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**VIA EMAIL**
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United States Sentencing Commission
Office of Public Affairs
U.S. Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC, 20002-8002

**RE: Comments on Proposed Priorities for Amendment Cycle Ending May 1, 2016**

Dear Commissioners:

*The views stated in this submission are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

On behalf of the Cartel and Criminal Practice Committee of the American Bar Association's Section of Antitrust Law, we are pleased to submit the attached comments on the United States Sentencing Commission's ("Commission") Proposed Priorities for Amendment Cycle Ending May 1, 2016. On June 2, 2014, the Commission invited comments on its policy priorities for the amendment cycle ending May 1, 2015. One priority was "a study of antitrust offenses, including examination of the fine provisions in §2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors)."[1] We are writing to urge the Commission to retain this priority for the upcoming amendment cycle ending May 1, 2016, and to invite further comments and to hold public hearings on a study of antitrust offenses.

We appreciate that the Commission has limited time and resources in each amendment cycle to devote to particular priority areas, but we urge that the Commission remain focused on the study of the antitrust sentencing Guidelines for the following reasons. First, the 10% overcharge assumption has not been questioned or evaluated by the Commission in over 28 years. Many commentators and scholars have issued studies and opinions concluding that the 10% overcharge is not an accurate assumption of the gain realized by conspirators. Second, the Guidelines do not provide any clarity or explanation on how to calculate the "volume of

[1] http://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20140602_FR_Proposed_Priorities.pdf.

commerce affected" by the conspiracy, which composes the base fine in §2R1.1. Third, the Guidelines for individual conspirators have not been evaluated in many years, and it is unclear whether volume of commerce is a helpful factor in assessing an individual participant's culpability. Finally, §2R1.1 does not provide any adjustment in corporate fines based on compliance programs, and in practice, the U.S. Department of Justice ("DOJ") Antitrust Division does not give credit under §8C2.5(f)(3)(C) to companies that plead guilty.

A more detailed explanation of each of these issues is set forth below. Please note that these views are being presented only on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide you further comments.

Sincerely,

Howard Feller
Chair, Section of Antitrust Law

10 Percent Overcharge

It has been 28 years since the Commission formulated its presumption that the expected overcharge from a cartel was 10 percent and, with that, implemented a base fine of 20 percent of a defendant company's volume of commerce. Since then, economists and lawyers have considered whether these (a) accurately reflect the typical gain realized by conspirators; and (b) provide effective deterrence to the formation of cartels. Not surprisingly, commentators have taken varying positions.

Some believe that the existing fine provisions are appropriate and do not require revision. In a July 29, 2014 letter to Judge Patti B. Saris, the Chair of the Commission, the DOJ wrote that "based on current evidence, the Department believes the typical cartel does increase prices more than 10 percent, but the actual average overcharge is subject to debate." However, the DOJ also wrote that it did not "believe it would be a worthwhile expenditure of resources to put any process in motion to increase the 10 percent presumption marginally" as "the current Guidelines already provide a mechanism to increase fines by imposing fines higher in the Guidelines range" and any change in the underlying overcharge presumption "would have only a marginal impact on our ability to adequately deter, detect and punish cartel offenses."[2]

Some point to empirical evidence of the size of overcharges realized through price fixing, bid rigging or other forms of collusion among competitors to suggest that the 10 percent presumption, and fines and deterrence, are too low. A 2014 study by John M. Connor surveyed more than 700 published economic studies that contained 2,041 quantitative estimates of the overcharges by hard-core cartels.[3] Connor concluded that the median long-run overcharge for all types of cartels was 23 percent; that 79 percent of cartel overcharges were above 10 percent; and that 56 percent were above 20 percent.[4] In a 2012 paper, Connor and Robert Lande concluded that the median overcharge in 25 litigated cartel verdicts was 22 percent.[5] For these reasons and others, in July 2014 the American Antitrust Institute asked the USSC to double the overcharge presumption to 20 percent.[6]

A recent study by Marcel Boyer and Rachidi Kotchoni adjusted the 2014 Connor data and analysis for what the authors believe to be problems with statistical bias. After doing so, they still found that the median overcharge exceeded 10 percent by at least 5 percentage points:

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[2] Jonathan Wroblewski, Public Comment to the U.S. Sentencing Commission on Proposed Priorities for 2015 Amendment Cycle, Office of the Attorney General, U.S Department of Justice, 24-25 (July 29, 2014), *available at* http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf.

