1776 I Street, NW, Suite 900
Washington, DC 20006

Robert E. Connolly
215.219.4418
Robert.Connolly@geyergorey.com
www.geyergorey.com
http://cartelcapers.com

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby,
Washington, DC 20002-8002
pubaffairs@ussc.gov

Re: Comments on USSG 2R1.1 Antitrust Offenses

Dear Commissioners:

Thank you for the opportunity to submit my suggestions to the Commission for consideration as reforms to the United States Sentencing Guidelines for Antitrust Offenses (U.S.S.G. 2R1.1). I have limited my comments to the antitrust sentencing guidelines as they relate to individuals.

I have three primary concerns with the guidelines: 1) that the maximum prison sentence of 10 years under the Sherman Act be reserved for the most egregious cases such as recidivism or explicit economic coercion;[1] 2) that the volume of commerce be deemphasized as the primary determinant of an individuals' culpability and be applied only for defendants who had the authority to commit their company to the cartel; and 3) that other factors that more accurately reflect culpability (such as motive) play a role in guidelines calculation. Please pardon the length of the submission, but I believe the reforms I am suggesting are better understood if I explain why my experience has led me to believe that criminal antitrust enforcement would be enhanced by reform of the antitrust guidelines.[2]

[1] Although Congress raised the Sherman Act maximum prison sentence to ten years to indicate the seriousness of antitrust offenses, it is still true that some offenses are more egregious than others and the maximum penalty should be reserved for such cases.

[2] I served in the Antitrust Division from 1980 until 2013. I was Chief of the Middle Atlantic Field Office until its closure in January 2013. I prosecuted many antitrust crimes from small road construction bid rigging cases to international price fixing cartels.

I. Introduction

The current Antitrust Guidelines fail to measure an individual's culpability in a conspiracy. The guidelines currently place an overwhelming weight on the volume of commerce involved in an antitrust conspiracy. The volume of commerce can add up to 16 levels to the base offense level of 12 and may easily push even a first time offender in an international cartel, regardless of role, to the 10-year maximum Sherman Act jail sentence.

To punish primarily based on volume of commerce may have merit when it comes to calculating a corporate fine, but overreliance on volume of commerce is an inappropriate way to measure an individual's real culpability for a crime. For example, as explored more herein, an owner of a company that rigs a $1 million school milk bid and personally pockets the conspiratorial overcharge is by most traditional measures of culpability as expressed in 18 U.S.C. §3553(a)(Factors to be Considered in Imposing Sentence) more culpable than a lower level employee in an international cartel who is ordered to attend cartel meetings. Yet the owner, motivated by personal gain, would receive a guidelines range of 18 to 24 months while the lower level employee who simply wished to retain his job could face a guidelines range of up to 10 years, depending upon the volume of commerce affected by the cartel. These are not extreme hypotheticals—they are essentially the guidelines result in United States v. VandeBrake[3] and United States v. AU Optronics.[4] In both cases, as discussed herein, the court rejected the sentencing guidelines and departed to impose sentences based not primarily on the volume of commerce, but on individual culpability factors that are not reflected in the current antitrust guidelines.

II. The Volume of Commerce Adjustment Is the Primary Factor in Determining A Guidelines Sentence but it is not the Primary Factor in Assessing Culpability.

Using volume of commerce as a basis for setting a corporate fine has a rational basis. The purpose of a fine is to disgorge the company of any profits it made from the illegal behavior, as well as to punish sufficiently to provide both specific and general deterrence. Furthermore, the volume of commerce varies by company, thereby automatically accounting for differences between the largest players in a cartel and the more minor. A company that has $1 billion in commerce in the price-fixed product is more critical to the cartel is punished more severely than a fringe player with $100 million in sales. But, the guidelines make no such distinction for role in the cartel among individuals in the same company. The volume of commerce attributable to an individual's participation in a conspiracy is the volume of commerce "done by him or his principal in goods that were affected by the violation." The Chairman/CEO of a company who commits the $1 billion enterprise to the cartel and makes decisions, including which subordinates to involve in the conspiracy, is tagged with the same volume of commerce as a foot soldier who is directed to go to cartel meetings.

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[3] United States. v. VandeBrake, 771 F. Supp. 2d 961 (N.D. Iowa 2011).

[4] United States v. AU Optronics Corp. et al., CR-09-0110 (SI)(filed June 10, 2010).

