



A Basic Introduction to the Organizational Guidelines

2023 National Seminar

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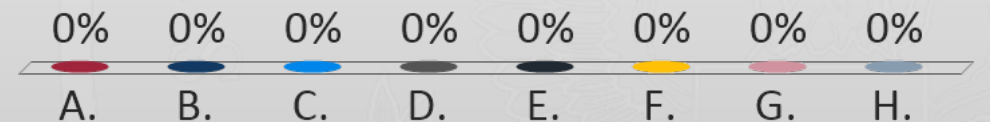
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Who is in the Audience?

- A. Circuit Staff Attorney
- B. CJA Panel Attorney/Private Defense Attorney
- C. Federal Public Defender
- D. Judge
- E. Law Clerk
- F. U.S. Probation Officer
- G. U.S. Attorney
- H. Other



Years of Experience with Federal Sentencing?

- A. Less than 2 years
- B. 2 to 5 years
- C. 5 to 10 years
- D. More than 10 years



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*?!?



Why Do I Need to Know About Chapter 8?

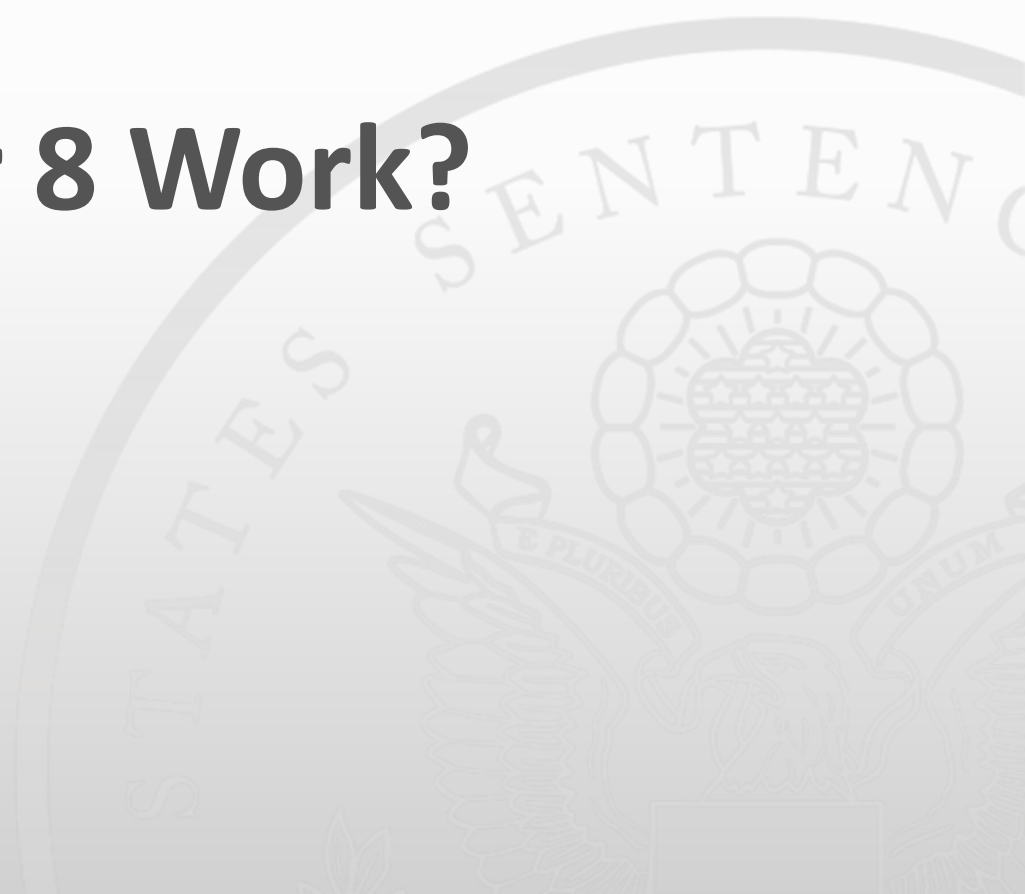
Authorization: **The Sentencing Reform Act of 1984**

- U.S. Sentencing Commission to develop sentencing guidelines for individuals and organizations.
- Like other guideline calculations, courts must consider the guideline sentence where applicable.

Chapter 8 has some differences from your typical GL calculations – **Avoid the common mistakes.**

While there aren't that many cases each year, they do come up.

How Does Chapter 8 Work?



When Do I Turn To Chapter 8?