[3] John M. Connor, *Cartel Overcharges*, RESEARCH IN LAW AND ECONOMICS, 29, Tables 6 and 12 (March 2014) [*also available as* "Price-Fixing Overcharges: Revised 3rd Edition," SSRN Working Paper No. 2400780, February 24, 2014, *available at* http://ssrn.com/abstract=2400780].

[4] *Id.* This study also found that the mean overcharge was 49%. Even though the Sentencing Guidelines discuss "average" overcharges, we believe the median is a better measure to employ, so we will discuss median results.

[5] John M. Connor and Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, CARDOZO LAW REVIEW, 34, 457 (2012), *available at* SSRN: http://ssrn.com/abstract=1917657.

[6] Albert A. Foer, John M. Connor, and Robert H. Lande, Public Comment to the U.S. Sentencing Commission on Proposed Priorities for 2015 Amendment Cycle, the American Antitrust Institute, at 2 (July 28, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/AAI.pdf.

- The median overcharge for approximately 336 cartels which operated in the United States was 15.08 percent; and had increased from 14.25 percent for cartels that ended prior to 1973, to 15.72 percent for cartels that ended in 1973 or later.

- The median overcharge for *domestic* cartels, where all parties generally are headquartered in one nation, was 14.34 percent; and had increased from 13.24 percent for cartels which ended prior to 1973 to 14.99 percent for cartels which ended in 1973 or later.

- The median overcharge for *international* cartels, where cartel members generally are headquartered in two or more nations, was 18.6 percent; and had increased from 14.76 percent for cartels which ended prior to 1973 to 21.12 percent for cartels which ended in 1973 or later.[7]

Some argue that increasing corporate fines does not improve deterrence and that the focus should be on penalizing the individuals who enter into collusive agreements with their competitors. In their July 28, 2014 letter to the USSC, Judge Douglas H. Ginsburg and Joshua D. Wright, pointing to their article *Antitrust Sanctions* in the Autumn 2010 Competition Policy International, urged "the Commission to focus its attention for now not upon increasing fines to organizations … but instead upon increasing and adding penalties for the individuals responsible for the antitrust violations within offending organizations" as "there is no empirical evidence to suggest the ever-increasing penalties levied by antitrust enforcement agencies in the past 20 years have had a significant effect upon deterrence, and that there is every reason to believe that individual penalties are far too modest to induce optimal compliance with the law."[8]

Finally, while recognizing the additional time and expense associated with calculating overcharges on a case-by-case basis, some are not comfortable using a 10 percent overcharge and 20 percent base fine to negotiate a plea agreement with the DOJ. This prescribed penalty may be too low or too high for a given defendant, and some suggest that the defendant and the DOJ should calculate the overcharge in each instance. In this regard, under the Supreme Court's decisions in *Southern Union*[9] and *Apprendi*,[10] the DOJ must prove beyond a reasonable doubt any facts relied upon to invoke the Alternate Fines Act and seek a fine above the statutory maximum. While the Supreme Court's decisions would certainly appear to apply in the context of sentencing after a conviction, it is less clear whether the DOJ would seek a fine above the statutory maximum where it has not adduced sufficient facts to prove beyond a reasonable doubt the requisite gain or loss under the Alternate Fines Act.

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[7] Marcel Boyer and Rachidi Kotchoni, *How Much Do Cartels Overcharge?*, Table 6 at 23 (Toulouse School of Economics, Working Paper No. 14-462, 2014), *available at* http://www.tse-fr.eu/publications/how-much-do-cartels-overcharge.

[8] Douglas H. Ginsburg and Joshua D. Wright, Public Comment to the U.S. Sentencing Commission on Proposed Priorities for 2015 Amendment Cycle, at 2 (July 28, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/Ginsburg_Wright.pdf; *see also* Douglas H. Ginsburg and Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POLICY INTERNATIONAL, no. 2, Autumn 2010, at 3-39.

