PRIMER

ANTITRUST

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Prepared by the Office of General Counsel, U.S. Sentencing Commission

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I. INTRODUCTION

This primer is intended to provide an overview of sentencing-related criminal antitrust topics. The information provided is drawn from §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) and its commentary, other related portions of the *Guidelines Manual*, and applicable caselaw. This primer is not, however, intended as a comprehensive compilation of all case law addressing these issues. The selected case law focuses on published circuit precedent, and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once.

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se* (*i.e.*, without any inquiry in individual cases as to their actual competitive effect.)[1]

Section 2R1.1 applies to violations of the antitrust laws. There is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging[2]) and horizontal market-allocation,[3] can cause serious economic harm, although they are not unlawful in all countries. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.[4]

When the Commission promulgated §2R1.1 it stated that deterrence was the primary goal in sentencing antitrust offenses, deviating from its usual empirical approach, which relied on data drawn from sources like presentence investigation reports and United States Parole Commission guidelines and statistics.[5] Thus, the Commission

[1] USSG §2R1.1, comment. (backg'd.).

[2] Bid rigging is most commonly defined as an agreement between two or more competitors to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded based on a competitive bidding process. *See* Sec. on Antitrust Law, American Bar Ass'n, Sample Jury Instructions in Criminal Antitrust Cases, No. 7 (1984) (Sample Jury Instructions).

[3] Market-allocation behavior includes, *inter alia*, an agreement among potential competitors to divide specific customers or types of customers, products, or territories among themselves to prevent competitive supply. *See* PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR (2015)(hereinafter PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES).

[4] USSG §2R1.1, comment. (backg'd.).

[5] *See* USSG, Ch.1 Pt. A, intro comment. (The Commission "departed from the data at different points for various important reasons . . . [including that] the data revealed inconsistencies in treatment, such as punishing economic crimes less severely than other apparently equivalent behavior.")

intended that prison terms for antitrust offenders "should be much more common, and usually somewhat longer" than before the guidelines.[6]

The background commentary states that "the guidelines require a period of confinement in the majority of cases that are prosecuted, including all bid-rigging cases." It also states that " [s]ubstantial fines are an essential part of the sentence," and that most antitrust defendants have the resources and earning capacity to pay those fines.[7]

BID-RIGGING, PRICE-FIXING, OR MARKET-ALLOCATION AGREEMENTS AMONG COMPETITORS - §2R1.1

This section of the primer discusses the statutes, sentencing guidelines, and case law relating to bid-rigging, price-fixing, or market-allocation agreements among competitors.

II. STATUTORY SCHEME

The primary offenses sentenced under §2R1.1 are those prosecuted under the Sherman Antitrust Act, codified at 15 U.S.C. §§ 1-38. The Sherman Act (Act) prohibits every contract, combination, or conspiracy in unreasonable restraint of trade or commerce.[8] Specifically, the Act prohibits (i) an agreement; (ii) which unreasonably restrains competition; and (iii) which affects interstate commerce.[9] "Conspiracies under the Sherman Act are on 'the common-law footing;' they are not dependent on the 'doing of any act other than the act of conspiring' as a condition of liability."[10] The Supreme Court has limited the scope of the law, stating that "[the Act] is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof."[11]

Violations of the Sherman Act are subject to a statutory 10-year maximum term of imprisonment.[12] In addition, individual defendants face a maximum fine of $1,000,000

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[6] *Id*. ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses . . . that in the Commission's view are serious.")

[7] USSG §2R1.1, comment. (backg'd).

[8] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (discussing judicial interpretation of the Sherman Act).

[9] Mardirosian v. American Institute of Architects, 474 F. Supp. 628, 636 (D.D.C. 1979).

[10] U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 252 (1940) (internal citations omitted).

[11] United States v. Standard Oil, 221 U.S. 1, 87 (1911).

