

ORGANIZATIONAL GUIDELINE SCENARIO

1. 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?

No. Pursuant to §8C2.1 (Applicability of Fine Guidelines), the fine range provisions at §§8C2.2 through 8C2.9 apply to each count for the guideline offense level determined under one of the listed guidelines. Section 1908 of Title 33 is referenced in Appendix A to §2Q1.3, which is not included in the list at §8C2.1. For any count or counts not covered under §8C2.1, the court is instructed to apply §8C2.1 (Determining the Fine for Other Counts), which in turn provides that courts should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 (Determining the Fine Within the Range) and §8C2.9 (Disgorgement).

2. 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?

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 18 U.S.C. § 1343 is referenced to §2B1.1, which is covered under §8C2.1. Under §2B1.1, defendant would have a base offense level of 7 since § 1343 has a statutory maximum of 20 years or more. The loss is more than \$9,500,000, resulting in a 20-level increase under §2B1.1(b)(1), and there are 10 or more victims, resulting in a 2-level increase under §2B1.1(b)(2). This results in a total offense level under §2B1.1 of 29.

Even though the fact pattern provides that the defendant accepted responsibility, do not apply a 2- or 3-level reduction under §3E1.1 (Acceptance of Responsibility). Section 8C2.3, Application Note 2 provides that courts “[d]o not apply the adjustments in Chapter Three, Parts A (Victim-

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Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility).” Instead, the defendant’s cooperation and acceptance are accounted for as part of the calculation of their culpability score under §8C2.5 (Culpability Score). See §8C2.5(g).

3. Defendant A has pleaded guilty to one count of money laundering in violation of 18 U.S.C. § 1956. Defendant A is a successful advertising agency that employs 200 people. The sole owner of the advertising agency (Owner) was approached by his neighbor (Neighbor) who stated that he needed “help cashing some checks.” Neighbor proposed that he would write \$10,000 checks to Defendant A, and that Defendant A need not provide any advertising services. Instead, Neighbor asked Defendant A to return \$9,000 in cash to Neighbor and to keep the remainder for itself. Owner agreed, and this arrangement continued for several months, with Defendant A taking in over \$250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

During the period in which Defendant A was involved in the scheme, it continued to conduct its other legitimate business. There is no other evidence of illegal activity in the company’s past.

The current market value of Defendant A’s assets is approximately \$3 million. The company’s annual net income was approximately \$200,000.

Defendant A has cooperated with the investigation and Owner has written a statement accepting responsibility on behalf of the company.

The court has previously sentenced Owner to a prison term and a \$20,000 fine for this activity.

How would the company’s guidelines be calculated in this case?

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 18 U.S.C. § 1956 is referenced to §2S1.1, which is covered under §8C2.1.

After determining the fine range provisions apply, the court should first make a preliminary determination of the defendant’s ability to pay. Where it is readily ascertainable that the organization cannot and is not likely to become able to pay required restitution or to pay the minimum guideline fine preliminarily determined under §§8C2.3 through 8C2.7, a further

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determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay). In this case, it appears the company is financially secure with assets of approximately \$3 million. Therefore, the court would proceed with calculating the fine range.

Under §2S1.1, defendant would have a base offense level of 8 plus 12 levels from the table in §2B1.1 based on \$250,000 in laundered funds. An additional two levels apply under §2S1.1(b)(2)(B) because the defendant was convicted under section 1956. This results in a total offense level of 22. Pursuant to the Offense Level Fine Table at §8C2.4(d), an offense level of 22 results in a base fine amount of 2,000,000.

The court next calculates the defendant's culpability score under §8C2.5. In all cases, the culpability score starts at 5 points. An additional 3 points are added under §8C2.5(b) because the company had 200 or more employees and an individual within high-level personnel of the organization (in this case, the owner) participated in the offense. Two points are deducted under §8C2.5(g)(2) because the defendant fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. This results in a final culpability score of 6.