[9] *Southern Union Co. v. United States,* 132 S. Ct. 2344 (2012).

[10] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Given these different viewpoints, the empirical evidence and the passage of 28 years, we believe that now is the time for the USSC to consider whether to modify the assumed overcharge from collusion and the base fine associated with such an antitrust offense.

<u>Volume of Commerce</u>

Section 2R1.1 provides the framework for the calculation of an organization's fine for engaging in criminal antitrust offenses in violation of the Sherman Act, 15 U.S.C. § 1. The fine is directly tied to the company's "volume of commerce." Section 2R1.1 states that "[f]or purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation."

Though the base fine for an antitrust violation under §2R1.1 derives from a corporation's or individual's "volume of commerce," the Guidelines and its commentary do not provide any definition or explanation for how to calculate volume of commerce. This omission is further complicated by (a) the DOJ's focus on international cartels that sell goods and provide services around the world; (b) the existence of cartels that conspired about one element of a product or service rather than a multi-component product or service; and (c) the Circuit split among courts that have interpreted "volume of commerce" under §2R1.1, which only creates added confusion in interpreting the Guidelines. We urge the Commission to revisit §2R1.1 and consider whether a more precise explanation for "volume of commerce" is necessary.

*A. International Commerce*

The Guidelines do not currently provide meaningful guidance concerning what particular commerce should be used in calculating volume of commerce, particularly for sales occurring outside of the United States. The result has been an ad hoc approach to sentencing in international cartel cases that involve multijurisdictional or international conduct. Non-U.S. commerce has been included in volume of commerce calculations in some sentencing decisions, but excluded in other sentencing decisions that are not obviously distinguishable. Moreover – and perhaps more problematic – it is often impossible to determine from the sentencing record whether and to what extent non-U.S. commerce is incorporated into sentencing decisions. Guidance and clarity is necessary to align the Guidelines approach with governing law and to increase transparency, predictability, and consistency of sentences in corporate antitrust cases.

We submit that there are several principles that likely merit consideration in determining whether and how to account for non-U.S. commerce in antitrust sentencing. As explained, these principles are not addressed in the current version of §2R1.1.

1. <u>Legal Limits on the Extraterritorial Scope of the Underlying Statute:</u> The extraterritorial application of the Sherman Act is limited by the terms of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"). That statute precludes application of the Sherman Act to conduct involving non-import foreign commerce unless the conduct produces a "direct, substantial and reasonably foreseeable effect" on U.S. commerce. Section 2R1.1 is silent on the FTAIA. It would be helpful for practitioners if §2R1.1

addressed the limitations imposed by the FTAIA and how those limitations should affect the calculation of a corporate fine.

2. Optimal Deterrence: In order to provide the appropriate level of deterrence, antitrust sentences should be proportionate to the impact of the illegal conduct. Section 2R1.1's fine methodology is modeled off of this principle, with the volume of commerce serving as the proxy for approximating the effects of the underlying conduct. This approach, however, often leads to over-deterrence (and excessive penalties) in international matters where the violation may produce effects both inside and outside the United States and where multiple jurisdictions are conducting investigations and imposing duplicate fines for the same conduct.

3. Principles of International Comity: The sentencing decisions of the United States implicate issues of international comity in cases involving international violations. Other countries have an interest in regulating commerce within their borders and have in the past expressed concerns about the application of U.S. antitrust laws and remedies for violations of that law that impinge on those sovereign interests. Guidance would be helpful to clarify what commerce should be properly considered in international antitrust cases.

*B. Components of Volume of Commerce*

The Guidelines are silent regarding how to calculate volume of commerce when the product or service that is the subject of collusion is not sold on a standalone basis but rather is a component of a finished product or service. For example, competitors may respond to an increase in labor costs by conspiring to add a uniform increase in a handling charge while nonetheless continuing to compete on the price of the underlying goods. In such cases, the Guidelines do not address whether volume of commerce should be calculated based solely on the amount of the handling charge that was the object of the collusion or on the total charge for the product. The difference in approaches can have a significant effect on the resulting base offense level or base fine, particularly in cases where the component price represents only a small fraction of the total price.