[12] 15 U.S.C. § 1. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237,

while corporations face a maximum fine of $100,000,000.[13]

Section 3 of the Act, also referenced to §2R1.1 in Appendix A, extends the protections of the Sherman Act to United States Territories and the District of Columbia, also punishable by 10 years' imprisonment, a maximum fine of $1,000,000 for individuals and a maximum fine of $100,000,000 for corporations.[14]

Appendix A also references to §2R1.1 violations of 18 U.S.C. § 1860 (Bids at Land Sales). Section 1860 criminalizes anti-competitive behavior at public sales of federal parcels of land, and sets forth a statutory maximum punishment of not more than one year imprisonment, a $1,000 fine, or both.[15]

III. Guideline Overview: §2R1.1

A. Base Offense Level

The base offense level at §2R1.1 for bid-rigging, price-fixing, or market-allocation agreements among competitors is 12.[16] The base offense level ensures that penalties for antitrust offenses will be coextensive with the base offense levels for sophisticated frauds sentenced under a different Chapter Two guideline.[17]

B. Specific Offense Characteristics

In addition to the base offense level, §2R1.1 contains two specific offense characteristics relating to:

(1) Whether the conduct involved participation in an agreement to submit non-competitive bids;[18] and

§ 215, 118 Stat. 661, increased the statutory maximum term of imprisonment under sections 1 and 3(b) from three years, and increased the maximum fine provision from $350,000 for individuals and from $10,000,000 for corporations under both sections.

13 *Id.*

14 15 U.S.C. § 3(b).

15 18 U.S.C. § 1860.

16 USSG §2R1.1(a).

17 USSG, App. C, amend. 678 (effect. Nov. 1, 2005).

18 USSG §2R1.1(b)(1).

(2) Upward adjustments when the volume of commerce attributable to a defendant exceeds $1,000,000.[19]

The section also provides special instructions regarding fines for both individuals[20] and organizations.[21]

IV. Specific Guideline Application Issues

A. Non-Competitive Bidding Agreement - §2R1.1(b)(1)

If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level.

The specific offense characteristic at §2R1.1(b)(1) is applicable in cases involving bid-rigging, which, as noted above,[22] generally involve an agreement between two or more competitors to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded based on a competitive bidding process. Bid-rigging behavior includes, *inter alia*, an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding, or any other agreement with respect to bidding that affects, limits, or avoids competition among competitors.[23]

The Commission recognized that relying solely on the volume of commerce could understate the measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging.[24]

19 USSG §2R1.1(b)(2).

20 USSG §2R1.1(c)(1).

21 USSG §2R1.1(d).

22 *See supra* note 1.

23 *Id*.

24 USSG §2R1.1, comment. (backg'd.). In 2017, 25 of the 26 cases sentenced under §2R1.1 also had an enhancement for bid-rigging. *See* Use of Guidelines and Specific Offense Characteristics, Guideline Calculation based, FY 2017 (2018).

B. Volume of Commerce - §2R1.1(b)(2)

If the volume of commerce attributable to the defendant was more than $1,000,000 adjust the offense level as follows:

	Volume of Commerce (Apply the Greatest)	Adjustment to Offense Level
(A)	More than $1,000,000	add **2**
(B)	More than $10,000,000	add **4**
(C)	More than $50,000,000	add **6**
(D)	More than $100,000,000	add **8**
(E)	More than $300,000,000	add **10**
(F)	More than $600,000,000	add **12**
(G)	More than $1,200,000,000	add **14**
(H)	More than $1,850,000,000	add **16**[25]

The Commission determined that tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun.[26] The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish.[27] The Commission determined, however, that volume of commerce is an acceptable and more readily measurable substitute.[28] Volume of commerce, rather than loss, serves as the basis for offense level calculation because damages are difficult and time-consuming to determine, and the scale or scope of the offense as measured by the volume of commerce is an acceptable proxy for the harm caused by the defendant's conduct.[29]

The guideline provides at §2R1.1(b)(2) that, for purposes of this enhancement, the volume of commerce attributable to an individual participant in a conspiracy is "the volume that was done by him or his principal in goods or services that were affected by the

25 The Commission adjusted this table for inflation in 2015, and the amounts are based on the Consumer Price Index. *See* USSG App. C, amend. 791 (effect. Nov. 1, 2015).

26 USSG §2R1.1, comment. (backg'd.).

27 *See, e.g.*, United States v. Giraudo, 2018 WL 2197703 (N.D. Ca. 2018) (noting that the guideline provides volume of commerce as only method for calculating harm, rather than more direct measures).

28 Additionally, the limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well. *See* USSG §2R1.1, comment. (backg'd). *See also* United States v. Diaz, 731 F. Appx 703, 704 (9th Cir. 2018)(unpub) (relevant amount is overall amount of commerce involved in scheme, not decrease in value resulting from scheme).