Organizations

- Corporations,
- partnerships,
- associations,
- joint-stock companies,
- unions,
- trusts,
- pension funds,
- unincorporated organizations,
- governments and political subdivisions,
- non-profit organizations

Felony and Class A misdemeanors



General Principles

1

Organizations should remedy harm caused by offense
§§8B1.1 - 8B1.4

2

Organizations with criminal purpose should be divested
§8C1.1

3

“Carrot and Stick Approach” - Fine ranges determined by seriousness of offense and culpability
§§8C2.1 - 8C2.10

4

Probation to implement sanctions and reduce recidivism
§§8D1.1 – 8D1.4

General Application Principles

§8A1.2

Apply Chapter 8 in order:

Part B Remediating Harm from Criminal Conduct

Part C Fines

Part D Probation

Part E Special Assessments, Forfeitures, and Costs

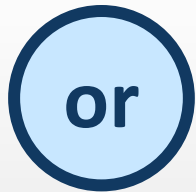
Restitution

§8B1.1

Requires identifiable victim.

If so, court shall either:

- Enter restitution order if authorized by specified statute.



- 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

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

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 means

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

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



Sufficient Fine to Divest
Organization of All Net Assets.

§8C1.1



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

§8C2.1

Organizational Fines

Decision Point #2

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

§8C2.1



Scenario 1: 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.



- 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)

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)

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)

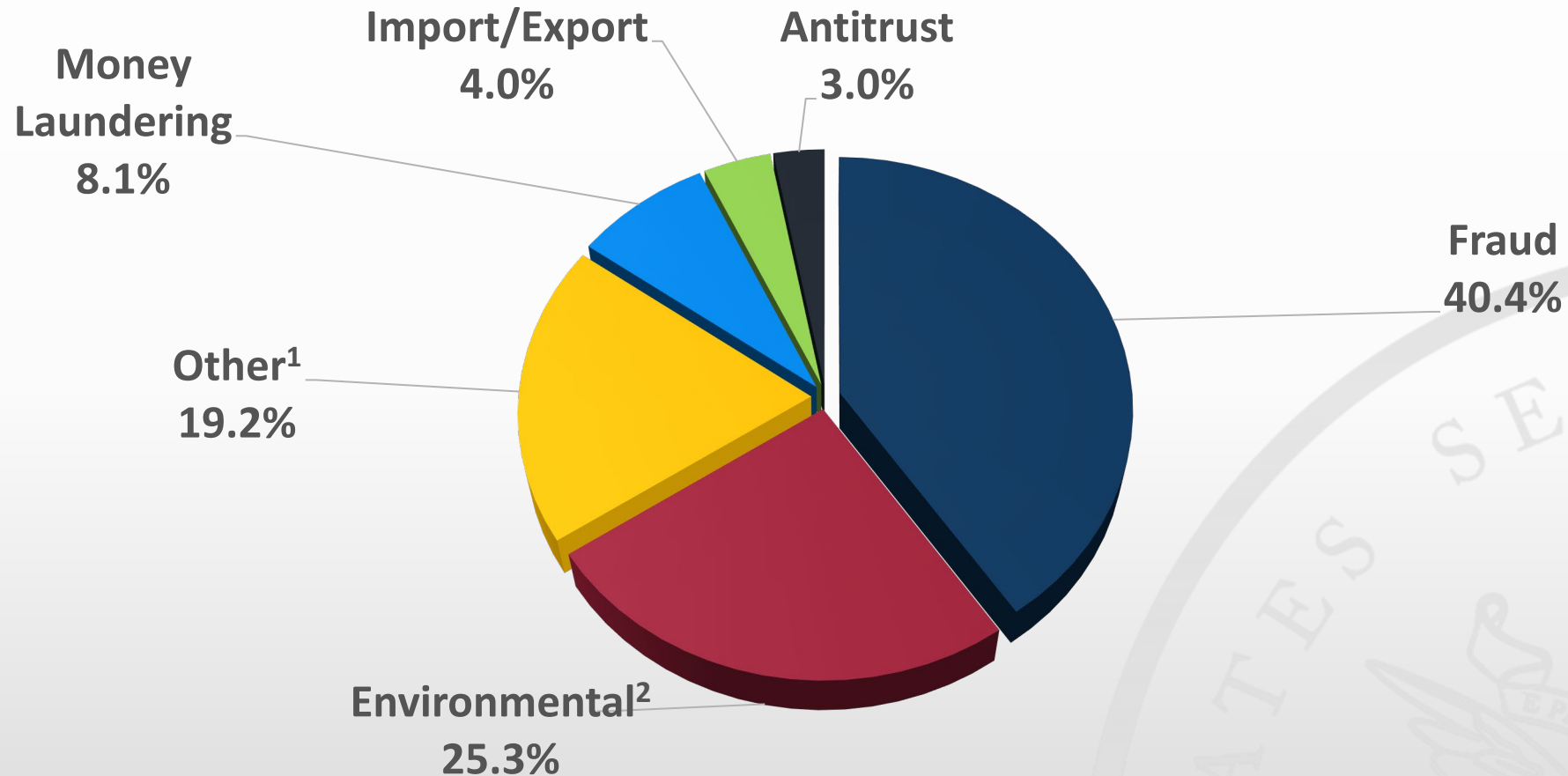
Odometer Laws and Regulations (§2N3.1)