In this example, both the CEO and subordinates would be approaching the Sherman Act ten-year maximum before any other adjustments are made. In a typical case, the Antitrust Division would push for a 4 level increase for the CEO for being "an organizer and leader of the criminal activity that involved five or more participants."[5] But, the subordinate would likely qualify for a three level increase as "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants."[6] With the likely adjustments, both the "Top Guy" and the "working level guy"[7] (as cartel participants sometimes refer to themselves) would be facing the ten-year Sherman Act maximum. This may seem like an extreme example because the volume of commerce is so high. But, even at lower levels of volume of commerce, the point remains—the most senior member of a cartel is tagged with the same adjustment for volume of commerce as the most junior—assuming the senior member directed the junior member to help carry out the conspiracy for the same duration.

Another measure of the ineffectiveness of the volume of commerce as a measure of culpability is that it can substantially *underestimate* an individual's culpability. For example, suppose a building contractor rigs a $10 million school construction project. By rigging the bids, the bid is padded with an undetermined (but using the guidelines estimate of 10% overcharge, an extra $1 million profit), which goes directly into the pocket of the President/owner who rigged the bid. The defendants' guideline range would be: 12 base offense level; plus 1 bid rigging, plus 2 for volume of commerce and plus 4 for role in the offense. The total offense level would be 19 with a guidelines range of 30 to 37 months.[8] Whatever one may think of the appropriateness that sentence, few, if anyone, would argue that the President/owner is less culpable than a lower level employee involved in an international cartel. The fact is, whether understating or overstating culpability, volume of commerce is an ineffective way to measure individual culpability.

Another reason the volume of commerce is an inappropriate measure of an individuals' culpability is that it is based on an estimate of the harm done by a conspiracy. "The purpose of specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss." [9] The Background notes to the antitrust guideline reads: "The offense levels are not based directly on damage caused or profit made by the defendants because damages are difficult and time consuming to establish."[10] A

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[5] USSG Section 3B1.1(a).

[6] USSG Section 3B1.1(b).

[7] In cartel prosecutions that I worked when I was with the Antitrust Division, "top guy" and "working level guy" were the common terms used to describe the division of labor in a cartel. In other cartels different terms have been used, though the gist is the same. It is ironic that the cartel members themselves so clearly differentiate the different roles played by leaders and subordinates, but under the guidelines, the commerce attributed is the same.

[8] The prosecutor could add fraud counts to a Sherman Act indictment, or simply charged fraud offenses. In my view, the underlying conduct, not the statue charged, should govern sentencing. Some courts agree. See, United States v. Rubin, 999 F.2d 194 (7th Cir. 1993) (antitrust guidelines used to sentence bid rigging despite fact that mails were used in the scheme). But see, United States v. Anderson, 326 F.3d 1319 (11th Cir. 2003)(fraud guidelines applied to bid rigging scheme).

[9] USSG 2R1.1 application note 3.

[10] *Id.*

short cut like this may be useful when assessing a fine for a corporation,[11] but courts will want to take the time to assess the impact from an individual's role in a cartel offense. An individual who reluctantly agreed to fix prices but was a constant irritant as a price cutter deserves punishment, but a different punishment than an organizer and enforcer for the cartel.[12]

A final concern that leads me to believe that volume of commerce should play a lesser role in determining an individuals' guideline range is that the volume of commerce is often extremely difficult to determine. The volume of commerce is usually negotiated between the Antitrust Division and corporate counsel in a give and take over many months, perhaps as long as a year. Experts may be involved. The negotiations cover variables such as duration of the conspiracy, geographic scope of the conspiracy, products covered, customers covered, etc.[13] An individual is often later sentenced using a volume of commerce he had no say in calculating and insufficient resources to challenge. Sometimes this will benefit the individual if his company had a strong negotiating position and excluded much commerce from its plea agreement; sometimes it will work to his detriment if the Division was in a position to take a hard line. But in neither case does it reflect the individuals' culpability in the offense. The sentencing court will also have limited access to the facts and methodology used by the Antitrust Division to calculate volume of commerce. This may be another reason why courts generally show little deference to the antitrust sentencing guidelines.

III. From "Big Fish Little Fish" to "Race to the Courthouse": The Effect of the Antitrust Division's Investigative Strategies on the Application of "Volume of Commerce" Adjustment

The incentives the Antitrust Division uses to investigate and prosecute cartels has sharpened the focus on the overwhelming weight given to the current the volume of commerce adjustment as it relates to individuals. As the Antitrust Division has focused on leniency and other incentives to drive early cooperation, there has been a shift from an investigative strategy of "Big Fish/Little Fish" to "A Race to the Courthouse."[14] The Division used to plan investigations

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[11] Such a short cut is not acceptable, of course, if the Government is relying on the alternative maximum fine provision of 18 U.S.C. § 3571(d) to impose a fine above the Sherman Act maximum of $100 million. *See* Phillip C. Zane, Booker Unbound*: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do About It*, 17 FED. SENTENCING REP. 263 (2005); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012)).