Under §8C2.6, a culpability score of 6 results in a minimum multiplier of 1.2 and a maximum multiplier of 2.4. Using these multipliers on the base fine amount of \$2,000,000 results in a fine range of \$2,400,000 to \$4,800,000. See §8C2.7. In this case, however, the statutory maximum penalty for an offense under 18 U.S.C. § 1956 is \$500,000. See 18 U.S.C. § 3571(c)(1), (3) [Note: The alternative fine provision under 18 U.S.C. § 3571(d) – twice the defendant's gain of \$25,000 – does not exceed the statutory fine.] Thus, the guideline minimum fine (\$2,400,000) exceeds statutory maximum fine (\$500,000), in which case statutory maximum fine becomes guideline fine. Therefore, the fine range in this case is \$500,000.

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- 3A.** Assume the same facts as Fact Pattern 3, except Defendant A has pleaded guilty to 25 counts of money laundering (one for each check) and the crime occurred prior to November 1, 2015.

How will the guideline fine be calculated?

The guidelines would be calculated in the same manner as scenario 3, with two exceptions. First, §8C2.4 includes a special instruction for calculating the base fine if the offense was committed prior to November 1, 2015. Subparagraph (e) provides that “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.” Under the 2014 offense fine table, an offense level of 22 results in a base fine amount of 1,200,000. Under §8C2.6, a culpability score of 6 results in a minimum multiplier of 1.2 and a maximum multiplier of 2.4. Using the applicable multipliers (1.2 and 2.4) results in a fine range of \$1,440,000 to \$2,880,000.

Additionally, because the combined statutory maximum penalties would now be \$12,500,000 (\$500,000 multiplied by 25 counts), the guideline minimum fine no longer exceeds statutory maximum fine.

- 4.** Defendant B has pleaded guilty to one count of price-fixing in violation of 15 U.S.C. § 1. Defendant B is a successful automotive component manufacturer that employs 150 people. Defendant B also manufactures commercial lighting products, but the violation did not involve this aspect of the business.

During a three-year period, Defendant B and three other manufacturers conspired to fix prices for taillights and other automotive components sold to customers in the United States and elsewhere. Defendant B, through its Owner, regularly communicated with competitors to agree on product pricing and pricing structures designed to limit competition and maintain high prices. Records demonstrate that the total volume of commerce affected by the conspiracy and attributable to Defendant B over the three-year period was \$12 million in automotive components.

There is no evidence of other misconduct in the company’s 15-year history. The current market value of the company’s assets is approximately \$20 million. The company’s annual net income is approximately \$1,750,000.

The company has cooperated with the investigation and the company’s president has written a statement accepting responsibility on behalf of the company.

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How would the company's guidelines be calculated in this case?

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 15 U.S.C. § 1 is referenced to §RS1.1, which is covered under §8C2.1.

After determining the fine range provisions apply, the court should first make a preliminary determination of the defendant's ability to pay. Where it is readily ascertainable that the organization cannot and is not likely to become able to pay required restitution or to pay the minimum guideline fine preliminarily determined under §§8C2.3 through 8C2.7, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay). In this case, it appears the company is financially secure with annual net income of approximately \$1,750,000. Therefore, the court would proceed with calculating the fine range.

Under §8C2.4, the base fine is the greatest of the amount from the offense level fine table, the pecuniary gain or the pecuniary loss. That guideline also provides, however, "that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate." USSG §2R1.1 includes such a special instruction providing that "[i]n lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce." Here, 20 percent of the \$12,000,000 in affected commerce results in a base fine of \$2,400,000.

The court next calculates the defendant's culpability score under §8C2.5. In all cases, the culpability score starts at 5 points. An additional 2 points are added under §8C2.5(b) because the company had 50 or more employees and an individual within high-level personnel of the organization (in this case, the owner) participated in the offense. Two points are deducted under §8C2.5(g)(2) because the defendant fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. This results in a final culpability score of 5.

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Under §8C2.6, a culpability score of 5 results in a minimum multiplier of 1.0 and a maximum multiplier of 2.0. Using these multipliers on the base fine amount of \$2,400,000 results in a fine range of \$2,400,000 to \$4,800,000. *See* §8C2.7.