This issue has already arisen in a major investigation involving fuel surcharges in the air cargo industry. There, airlines responded to an increase in fuel costs by colluding with respect to a surcharge added to air freight shipments. The DOJ's investigation eventually led to criminal charges against 22 entities and 21 individuals. In each of those cases, the DOJ took the position that the volume of commerce should be calculated on the basis of the total air freight price charged to customers, not just on the colluded fuel surcharge. Defendants entered into plea agreements that accepted the DOJ's interpretation, but, because there were no contested sentencings, no court has ruled on whether that interpretation is correct.

The DOJ's position is based primarily on the premise that calculating the volume of commerce for a component would add undue complexity to the sentencing process. However, as commentators have noted, that premise is untested and, indeed, in the air cargo cases, the component prices (i.e., the fuel surcharges) were publicly listed.[11] Moreover, the DOJ's approach appears inconsistent with the Sentencing Commission's stated purpose in tying the offense level and base fine for antitrust crimes to the volume of commerce. As explained in the Application Notes, the Commission believed that the offense level and base fine should be tied to the damage caused or profit obtained by the defendant. Because damage and profit are difficult to establish, the Commission chose to use volume of commerce as "an acceptable and more readily measurable substitute."[12] However, the DOJ's total price approach removes the link between damage and overcharge – which are a function of only the component price increase – and volume of commerce, which is not. Thus, as the same commentators explain:

> Criminal sentencing based on the total-price volume of commerce . . . creates a peculiar inequity among defendants with different levels of culpability. If a calculation based on total price is appropriate for defendants that conspire to fix only the price of fuel surcharges, then how should the volume of commerce be calculated in a situation where defendants fix all components of the total price?[13]

*C. Circuit Court Division on "Volume of Commerce"*

As a result of the Guidelines' silence on how to interpret "volume of commerce" under §2R1.1, several U.S. Circuit Courts have weighed in – unfortunately, resulting in greater confusion. The Sixth Circuit takes the broadest interpretation of "volume of commerce affected," holding that there is a presumption that affected commerce includes all sales "during the period of the conspiracy, without regard to whether individual sales were made at the target price."[14] Though the DOJ routinely enforces the *Hayter Oil* approach, the Second Circuit rejected it in *United States v. SKW Metals & Alloys, Inc.*, explaining that "a price-fixing conspiracy that fails to influence market transactions, notwithstanding overt acts sufficient to support criminal responsibility has affected no sales within the meaning of the Guidelines."[15] The Second Circuit further clarified that "if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals were not 'affected by' the illegal agreement, and should be excluded from the volume of commerce calculation."[16] In *United States v. Andreas*, the Seventh Circuit took elements from the holdings of both *Hayter Oil* and *SKW Metals*, holding that there is a rebuttable presumption "that all sales during the period of the conspiracy have been affected by the illegal agreement."[17] However, the Court in *Andreas* elaborated that "sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense."[18]

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[11] *See* Melissa H. Maxman and Elizabeth L. Holdefer, *Volume of Commerce and Criminal Sentences for Antitrust Violations – Alternative Interpretations in the Air Cargo Fuel Surcharge Cases,* THE ANTITRUST SOURCE, August 2011, at 4 (hereinafter "Maxman and Holdefer").
[12] *See* U.S.S.G. § 2R1.1, Background to Application Notes.
[13] Maxman and Holdefer at 3.
[14] *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995).
[15] *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999).
[16] *Id.* at 91.
[17] *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000).
[18] *Id.* at 677-78; *see also United States v. Giordano*, 261 F. 3d 1134, 1146 (11th Cir. 2001) (holding that there is a rebuttable presumption that all sales during the effective period of a conspiracy were "affected by" the conspiracy, though "the defendant may rebut that presumption by offering evidence

As demonstrated, determining a corporation or individual's attributed volume of commerce under §2R1.1 is complex. Although the DOJ Antitrust Division repeatedly informs the Commission that this complexity supports continuing to use the Guidelines as written, in fact, the lack of guidance in §2R1.1 makes it difficult for counsel to effectively predict potential criminal fines resulting from antitrust violations.