[12] Similarly, courts have taken an expansive view of what commerce should be included in the guidelines calculation. Courts have uniformly held that all sales made by a defendant during the price fixing conspiracy should be presumed affected by the conspiracy. See United States v. Giordano, 261 F.3d 1134, 1146(11th Cir. 2001)(presuming all sales within conspiracy period were affected unless the conspiracy was a 'non-starter" or "ineffectual."); United States v. Andreas, 216 F.3d 645, 678 (7th Cir. 2000)(holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement since few if any factors in the world of economics can be held in strict isolation; United States v. Hayter Oil. Co, 51 F.3d 1265, 1273 (6th Cir. 1995)(concluding that "the volume of commerce attributable to a particular defendants…includes all sales of the specific goods or services which were made by the defendant or his principal during the period of the conspiracy.).

[13] The many variables subject to negotiation are outlined in the Antitrust Division's Model Plea Agreement. See *Antitrust Division Model Annotated Corporate Plea Agreement,* available at: http://www.justice.gov/atr/public/criminal/302601.pdf.

[14] See *Making Companies An Offer They Shouldn't Refuse, The Antitrust Division's Corporate Leniency Policy -- An*

by working up the chain of command to leave the most culpable (i.e. most senior) executives for the most significant penalties. It would be common for Division attorneys at the beginning of the investigation to map out an investigative plan based on a culpability chart such as:

CEO 1	**CEO 2**	**CEO 3**	**CEO 4**
V.P Sales	VP Sales	VP Sales	VP Sales
Regional Mgr.	Regional Mgr.	Regional Mgr.	Reg. Mgr.
District Mgr.	District Mgr.	District Mgr.	Dist. Mgr.

Antitrust Division prosecutors would then use the grand jury to call lower level witnesses such as sales manager and/or estimators to build a case against the most culpable individuals. The investigation worked its way up the chain of command from little fish to big fish. A CEO who cooperated early on in an investigation would get a better deal than a co-conspirator CEO who went to trial and was convicted, but it was unusual (if it happened at all) for a CEO at Company A to get less jail time than a District Manager at Company B. The "Big Fish/Little Fish" strategy assessed culpability primarily by role in the offense and level of responsibility. Volume of commerce as a relevant factor in sentencing was ordinarily limited to the "Big Fish," i.e. those executives with the authority to commit their company (and subordinates) to a conspiracy.

The current Division strategy is to create "A Race to the Courthouse."[15] This started with the revised 1993 Corporate Leniency Policy, and by most accounts this has been a very successful approach. But the Division has also set up a Race to the Courthouse approach not just for leniency but also for subsequent plea agreements. Typically, the Division deals with a cooperating company and its employees as a group. Depending upon place in the queue, the Division negotiates greater discounts from a guidelines fine, charges fewer individuals and imposes less jail time for individuals charged based on how quickly the companies come in and cooperate. Place in the queue depends upon speed, not culpability. How quickly a company

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Update, Gary Spratling, Deputy Ass't Att'y Gen, Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, Feb 16, 1999 *(*"The early identification of antitrust offenses through compliance programs, together with the opportunity to pay zero dollars in fines under the Division's Corporate Amnesty program, has resulted in "a race to the courthouse," to use the words of an experienced antitrust attorney quoted in the Forbes article. We frequently see situations where a company approaches the government a few days, or even less than one full day, after one of its conspirators has already approached the Division and secured its position as first in line for amnesty. Of course, as in all things, timing is everything. In two recent cases, being second in the door ended up costing companies tens of millions of dollars in fines as well as criminal exposure for the culpable executives."), available at http://www.justice.gov/atr/public/speeches/2247.htm.

[15] See "*Measuring the Value of Second-In Cooperation In Corporate Plea Negotiations"* Scott D. Hammond, Deputy Asst. Att'y. Gen. for Criminal Enforcement , Antitrust Division, U.S. Department of Justice, March 29, 2006, ("While the top prize is reserved for the amnesty applicant, a company that moves quickly to secure its place as "second in the door" and provides valuable cooperation can also reap substantial benefits." available at http://www.justice.gov/atr/public/speeches/215514.htm. In practice, there are also benefits place in the cooperation queue for the remainder of the companies and executives in the cartel. Within a company, culpability matters to the Division in charging/sentencing, but across the cartel, speed trumps role in the offense. For example, six AU Optronics executives were indicted. These benefits are not always uniform as circumstances vary in investigations.

comes forward can turn on factors such as their prior run-ins with the law that educates them about the process; familiarity with Antitrust Division practices, experience level of outside counsel, etc. The Division has a very effective strategy for investigating cartels, but the relative culpability of the individuals involved has been lost in sentencing.