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)

Primary Offense in Organizational Cases Fiscal Year 2022



¹ The Other category includes the following offense types: immigration, copyright/trademark, food and drugs, bribery, obstruction of justice, larceny/theft/embezzlement, and obstruction of justice.

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

Organizational Fines

Decision Point #2

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

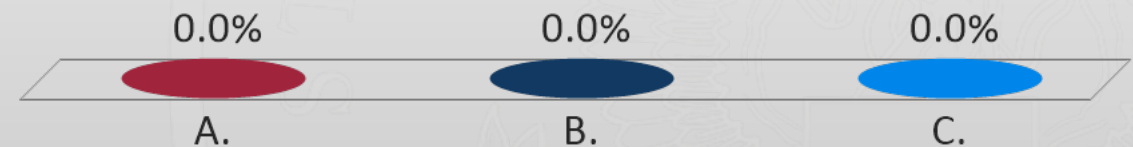
§8C2.1



Scenario 1: 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

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

§8C2.1



Determine
appropriate fine
under **§8C2.10**.

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

18 U.S.C. § 3572 (Imposition of sentence of fine and related matters).

Organizational Fines

Decision Point #2

Is the type of offense covered by
the *Guidelines* fine provisions?
§8C2.1



Determine
appropriate fine
under **§8C2.10**.

Preliminary Determination of Inability to Pay Fine.
(Readily ascertainable that organization cannot
and is not likely to become able to pay?)