Individuals under §2R1.1

In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act amended the Sherman Act to increase the maximum jail sentence to ten years in prison.[19] In 2005, U.S.S.G. §2R1.1 was correspondingly amended to reflect this more than tripling of the maximum jail sentence. Since the Sentencing Commission last amended the antitrust guideline, effective November 1, 2005, more than three hundred individuals have been sentenced for antitrust crimes under §2R1.1.[20] There is now ample data available to study how the Guidelines have been implemented and whether any reform/adjustment to the Guidelines is warranted.[21]

A study of sentencings under §2R1.1 seems particularly warranted because it appears to those practicing in the field that virtually every sentence of imprisonment imposed based upon a Sherman Act conviction (15 U.S.C. § 1) has been a downward departure from the recommended Guidelines range. The vast majority of these departures have come after the government moved the Court to depart from the Guidelines under U.S.S.G. § 5K1.1 (substantial assistance to authorities). But even when individuals were sentenced upon conviction at trial, courts have uniformly departed from the Guidelines.[22] The near universal inclination of courts to depart from the Guidelines indicates that sentencing courts do not treat §2R1.1 as "carving out a 'heartland,' a set of typical cases embodying the conduct that each

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that certain sales, even though made during a period when the conspiracy was effective, were not affected by the conspiracy").

19 Pub. L. No. 108-237, tit. II, 118 Stat. 661, 665.

20 U.S. Department of Justice's Antitrust Division Workload Statistics FY 2004 – 2013, *available at* http://www.justice.gov/atr/public/workload-statistics.html. The statistics show 312 individuals sentenced from FY 2006 through FY 2013. The Antitrust Division has not published more recent statistics on individual sentencings.

21 The Commission itself has not analyzed sentencing date for antitrust offenses since 2008. *See* Beryl A. Howell, *Sentencing of Antitrust Offenders: What Does the Data Show?*, *available at* http://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf.

22 An example is the case of *United States v. AU Optronics Inc.*, *et al.*, Case No. CR-09-0110 (SI) (N.D. Cal.). Three individuals were convicted after trial. H.B. Chen, President, and Hui Hsuing, Vice President, each had a recommended guideline prison range of 121-151 months, exceeding the ten-year maximum. The government described Chen and Hsiung as "leaders and organizers of the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted." United States' Sentencing Memorandum (filed Sept. 20, 2012) at 51, *available at* http://www.justice.gov/atr/cases/f286900/286934_1.pdf. The government sought 120-month prison sentences, the statutory maximum. Both defendants were sentenced to 36 months. Steven Leung, Senior Manager of the Desktop (Monitor) Display Business Group, was convicted in a separate trial. His recommended guideline range was 108 to 135 months. He was sentenced to 24 months. Three other AU Optronics executives were acquitted, but had they been convicted, they would have faced similar volume-of-commerce adjustments, depending on their length of time participating in the cartel.

guideline describes."[23] The decade of sentencings under the current antitrust guideline give the Commission sufficient data upon which to consider whether changes are warranted to make the antitrust guideline more reflective of practical and legal realities, and more useful for courts and litigants.

In response to the June 2, 2014 Federal Register notice listing §2R1.1 as a policy priority, the Commission received submissions from leading scholars and practitioners in the field related to the sentencing of individuals. One submission came from Douglas H. Ginsburg, U.S. Court of Appeals Judge, District of Columbia and Joshua D. Wright, Federal Trade Commissioner.[24] Another submission came from Robert E. Connolly, now in private practice, but a former career Antitrust Division prosecutor and Chief of the Division's Philadelphia Office.[25] We are not endorsing the particular recommendations made in these, or any of the other submissions, but suggest that the proposals may appropriately be the subject of further study and public hearings.

As part of its study of economic crimes, the Commission has already issued proposed amendments and held hearings on the fraud Guidelines. The proposed revisions to the fraud Guidelines came "after a multi-year study, which included a detailed examination of sentencing data, outreach to experts and stakeholders, and a September 2013 symposium at John Jay College of Criminal Justice in New York."[26] This extensive study was prompted in part by criticism from the defense bar and judiciary that the fraud Guidelines were too heavily driven by monetary loss.