Basing individual sentences on the speed with which the defendant cooperates is particularly ill suited to international cartels. It is naïve to think foreign executives, especially those lower down on the corporate ladder, will understand that they must get their own lawyer and act swiftly, or otherwise they will be labeled as "uncooperative," "unrepentant," and subject to harsher penalties. It is really unfortunate that the measure of a foreign executives' culpability, absent a 5K1.1 downward departure,[16] is primarily the volume of commerce. Guideline reform can help balance the government's need for cooperation with sentencing based on relative culpability

IV. Sentencing Courts Have Found the Guidelines to Be An Ineffective Measure of Culpability.

In the overwhelming majority of sentencing proceedings in antitrust cases, the government itself moves for a departure from the recommended sentencing guidelines range by making a 5K1.1 downward departure motion based on cooperation. But, where the government does not recommend a downward departure, the sentencing courts themselves have routinely departed. Instead of issuing guideline sentences, judges have departed and based sentences on the factors set forth in 18 U.S.C. Section 3553 (Imposition of Sentence)(Factors to be Considered in Sentencing). The statute directs the court to impose a "sentence sufficient, but not greater than necessary." Courts are directed to consider various factors including "the nature and circumstances of the offense and the history and characteristics of the defendant." The sentence should "reflect the seriousness of the offense," and to "afford adequate deterrence." The other factors "to protect the public from further crimes of the defendant" and to provide the defendant with "needed educational or vocational training" are not generally consider relevant in sentencing antitrust offenders. Applying these factors, courts have found departures from the antitrust sentencing guidelines warranted.

1. United States v. AU Optronics, et al., CR-09-0110 (N.D. Cal. June 10, 2010).

The Division had a very successful prosecution of the Liquid Crystal Display--Thin Film Transistor (LCD-TFT) cartel. But the sentencing in the LCD investigation, capped off by the sentencing of individuals AU Optronics defendants, illustrates the irrelevance of the volume of commerce in sentencing individuals. Nobody who pleaded guilty, regardless of position in or

[16] U.S.S.G. §5K1.1. Substantial Assistance to Authorities (Policy Statement) **"**Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

importance to the cartel, received a sentence of more than 14 months. Conversely, every indicted AU Optronics individual faced a guidelines range that approached a ten-year sentence no matter how far down the company chain of command they were. While a "trial penalty" is common in criminal cases, the extreme nature of this disparity is attributable the weight given to the volume of commerce in calculating a guidelines sentence.

After conviction at trial, the prosecutors had sought prison sentences of 10 years each for defendants H.B. Chen and Hui Hsuing, the President and Vice-President of AU Optronics. The sentencing guidelines range actually exceeded the Sherman Act maximum; the defendants each had an offense level of 121-151 months based on the huge volume of commerce in the global liquid crystal display conspiracy. The court soundly rejected the government's recommendation and sentenced each defendant to three years in prison. A third, lower-level AU Optronics executive, Steven Leung, was also convicted after a second trial (the jury having deadlocked in his first). The top of Leung's guidelines range of 108 to 135 months also exceeded the 10-year Sherman Act maximum. The government, however, recognized that the 36-month sentence on Chen and Hsuing set a ceiling for Leung who had a lesser role in the offense. The government recommended 30 months. Leung was sentenced to 24 months in prison.

2. United States v. Peake, Crim. No. 11-512 (D. PR. Nov. 17, 2001).

Frank Peake was convicted of participation in a price-fixing conspiracy that began in 2002 and affected billions of dollars of goods shipped by coastal water freight transportation between the U.S. and Puerto Rico. Peake had a total offense level of 29 under the Sentencing Guidelines for Antitrust Offenses §2R1.1. This translated to a guideline range of 87 to 108 months in prison; the prosecutors sought a sentence of 87 months.[17] The court relied on the sentencing factors in 18 U.S.C. § 3553(a) and sentenced Peake to 60 months in prison.[18] This was actually a significant victory for the Antitrust Division as it was a record sentence for a single count Sherman Act conviction—but it was still a substantial departure from the recommended guidelines sentence.