Preliminary Determination of Inability to Pay Fine

§8C2.2

If the organization cannot and is not likely to become able to pay

restitution required under
§8B1.1

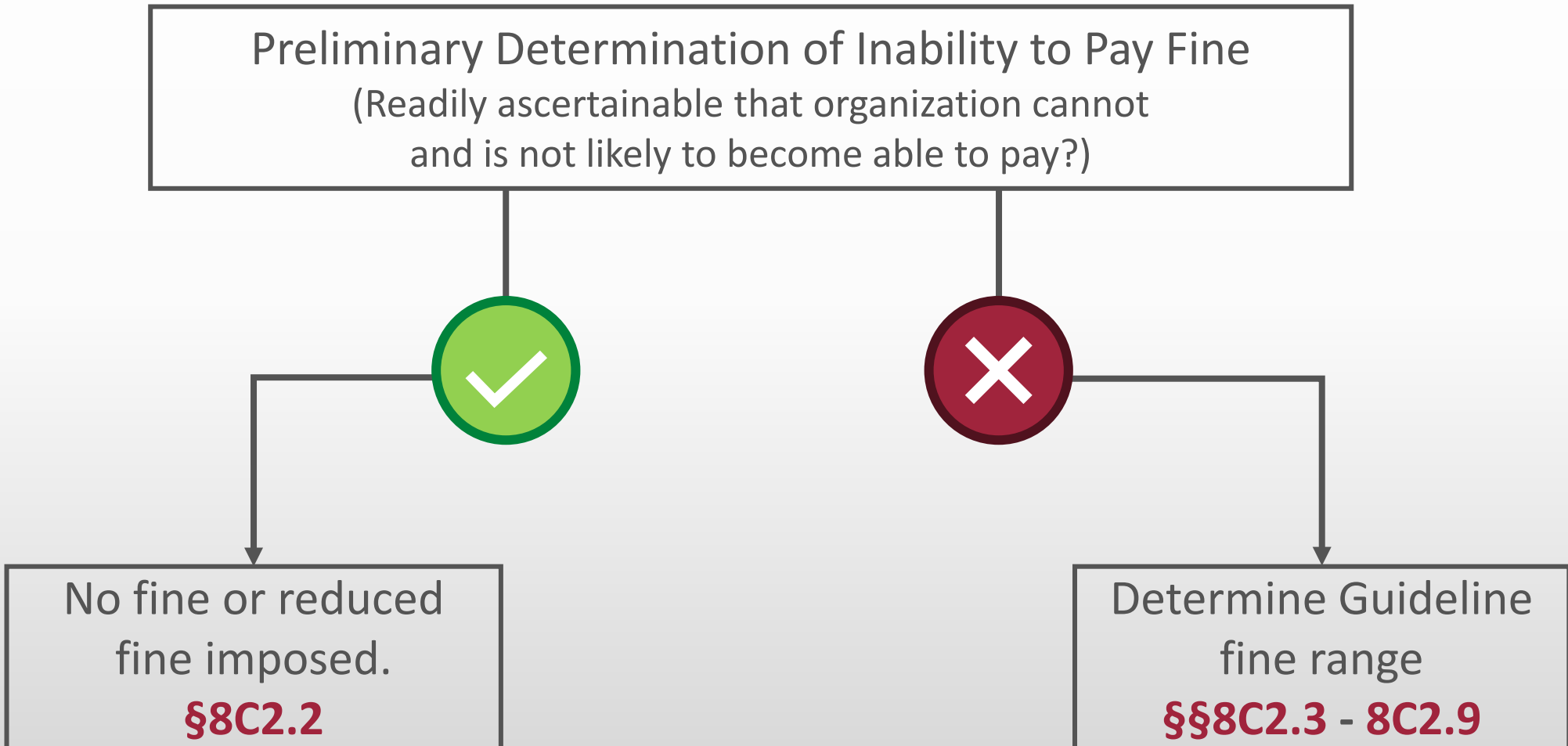
or

minimum guideline fine

There is no need to make guideline fine determination.

Organizational Fines

Decision Point #3



Determining the Fine Range

Step One | Calculate the Chapter Two Offense Level §8C2.3

For counts covered by §8C2.1

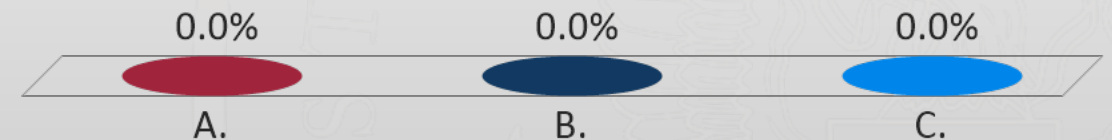
- Use the applicable Chapter Two guideline to determine the offense level (BOL and all applicable SOCs).
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level.

Scenario 2: Determining the Fine Range

The Defendant company, a multimillion-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



Determining the Fine Range

Step One | 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)

Determining the Fine Range

Step Two | 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

Determining the Fine Range

Step Two | Base Fine

§8C2.4

(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
25	\$5,000,000
26	\$6,500,000
27	\$8,500,000
28	\$10,000,000
29	\$15,000,000
30	\$20,000,000
31	\$25,000,000
32	\$30,000,000
33	\$40,000,000
34	\$50,000,000
35	\$65,000,000
36	\$80,000,000
37	\$100,000,000
38 or more	\$150,000,000.

Determining the Fine Range

Step Three | 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 and Acceptance of Responsibility	-5/ -2/ -1

