	Adjustment for defendant's victim's conduct	
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