

[Criminal Tax Manual](#)

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## 45.00 FINES

A defendant who has been found guilty of a criminal tax offense may be sentenced to pay a fine.

### 45.01 STATUTORY PROVISIONS

#### 45.01[1] Statute Defining the Offense

Title 26 offenses generally specify the maximum fine in the statute defining the crime. The table below lists the fines for the most common offenses:

26 U.S.C. § 7201	\$100,000 (\$500,000 in the case of a corporation)
26 U.S.C. § 7202	\$10,000
26 U.S.C. § 7203	\$25,000 (\$100,000 in the case of a corporation)
26 U.S.C. § 7206	\$100,000 (\$500,000 in the case of a corporation)
26 U.S.C. § 7212(a)	\$5,000/\$3,000 (if offense is committed only by threats of force)

#### 45.01[2] General Criminal Fine Statute (18 U.S.C. § 3571)

However, the general criminal fine statute, 18 U.S.C. § 3571, provides for higher maximum fines than those specified in the statute of conviction, unless the statute of conviction specifically exempts the offense from Section 3571's provisions. *See* 18 U.S.C. § 3571(e). Title 26 tax offenses are not exempted, so the higher limits of Section 3571 apply. *See, e.g., United States v. Looney*, No. 04-16064, 2005 WL 2522519, at \*8 (11th Cir. 2005) (“The statute under which Looney was convicted, 26 U.S.C. § 7203, does not contain any language exempting it from 18 U.S.C. § 3571, the general fine statute.”).

18 U.S.C. § 3571(b) provides that, with certain exceptions, “an individual who has been found guilty of an offense may be fined not more than the greatest of –

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$250,000;
- (4) for a misdemeanor resulting in death, not more than \$250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or

(7) for an infraction, not more than \$5,000.

Subsection (c) contains the maximum fines that may be imposed on organizations:

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than \$500,000;

(4) for a misdemeanor resulting in death, not more than \$500,000;

(5) for a Class A misdemeanor that does not result in death, not more than \$200,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; or

(7) for an infraction, not more than \$10,000.

Finally, subsection (d) provides for an alternative fine based on gain or loss from the offense:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of the fine under this subsection would unduly complicate or prolong the sentencing process.

#### ***45.01[3] Applicability of Apprendi to Criminal Fines***

Prosecutors invoking the alternative fine provision of Section 3571(d) should be aware that the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to criminal fines. The Supreme Court held in *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350-2351 (2012), that the Sixth Amendment requires that where the maximum fine is calculated based on reference to particular facts, including the defendant's gain or the victim's loss, such facts must be found by the jury beyond a reasonable doubt. *See also United States v. Bane*, 720 F.3d 818, 830-31 (11th Cir. 2013); *United States v. Coplan*, 703 F.3d 46, 94-95 (2d Cir. 2012); *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010); *United States v. LaGrou Distrib Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006). Absent such a finding, the district court may not impose a fine exceeding the default statutory maximum. Therefore, in cases where the prosecutor anticipates invoking 18 U.S.C. § 3571(d), the prosecutor should ensure that the indictment alleges the necessary facts,

request appropriate jury instructions and a special verdict form at trial, or obtain an admission by the defendant. See *United States v. Day*, 700 F.3d 713, 731-32 (4th Cir. 2012).<sup>1</sup>

#### **45.02 SENTENCING GUIDELINES PROVISIONS**

The Sentencing Guidelines require the district court to impose a fine unless the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

U.S.S.G. § 5E1.2(a). The fine guideline range is based on the offense level.

U.S.S.G. § 5E1.2(c)(3). The sentencing court should calculate the fine guideline range even where the alternative fine statute applies. *United States v. Chusid*, 372 F.3d 113, 117-118 (2d Cir. 2004) (holding that the applicability of the alternative fine statute does not authorize a sentencing court to disregard the guidelines for fines); *United States v. Sharma*, 85 F.3d 363, 365 n.1 (8th Cir. 1996); but see *United States v. Ellis*, 548 F.3d 539, 546 (7th Cir. 2008) (“However, 18 U.S.C. § 3571 allows a sentencing judge to disregard the suggested fines under the Sentencing Guidelines . . . .”) and *United States v. Levinson*, 543 F.3d 190, 193 n1. (3d Cir. 2008) (calculating upper end of the fine range as twice the gross gain or loss from the crimes).

However, where the Section 3571(d) alternative fine exceeds the maximum of the guideline fine range, the Guidelines specifically contemplate that the district court may be warranted in departing from that range. U.S.S.G. § 5E1.2 cmt. 4. Additionally, an upward departure may be appropriate where a fine within the guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that would not otherwise be disgorged (for example, by restitution or forfeiture) and an adequate punitive fine. *Id.*

When imposing a fine, the district court must consider not only the 18 U.S.C. § 3353(a) sentencing factors, but also specific factors enumerated at U.S.S.G. § 5E1.2(d) and at 18 U.S.C. § 3572(a). These factors include the costs of incarceration; the defendant’s income, earning capacity, and financial resources; any pecuniary loss inflicted on others as a result of the offense; the amount of restitution ordered; and the need to deprive the defendant of illegally obtained gains. Importantly, the court must not impair the ability of the defendant to make restitution to victims of the offense other than the United States. 18 U.S.C. § 3572(b).

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<sup>1</sup> The Environmental Crimes Section of the Environment and Natural Resources Division issued a memorandum on December 4, 2013, providing guidance in the wake of the *Southern Union* case. The memorandum also includes sample charging language, jury instructions, special verdict forms, and plea agreement language. <http://dojnet.doj.gov/ecs/usefulguidance/final-post-southern-union-guidance.PDF>