3. United States v. VandeBrake, Crim. No. 10-4025 (April 26, 2010).

There is a notable sentence where the district court departed *upward* from the guidelines. In *United States v. VandeBrake*,[19] the court departed upward and imposed what was at the time a record four-year sentence for Sherman Act violation. This was a case where the sentencing court felt the antitrust guideline did not adequately measure to the defendant's culpability. VandeBrake pled guilty to a three count Information filed charging three separate violations of the Sherman Act. Each count charged a separate conspiracy to fix prices and rig bids for the sales of ready mix concrete. The recommended guidelines sentencing range was 21-27 months.

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[17] The prosecutors took a conservative approach to calculating Peake's volume of commerce, possibly in anticipation that the court may depart from even the lower level used to calculate Peake's guidelines sentence.

[18] But the court also allowed Peake to reduce his prison time by one year if he participates in the Bureau of Prisons' residential drug and alcohol program.

[19] 771 F. Supp. 2d 961 (N.D. Iowa 2011).

The court found the guidelines range to be too low to punish adequately VandeBrake for the seriousness of his crime. The court turned to Section 3553(a) factors to consider, particularly "the history and characteristics of the defendant." The analysis of factors not relevant in setting the recommended antitrust guideline was not favorable to the defendant. The court noted that despite being an already very wealthy man, the defendant was motivated by greed.[20] The court was further disturbed that the defendant failed to admit that he was motivated by greed.[21] By contrast, the court took into account that it believed another defendant, with a smaller more vulnerable company, was motivated by an attempt to save jobs and prevent being squelched by the larger competitor.[22] Also weighing against VandeBrake was that the court found that he instigated at least two of the conspiracies charged.[23] Finally the Court noted that the defendant was one of the few white-collar defendants "where the sentencing record is totally devoid of any community work, participation in any service organization, or charitable giving."[24]

4. <u>U.S. v. Homy Hong-Ming Hsu</u>, Case No. 3 11 70758 (N.D. Cal. July 12, 2011).

In an unusual case, a foreign executive, Homy Hong-Ming Hsu, did not negotiate a 5K1.1 departure with the Division and did not go to trial, but simply pleaded guilty to participating in a seven year, $88 million international conspiracy to fix prices on aftermarket auto lights. The government recommended a 27-month guideline sentence. The court departed downward from the guidelines and imposed a sentence of 14 months.

5. The Government's Departure from Guideline Sentences

It is also worth noting that the vast majority of criminal cases brought by the Antitrust Division against individuals are resolved by negotiated pleas**.** The Division itself routinely makes dramatic departures from the recommended guidelines sentence, particularly in international cartel cases. In the LCD case the longest sentenced imposed, as part of a plea agreement, was 14 months on Jau-Yang "JY" Ho, the president of a Taiwanese company. Ho had a guideline range of 51 to 63 months but negotiated a sentence of 14 months.[25] Other high-ranking executives such as a Chairman/CEO and Global Sales managers received sentences between 9 and 7 months.[26]

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[20] *<u>Id.</u>* at 1005-1006. ("What the court finds most disquieting about VandeBrake history and characteristics is that VandeBrake was already wealthy when he embarked on and engaged in the charged conspiracies."

[21] *<u>Id.</u>* ("Stewart [a co-defendant] did not seek his company's continued profitability to be a means to benefit only himself. Rather, he saw his company's continued profitability as a way of ensuring the jobs and livelihood of his employees in the face of competition from the subsidiary of a multi-national conglomerate.").

[22] *<u>Id.</u>*

[23] *<u>Id.</u>* at 1006.

[24] *<u>Id.</u>*

[25] See http://www.justice.gov/atr/cases/f259300/259382.htm.

[26] Chieng-Hon Lin, the Chairman and CEO of Chunghwa Picture Tubes, was sentenced to 9 months in prison; see http://www.justice.gov/atr/cases/f243600/243697.htm; Jui Hung Wu, ex Director Global Sales for LG Phillips was sentenced to seven months in prison,
see http://www.justice.gov/atr/cases/f264300/264397.htm; Chang Suk Chung, V.P. of Monitor Sales, LG Philips was sentenced to 7 months in prison. see http://www.justice.gov/atr/cases/f243500/243519.htm. Chih-Chung Liu, VP of Sales of Chunghwa Picture Tubes was sentenced to 7 months in prison. see

These plea agreements were entered into pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, which gave the defendant the right to withdraw the plea if the agreed upon sentence was not imposed by the court. Of course it is normal for a prosecutor to offer a 5K departure for cooperation, but these are extreme departures and offered freely to anyone in the cooperating company who agreed to cooperate in what the government stated was "the most serious price-fixing cartel ever prosecuted by the United States."[27] If the government believed the recommended guidelines sentence actually captured the relative culpability of each defendant, the departures should be at least in some cases less significant and less freely granted. The volume of commerce adjustment in the current sentencing guidelines seems to function primarily as a penalty for going to trial.[28]

V. Collateral Negative Consequences of Arbitrary Sentencing Guidelines

There are several ways that the current guidelines with the emphasis on volume of commerce may actually have a negative effect on antitrust enforcement.