There is also concern that §2R1.1 as applied to individuals assigns too much weight to the volume of commerce affected by the charged conduct, as the volume of commerce is just one measure of individual culpability. Antitrust violations are conspiratorial crimes typically involving numerous individuals with different levels of responsibility/culpability within the organization. This is particularly true as the size of the organization and volume of commerce increases. Yet, under the current Guidelines, each individual from Chairman of the Board down to a salesperson receives the same volume of commerce upward adjustment, assuming the same length of participation in the conspiracy. Also, as noted, courts nearly always depart from the recommended guideline sentence in antitrust cases. For these reasons, the concern about §2R1.1 lies in contrast from the concern already considered by the Commission with respect to the fraud Guidelines. Further study may reveal if the volume of commerce adjustment warrants revision or elimination with respect to individuals.

Compliance Programs and §2R1.1

While §8C2.5(f)(3)(C) provides for up to a three point reduction in the culpability score for a company compliance program, as a practical matter, the Antitrust Division has not

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23 U.S. SENTENCING GUIDELINES MANUAL ch. 1 pt. A, 4b, (2014).
24 *See supra* note 8.
25 Robert E. Connolly, Public Comment to the U.S. Sentencing Commission on Proposed Priorities for 2015 Amendment Cycle, *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/Connolly.pdf.
26 Press Release, United States Sentencing Commission, U.S. Sentencing Commission Seeks Comment on Revisions to Fraud Guidelines, Increase in Hydrocodone Sentences (January 9, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150109_Press_Release.pdf.

agreed to seek such a reduction nor has the existence of a corporate compliance program been an effective point in negotiation for cooperating companies that are not the amnesty applicant.

At least two rationales have been put forth by the Antitrust Division for the reluctance to seek a point reduction for compliance programs, including:

- There is a rebuttable presumption that the compliance program was not effective if an employee with substantial authority[27] participated in, condoned or was willfully ignorant of the offense. The majority of cartel cases investigated by the Antitrust Division involve company employees who are viewed by the Division as having a sufficiently high level of authority that credit will not be given under §8C2.5(f)(3)(B)(i)-(ii).

- If the company did not come forth as an amnesty applicant, the company cannot utilize the provisions of §8C2.5(f)(3)(C) to avoid the rebuttable presumption. Specifically, the program does not meet the requirement that "the compliance and ethics program detected the offense before discovery outside of the organization or before such discovery was reasonably likely."[28]

There are a variety of considerations that weigh on both sides of a potential revision, making this a worthy topic for consideration by the USSG, Antitrust Division, and members of the cartel bar.

The current language and interpretation of the Guidelines, which results in no possibility of a reduction, does not acknowledge or reward the second-in-the-door companies that invest resources in robust compliance programs. Given the concealed nature of antitrust violations, effective programs may not have a 100% detection rate. As a result, practitioners perceive that the development of the antitrust compliance practice lags behind the progress and attention given to other areas – the Foreign Corrupt Practices Act, for example.

Changes to §2R1.1with regard to the treatment of compliance programs may be perceived as undermining the certainty of the Antitrust Division's leniency program, which currently sends a clear message that only a compliance program that results in an amnesty

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[27] "'Substantial authority personnel' means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (*e.g.,* a plant manager, a sales manager), and any other individuals who, although not part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority." U.S. Sentencing Guidelines Manual §8A1.2 cmt. 3(C) (2012)

[28] *See* United States Attorneys' Manual, Principles of Federal Prosecution of Business Organizations, 9-28.400 - Special Policy Concerns (August 2008). "As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government."

application will be credited. Indeed, the lack of this certainty in other criminal areas has been the subject of critical commentary by the broader defense bar.

Yet, the Antitrust Division's overall approach to compliance programs may be viewed as inconsistent with the view of the Criminal Division and other prosecuting components, which do consider compliance programs for all conspirators – not just an amnesty applicant. For example, even at earlier stages of cases (*e.g.*, at the charging stage) other prosecuting components of DOJ consider compliance programs under the Filip factors (which specifically exempt antitrust offenses) and the Guidelines.

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For all of these reasons, we urge the Commission to continue to keep antitrust crimes Guidelines (§2R1.1) as a policy priority in the upcoming amendment cycle and to invest resources in studying §2R1.1 and its effectiveness.