Determining the Fine Range

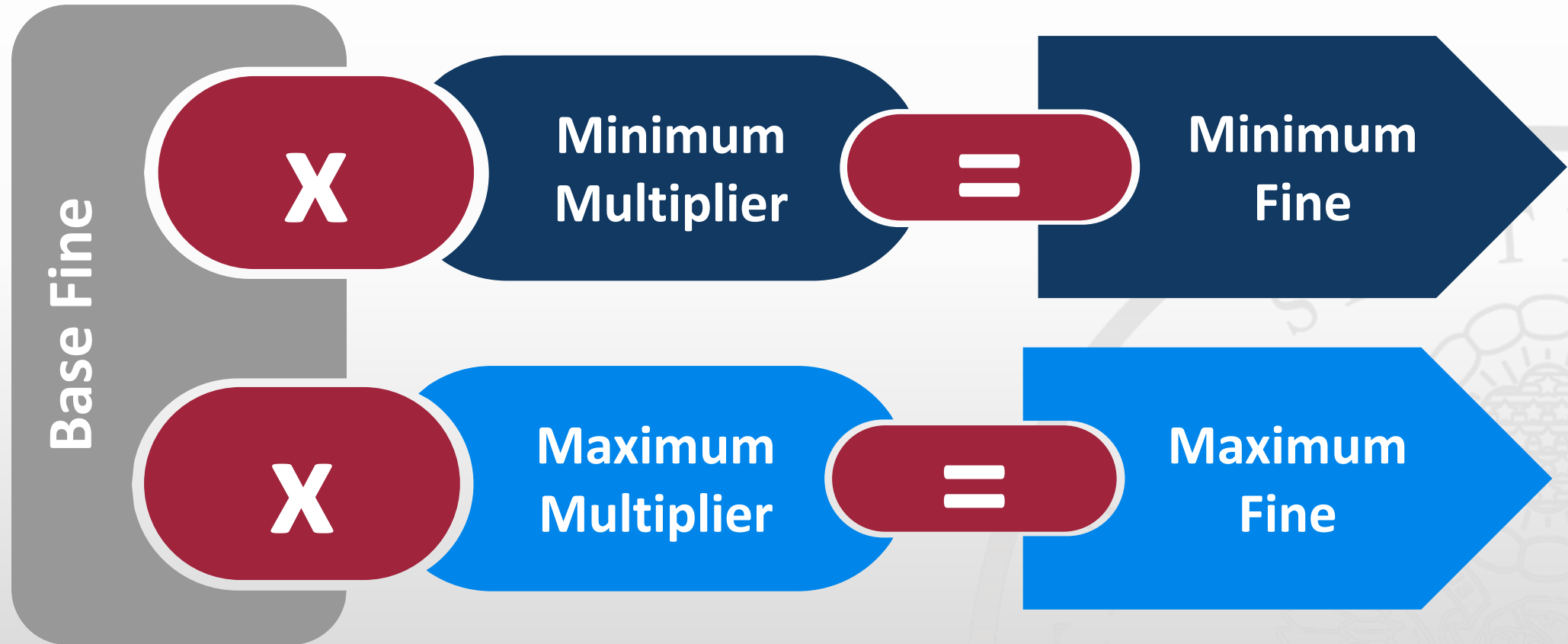
Step Four | Minimum & Maximum Multipliers

§8C2.6

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.

Guideline Fine Range

Step Five | Putting the Pieces Together §8C2.7



Other Guideline Provisions Relating to Calculation of the 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

Scenario 3 – Putting the Pieces Together

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.

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 3 – Putting the Pieces Together (cont.)

Defendant A is a successful advertising agency with over \$3 million in assets and has 200 employees. Without providing services, Defendant A received \$10,000 checks from Neighbor, returning \$9,000 in cash. The Owner of Defendant A took in over \$250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

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



Scenario 3 – 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 Culpability Score

§8C2.5

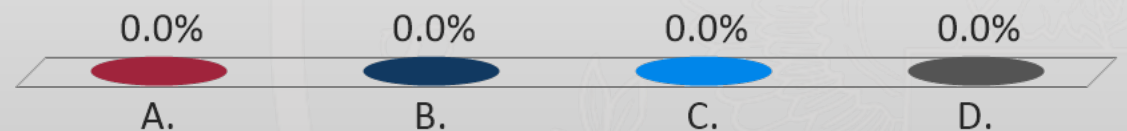
BASE OFFENSE LEVEL	5 POINTS
Involvement in or Tolerance of Criminal Activity	+5/ +4/ +3/ +2/ +1
Prior History	+2 or +1
Violation of an Order	+2 or +1
Obstruction of Justice	+3
Effective Program to Prevent and Detect Violations of Law	-3
Self-Reporting, Cooperation and Acceptance of Responsibility	-5/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

Scenario 3 – 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.

Scenario 4 – Putting the Pieces Together

Company B is convicted of one count of price-fixing in a three-year conspiracy, a violation of 15 USC § 1. The total volume of commerce in the goods affected by the violation over the three years was \$12 million.

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

Hint: Relevant Chapter Two guideline is §2R1.1

- A. \$300,000
- ✓ B. \$2,400,000
- C. \$12,000,000
- D. The fine guidelines provisions (§§8C2.2 – 8C2.9) do not apply



Base Fine – Chapter Two Special Instruction

§8C2.4(b)

§8C2.4

- (a) Apply the greater of fine table, pecuniary gain or pecuniary loss
- (b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate

Antitrust

§2R1.1(d): In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of commerce affected.

