

For Beginners: A Basic Introduction to the Organizational Guidelines



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Overview of Chapter 8

- **Chapter 8 reflects 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)**

Part A – General Application Principles

- Apply to felony and Class A misdemeanors (8A1.1)
- Apply Chapter 8 in order (8A1.2)
 - Part B - Restitution
 - Part C – Fines
 - Part D – Probation
 - Part E – Special Assessments, Forfeitures and Costs

Part B, Subpart 1

Remedying Harm

- Restitution (8B1.1)
- Remedial Orders (8B1.2)
- Community Service (8B1.3)
- Order of Notice to Victims (8B1.4)

Restitution - 8B1.1

- Requires identifiable victim
- If so, court shall either
 - Enter restitution order if authorized by specified statutes 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

- Apply 5F1.4.
- Court may order defendant to pay cost of giving notice to victims.
- Cost may be set off against fine imposed if imposition of both sanction is excessive.

Criminal Purpose Organizations - 8C1.1

- If court determines that organization operated primarily
 - For a criminal purpose or
 - By criminal means

then set fine in an amount sufficient to divest organization of all net assets.
- Net assets means all assets remaining after payment of all legitimate claims by known innocent bona fide creditors.

Applicability of Fine Guidelines - 8C2.1

- Apply 8C2.2 through 8C2.9 to each count for which offense level is determined under either
 - 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.

continued

Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

- Fraud (2B1.1)
- Insider Trading (2B1.4)
- Trespass (2B2.3)
- Commercial Bribery (2B4.1)
- Criminal Infringement of Copyright or Trademark (2B5.3)
- Offenses involving altering or removing motor vehicle identification numbers (2B6.1)
- Certain offenses involving public officials (2C1.1, 2C1.2, 2C1.6)
- Offenses involving drug paraphernalia and drug regulatory offenses (2D1.7, 2D3.1, 2D3.2)

continued

Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

- Certain offenses involving criminal enterprises or racketeering (2E3.1, 2E4.1, 2E5.1, 2E5.3)
- Obscenity offenses (2G3.1)
- Certain offenses involving explosive materials or firearms (2K1.1, 2K2.1)
- Smuggling, Transporting or Harboring an Unlawful Alien (2L1.1)
- Odometer Laws and Regulations (2N3.1)
- Antitrust (2R1.1)
- Money laundering and structuring offenses (2S1.1, 2S1.3)
- Certain tax offenses (2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1)

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

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.

Offense Level - 8C2.3

For counts covered by 8C2.1

- Use applicable Chapter Two guideline determine 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 of justice).

Base Fine = 8C2.4

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

MEASURING CULPABILITY

**BASE FINE (8C2.4) x MULTIPLIERS (8C2.6) =
FINE RANGE (8C2.7)**

Six Factors to calculate “culpability score”:

- ↑ Tolerance of criminal activity**
- ↑ Prior history**
- ↑ Violation of order**
- ↑ Obstruction of justice**
- ↓ Effective compliance and ethics program**
- ↓ Self-reporting, cooperation, acceptance of responsibility**

Determining Culpability Score - 8C2.5

BASE OFFENSE LEVEL	5 POINTS
Level of Authority	+5/ +4 /+3
Size of Organization	+2 or +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(a)

AN EFFECTIVE COMPLIANCE PROGRAM MUST:

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

Seven Minimum Requirements - §8B2.1(b)(2)

1. Standards and procedures to **prevent** and **detect** criminal conduct.
2. **Board** must be knowledgeable about and oversee program; top **management** must ensure effectiveness of program; specific individual(s) within high-level personnel must have responsibility.

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Seven Minimum Requirements - §8B2.1(b)(2)

3. Reasonable efforts not to include within substantial authority personnel **individuals** whom organization knew or should have known have engaged in **illegal activities** or **conduct inconsistent** with effective program.
4. Communicate standards and procedures by **training** directors, employees and, as appropriate, agents, and by other means.

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Seven Minimum Requirements -- §8B2.1(b)(2)

5. Monitor and audit to **detect** criminal conduct; **evaluate** program periodically; have and publicize a system for **reporting** suspected violations and seeking guidance.
6. Promote and consistently **enforce** through appropriate incentives to perform in accordance with the program and appropriate discipline.
7. **After criminal conduct is detected**, take reasonable steps to **respond** appropriately and **prevent** further similar criminal conduct, including necessary modifications to program.

Determining the Fine within the Fine Range

- 8C2.8

Factors to consider (8C2.8(a)):

- The purposes of sentencing under 3553(a);
- Role in the offense;
- Collateral consequence of conviction;
- Nonpecuniary loss caused or threatened;
- Involvement of vulnerable victim;
- Prior criminal record of high level personnel;
- Prior civil or criminal misconduct not counted in culpability score;
- Culpability score higher than 10 or lower than 0;
- Partial but incomplete satisfaction of conditions of culpability score factors;
- Any factor in 3572(a) ;
- Failure to have effective compliance and ethics program.

Court may weigh importance of these factors and others (8C2.8(b)).

Other Guideline Provisions relating to Calculation of Fine

Disgorgement - 8C2.9

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

Calculation of Fine for Other Counts - 8C2.10

- Determine fine for counts not covered under 8C2.1 by applying provisions of 3553 and 3572.

Implementing the Sentence of A Fine

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.

Payment of the Fine - 8C3.2

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

continued

Implementing the Sentence of A Fine

Reduction of Fine Based on Inability to Pay - 8C3.2

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

Fines Paid by Owners of Closely Held Organizations - 8C3.4

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

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;
- 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

Conditions of Probation - 8D1.3

- No new federal, state or local crimes;
- Impose at least one of the following conditions for felony offenses:
 - Restitution, or
 - Community serviceUnless fine is imposed or court makes finding that condition is plainly unreasonable.
- 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

Recommended Conditions of Probation - 8D1.4

- Publicize information about offense, conviction, sentence, and any steps to prevent future misconduct
- If probation is imposed under 8D1.1, the following conditions may be appropriate
 - Develop an Ethics and Compliance (E&C) program;
 - Once E&C program approved, notify employees and shareholders about criminal conduct and E&C program;
 - Make periodic submissions to court about financial condition and report on progress implementing E&C program;
 - Notify of material changes in financial condition or commencement of administrative, civil, or criminal litigation against organization, or any investigations or formal inquiries by governmental authorities;
 - Submit to reasonable inspection of books and records and interrogation of knowledgeable employees and pay any costs associated with experts;
 - Make periodic payments toward monetary sanctions (priority to restitution, fine and then other).

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