1. Sentencing Trials

Defendants who are not offered a 5K1.1 downward departure from the recommended sentencing guideline for cooperation may elect to go to trial to present to the sentencing court the facts relating to their culpability that are not measured by volume of commerce. Other defendants who have pleaded guilty and received tremendously discounted guidelines sentences may have to testify and the court can better measure relative culpability. For example, in AU Optronics, without a 5K departure, all six individual defendants faced a ten-year guidelines range (or close to it) even if they accepted responsibility and pleaded guilty. Instead, six defendants went to trial. Three were acquitted and it is possible they may have pled guilty if they were not looking at a 10-year sentence under the Guidelines. When rejecting the government's 10 year guideline recommendation and departing down to three years, the court said "The defendants thought they were doing the right thing vis-à-vis their industry and their companies. They weren't, but that's what they thought at the time."[29] It is difficult to convey that story to a court without a trial and solely in a presentence memorandum.

Of course, trials should occur and the government's evidence should be put to the test when the defendant believes he is not guilty. On the other hand, the government should not waste precious resources in a quest to attain the headline capturing ten-year maximum sentence. The Division has expended enormous resources on the AU Optronics trials (there have been three trials) and where convictions were obtained, the cases are still on appeal. Resources spent on

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http://www.justice.gov/atr/cases/f243600/243698.htm. All of these sentences were imposed pursuant to plea agreements with 5k1.1 downward departures for cooperation.

[27] See United States Sentencing Memorandum, United States v. AU Optronics, et al. [CR-09-0110 SI]. http://www.justice.gov/atr/cases/f286900/286934_1.pdf p. 11.

[28] The government also calculated a much higher volume of commerce for AU Optronics individual defendants (and corresponding greater upward adjustment) than any other defendants.

[29] United States v. AU Optronics Corporation, CR-09-0110 (N.D. Cal. Sept 20, 2012)(sentencing hearing).

unnecessary trials[30] could be devoted to other investigations. Investigations in and of themselves have a deterrent value—not only to the industry being investigated, but also in adjacent markets that become well aware of the investigation. As Attorney General Holder said "[W]e need to examine new law enforcement strategies—and better allocate resources."[31]

2. Will The Current Weight Given Volume of Commerce Hinder International Cooperation?

Another concern, while admittedly speculative, is whether the ten-year Sherman Act maximum and the sentencing guidelines that gives primary weight to volume of commerce will hinder foreign cooperation. The United States is still one of the few jurisdictions in the world that incarcerates a large percentage of convicted price-fixers. Many countries do not have criminal antitrust penalties at all, and those that do rarely if ever impose multi-year sentences as now routinely occurs in the United States. With the maximum sentence increased to ten years, and the guidelines structured so that members of international cartel (i.e. foreigners) are the ones likely to reach the maximum sentence, a sense of unfairness may limit the U.S. efforts at further cooperation. The 10-year maximum based principally on volume of commerce and the speed with which a target cooperates may even become a detriment in extradition efforts and other areas of cooperation.[32]

VI. Suggestions for Reform

The Antitrust Division has long been a proponent of the idea that jail sentences for individuals who commit antirust crimes are a necessary tool for just punishment and general deterrence. Without jail sentences for individuals, committing a cartel violation may be viewed simply as a cost of doing business—no matter how high the fine.

> It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them…. Hard-core cartel offenses are premeditated offenses committed by highly educated executives…. When an executive believes that incarceration is a possible consequence of engaging in cartel activity, he is far more likely to be deterred from committing the violation than if there is no individual exposure.[33]

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[30] I did not work on any of the cases referenced above. I do not know whether any of the AU Optronics individuals may have pleaded guilty if offered a non-guideline sentence.

[31] See, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates,* August 12, 2013, available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

[32] A ten-year sentence in many cases may seem to be a virtual life sentence to the very senior members of a corporation who are the typical antitrust defendants.