Special Instructions

- §2B4.1** (Bribery in Procurement of Bank Loan)
- §2C1.1** (Bribery)
- §2C1.2** (Offering/Soliciting Gratuity)
- §2E5.1** (Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan)

Implementing the Fine



Payment of the Fine

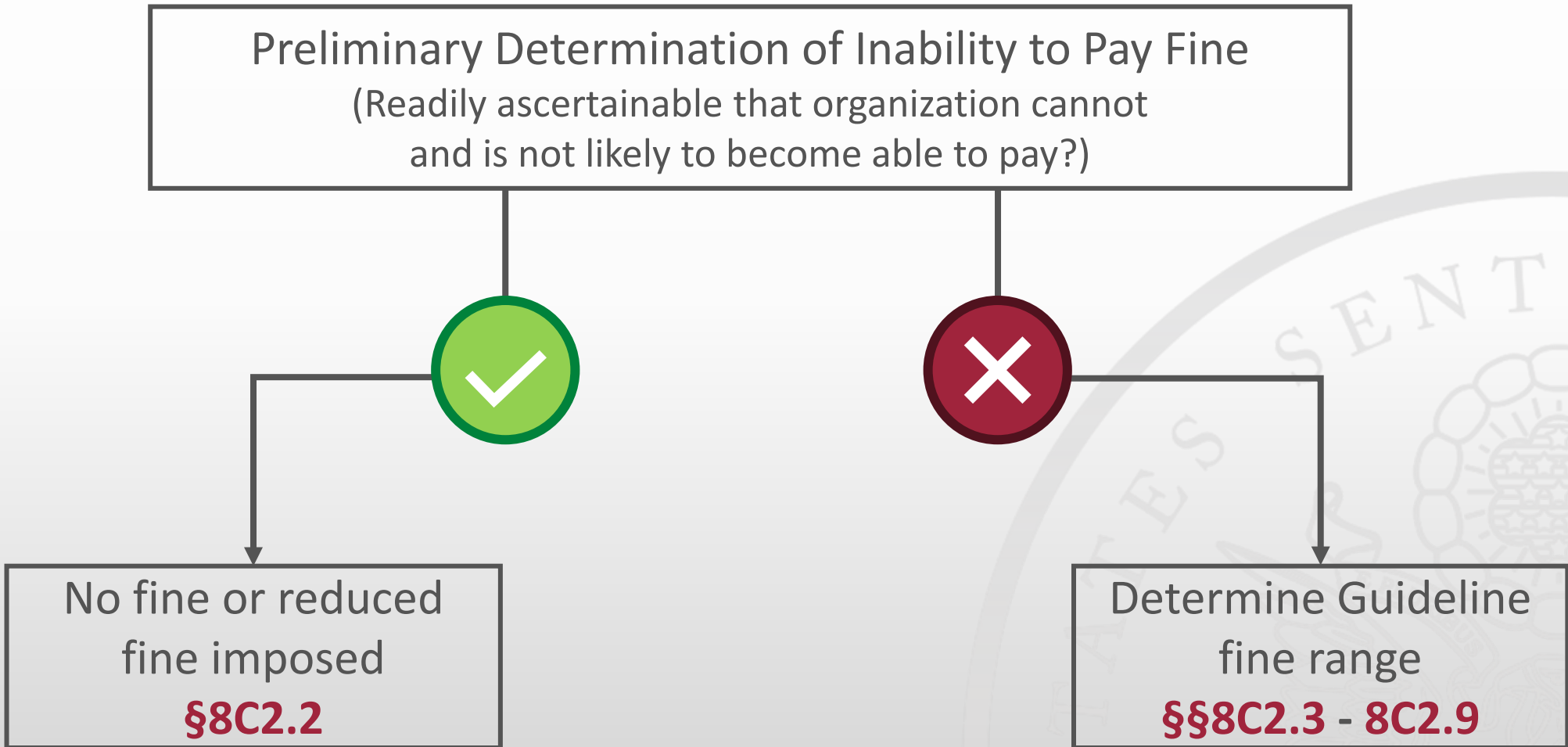
§8C3.2

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

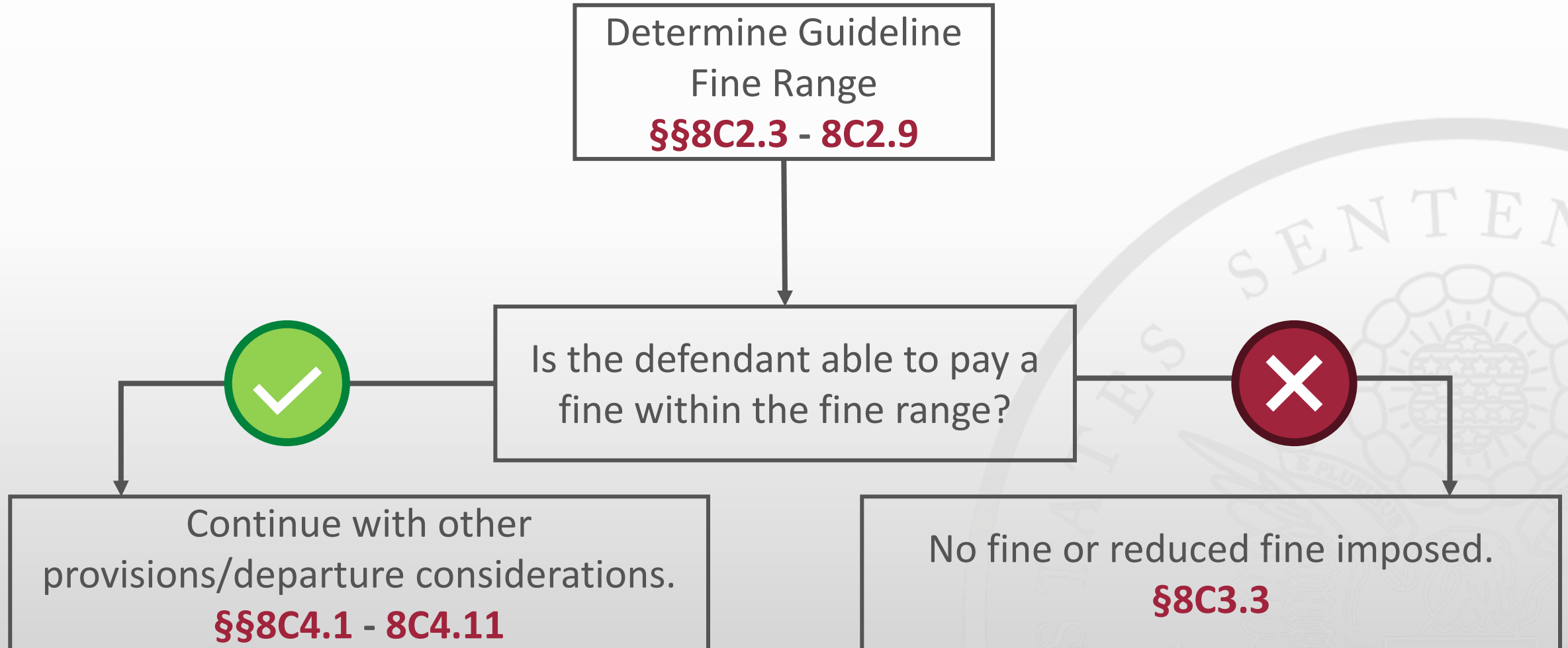
If fine would impair ability to make restitution.