[33] See Scott D. Hammond, Deputy Ass't. Att'y Gen. Antitrust Division, U.S. Dept. of Justice, *Charting New Waters in International Cartel Prosecution,* Address before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (March 2, 2006), available at http://www.justice.gov/atr/public/speeches/214861.htm.

I completely agree with this view but disagree that a ten-year sentence, or even one approaching ten years, is necessary to provide deterrence to first offenders in garden-variety antitrust crimes. Accordingly, there are three principles that I believe should govern guidelines reform for sentencing individual antitrust defendants. First, the ten-year maximum should be saved for egregious cases based on factors such as recidivism, coercion of competitors or subordinates, or extraordinary efforts to prevent exposure of the cartel such as a payoff to, or retaliation against, a potential whistle blower. Second, the volume of commerce adjustment should be greatly reduced and applicable only to defendants who had the authority to commit their company to the cartel. Third, other adjustments should be added that more reasonably measure the culpability of individual members of a price fixing conspiracy.

XII. Specific Suggestions

1. Increase the Base Offense Level

Rather than adjust the offense level dramatically based on volume of commerce, I would raise the base offense level to 16 with a resulting range of 21-27 months. This captures the philosophy that short but certain jail sentences are key to deterring antitrust crimes—with "short" being redefined in light of the increase in the Sherman Act maximum to ten years in jail.

2. Volume of Commerce Changes

The most important antitrust guideline reform would be to downplay the volume of commerce adjustment by either eliminating it altogether, or at least knocking it from its perch as the most important determinant of a jail sentence. The following are some possibilities:

A. Eliminate volume of commerce altogether and use it only for corporate fines.

My rationale for this suggestion has already been explained.

B. Use volume of commerce only for the most senior level defendants that committed the company and subordinates to the cartel.

If the volume of commerce has a relationship to culpability, it should be limited to those actors who have a say in whether to engage their company in a cartel. Even here, however, I would limit the extreme sentences for large international cartels by lowering the upward adjustment for individuals.

Commerce More Than:

$50 mill	+1
$100 mill	+2
$250 mill	+3
$500 mill	+4

$1 billion +5

3. Role in the Offense Adjustments

While the volume of commerce is the biggest issue with making the antitrust guidelines non-responsive to actual culpability, there are other areas where the guidelines can be reformed to give more thought to actual culpability of the actors.

A. Eliminate the 4 level role in the offense enhancement "if five or more participants" (3B1.1. Aggravating Role).

There should be no enhancement based simply on the number of participants in the cartel. It is simply double counting. By their very nature, price fixing cartels involve numerous participants. And, this is certainly true as the cartel grows larger. It is highly unlikely that there will be an international cartel with five or fewer participants. This adjustment also makes no sense as a measure of culpability. How is a bid rigging conspiracy hatched by only the Presidents of three companies substantially more serious than a price fixing conspiracy where lower level employees are aware of the agreement and help carry it out? This role in the offense enhancement should not apply to antitrust violations.

B. Make a 1-3 level reduction for Mitigating Role More Certain (3B1.2(a) Mitigating Role)

This downward adjustment should be presumed if the defendants' role in the offense is as minimal as attendance at a price fixing meeting at direction of superior, calling a competitor to exchange prices or other conspiratorial tasks that don't show any initiative by the subordinate to expand, police or in other ways show independent action. Making the departure a 1 to 3 level downward adjustment, gives the court more flexibility to examine the facts of each case. There needs to be more separation between a senior executive who has the power to and elects to involve his company in a price fixing cartel and a junior level executive who attends meetings or talk to a colleague about pricing at the direction of a superior.

This change could actually be accomplished without a change in the guidelines, but rather a change in the policy of the Antitrust Division. The Antitrust Division could currently provide a two to four level reduction in the offense level based on Mitigating Role Section 3B1.2. But, as it currently stands, the Antitrust Division is intent on maximizing guidelines ranges and then departing for an individual who pleads and cooperates and sticking to the guidelines for an individual who loses the race to cooperate or simply believes he is not guilty.[34]

C. Upward Adjustment for Extraordinary Factors Such as Recidivism or Coercion of Competitors or Subordinates

[34] See Mark Rosman and Jeff VanHooreweghe, Antitrust Source, August 2012 "*What Goes Up Doesn't Come Down: The Absence of The Mitigating Role Adjustment In Antitrust Sentencing*, available at: http://www.wsgr.com/publications/PDFSearch/rosman-august-12.pdf.

I believe the maximum penalty of ten years in prison should not be driven by the volume of commerce of the cartel, but rather by extraordinary bad acts of an individual in carrying out the conspiracy. Recidivism is very rare in antitrust cases because anyone convicted one time is fully aware of the enormous consequences the crime has not only to that individual but to his family, his customers, his company, his colleagues, etc. It would take a determined criminal to give price fixing a second go. The Criminal History table should not apply to an antitrust recidivist. To engage in price fixing or bid rigging a second time is so premeditated and egregious that a court should simply assess the seriousness of the situation and sentence up to the Sherman Act maximum.

Another situation where the maximum may be appropriate is if an individual used express coercion to compel either a competitor or subordinate to participate in a cartel. This coercion is likely to be economic, but if it is express, it should be an aggravating factor.[35] Or, a superior may take explicit steps to prevent a subordinate (or competitor) from ending the conspiracy. These are just a few examples of egregious conduct that better measure criminal culpability than the size of an industry.

4. Other Possible Role in the Offense Adjustments

There are numerous role in the offense adjustments that are not currently in the antitrust guidelines that more accurately reflect individual culpability. Some suggested reforms are:

A. 4 level upward adjustment for most senior member of the cartel in a given firm.

The most senior member is obviously the most culpable member in the cartel for that individual firm and should be punished more harshly than subordinates. This adjustment would have the collateral benefit of encouraging lower level employees not to just cooperate and testify against their competitors, but to place the blame in their own corporation where it most belongs. By implicating a superior, an executive could remove the four level enhancements from himself, and implicate a more senior conspirator. While there is a danger that a subordinate could falsely implicate a superior, this is no worse than the current danger that a subordinate can protect a superior or falsely implicate a competitor to gain the 5K1.1 cooperation downward departure. In either case, the Division and the sentencing court will have to weigh credibility based on all the circumstances. The adjustment, however, is intended to place the blame at the most senior level where culpability exists.

B. 1-4 level enhancements if there is evidence that participant motivated by personal gain such as bonuses stock options and salary. (Unless already tagged as most senior member)

Conspirators can vary in their motivation. In some cases, a defendant may simply be making a bad choice to save a business (and jobs) whose time has come and should be in

[35] In some ways smaller competitors, or subordinates, may always feel subtle coercion to participate in a cartel. But, this recommendation targets express coercion.

bankruptcy. And in some cases, a conspiracy hatched out of desperation during a depressed market can morph into one where the cartel members regain their footing and continue to overcharge customers when profits are high. Motivation should play some role in determining an appropriate sentence. Providing a range of upward adjustment give discretion to the court to weigh the motivation in each case.[36]

5. Upward Adjustment for Lack of Antitrust Compliance Training

I believe the guidelines can be used to encourage companies to adopt effective antitrust compliance programs. One suggestion is to add +4 level adjustment if the defendant had the authority to institute an effective antitrust compliance program (as defined in the Sentencing Guidelines) and failed to do so.

If a senior member of a corporation is convicted of an antirust offense, it is obvious he did not adhere to an ethics and compliance program even if the company had one. But, in my opinion a senior executive who had the authority to implement an antitrust compliance program (typically c-suite executives) and failed to do so is even more culpable than an executive who violated a compliance program. Such an executive failed to give their subordinates the training they needed to perhaps resist their own involvement in the criminal activity and failed to give them the "whistle-blower" mechanism to stop the activity if they were instructed to get involved.

These proposals are based on my experience in prosecuting cartels. I have no doubt, however, that with the collective wisdom and experience of the Sentencing Commission, the judiciary, the defense bar and Antitrust Division, they can be improved upon. I do hope however that the underlying concerns that led me to make these proposals resonates with the Sentencing Commission and leads to further study of the issues raised.

[36] Section 5K2.11 (Lesser Harms) of the guidelines permits a court to depart downward from the guideline sentencing range if the defendant "commit[s] a crime to avoid a perceived greater harm…provided that the circumstances significantly diminish society's interest in punishing the conduct." This section has never been held to apply to an antitrust sentencing, and rightly so. In a capitalist economy, society has an interest in seeing a failing business fail—not be rescued by resort to collusion. Nonetheless, the defendant's motivation in committing the crime is relevant to sentencing.

XII. Conclusion

I very much appreciate the Sentencing Commission soliciting views on possible reform to the Antitrust Guidelines. I look forward to reading comments submitted by others. I am sure the Sentencing Commission will give my comments and all comments due consideration. I welcome the opportunity to answer any questions or further explain concerns I have. Thank you.

Respectfully submitted,

Robert E. Connolly
Partner
GeyerGorey, LLP
(215) 219-4418
Robert.connolly@geyergorey.com