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

- 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

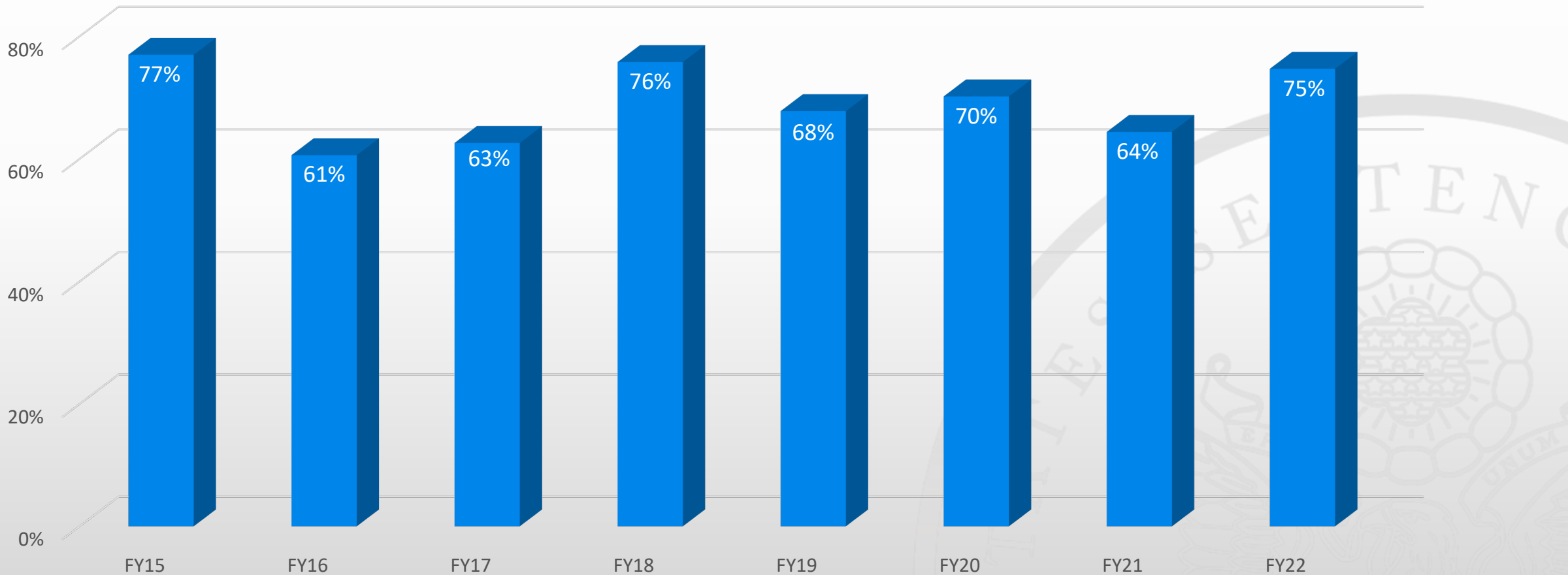
- Public Entity – §8C4.7
- Members or Beneficiaries of Organization as Victims – §8C4.8
- Remedial Costs that Greatly Exceed Gain – §8C4.9
- Exceptional Organizational Culpability – §8C4.11 (if no substantial authority involved and had effective program)

Organizational Probation



Percentage of Organizational Cases Receiving Probation

Fiscal Years 2015 - 2022



SOURCE: United States Sentencing Commission, 2015-2022 *Sourcebooks of Federal Sentencing Statistics*.

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 an ethics and compliance 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

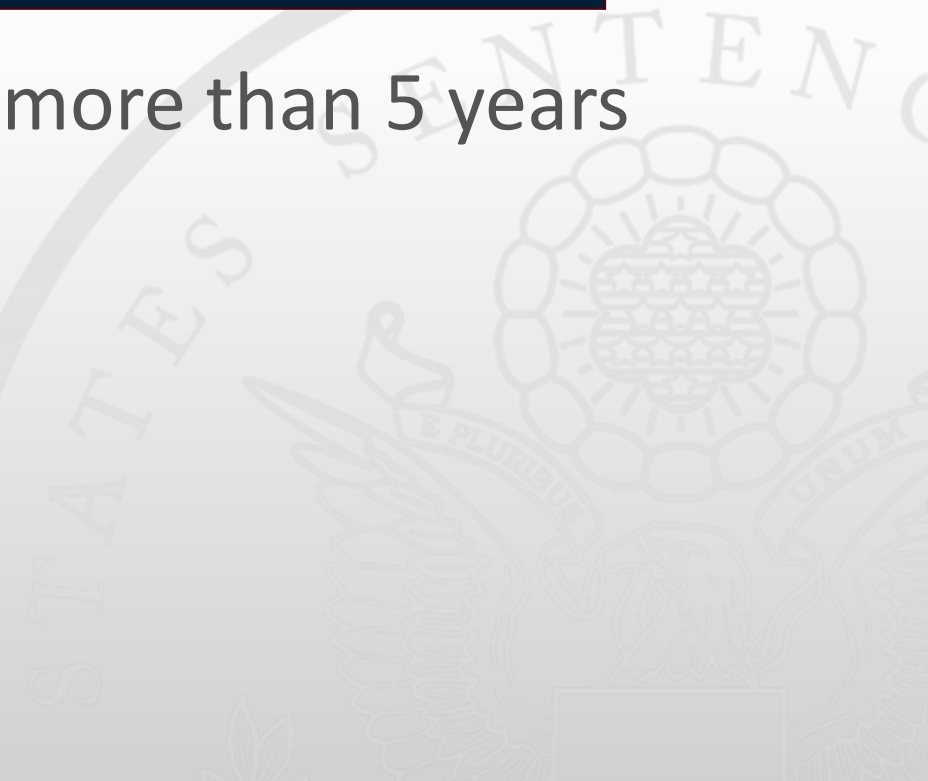
§8D1.2

Felony Offenses

1 – 5 years

Class A Misdemeanors

Not more than 5 years



Mandatory Conditions of Probation

§8D1.4

§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

§8D1.3(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.

Questions or Comments?



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