29 USSG §2R1.1 comment. (backg'd.).

violation,"[30] and multiple counts should be treated cumulatively.[31]

Courts have taken a variety of approaches to calculating the volume of commerce, depending on their interpretation of the phrase "affected by the violation" in §2R1.1(b)(2). The first circuit to address this issue was the Sixth Circuit, which held that the term "volume of affected commerce" that was "affected by the violation" includes all the sales made by the defendant within the scope of the conspiracy. A few years later, both the Second and the Seventh Circuits disagreed with the Sixth Circuit and held the term "volume of affected commerce" includes only those sales actually influenced by the conspiracy. After analyzing these three opinions, the Eleventh and the First Circuits held that there is a rebuttable presumption that all sales made by the defendant are included in the term "volume of affected commerce," as discussed more fully below.

Specifically, in *United States v. Hayter Oil Co.*, the Sixth Circuit defined the term "volume of affected commerce" to include "all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price."[32] In *United States v. SKW Metals & Alloys, Inc.*, the Second Circuit disagreed with the approach taken by the Sixth Circuit to include all sales and held 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."[33] In *United States v. Andreas*, the Seventh Circuit joined the Second Circuit to hold that "the purpose of the §2R1.1 enhancement is to gauge the harm inflicted by the illegal agreement . . . [t]heoretically, 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."[34]

Addressing the standards from each of the other circuits, in *United States v. Giordano*, the Eleventh Circuit held that "[o]nce the conspiracy is found to have been effective during a certain period, there arises a rebuttable presumption that all sales during that period were 'affected by' the conspiracy . . .. The defendant may rebut that presumption by offering evidence that certain sales, even though made during a period when the conspiracy was effective, were not affected by the conspiracy."[35] The First

[30] USSG §2R1.1(b)(2).

[31] USSG §2R1.1(b)(2). *See also Giraudo*, at *2 (noting although co-conspirators not liable for sales made by other co-conspirators by virtue of association, volume of commerce calculation includes commerce done by participants and principals, and law treats partnership as principal).

[32] United States v. Hayter Oil Co. of Greeneville, Tenn., 51 F.3d 1265, 1273 (6th Cir. 1995).

[33] United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 91 (2d Cir. 1999).

[34] United States v. Andreas, 216 F.3d 645, 677-78 (7th Cir. 2000).

[35] United States v. Giordano, 261 F.3d 1134, 1146 (11th Cir. 2001) (internal citations omitted).

Circuit followed the Eleventh Circuit, in *United States v. Peake*, by holding that "[a]lthough there is a presumption that all sales made during the conspiracy were affected, and should therefore be included in the volume of commerce calculation, this is a presumption that the defendant may rebut by offering evidence that some sales were not affected."[36]

For cases involving foreign transactions, 15 U.S.C. § 6a (Conduct involving trade or commerce with foreign nations), the Foreign Trade Antitrust Improvements Act ("FTAIA"), may control the determination of the volume of commerce. FTAIA generally excludes foreign transactions from consideration under the Sherman Act unless those foreign transactions: (1) are import commerce into the United States; or (2) have a direct, substantial, and reasonably foreseeable effect on American commerce that gives rise to an antitrust claim under another provision of title 15.[37]

C. SPECIAL INSTRUCTION FOR FINES FOR INDIVIDUALS - §2R1.1(c)

> *(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than $20,000.*

In promulgating the antitrust guideline, the Commission stated that substantial fines are an essential part of the sentences.[38] In setting the fine for an individual defendant under §2R1.1(c)(1), the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the defendant's profits (including salary, bonuses, and career enhancement).[39] If the court finds a defendant unable to pay the guideline fine, the guidelines instruct that the court should impose community service in lieu of a portion of the fine,[40] stating that the community service should be equally as burdensome as a fine.[41] The commentary notes that it is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.[42]

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[36] United States v. Peake, 804 F.3d 81, 100 (1st Cir. 2015).

[37] 15 U.S.C. § 6a

[38] USSG §2R1.1, comment. (backg'd.).

[39] USSG §2R1.1, comment. (n. 2).

[40] *Id*.

[41] *Id*.

[42] USSG §2R1.1, comment. (n. 5).

D. SPECIAL INSTRUCTIONS FOR FINES FOR ORGANIZATIONS - §2R1.1(d)

> *(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.*
>
> *(2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.*
>
> *(3) In a bid-rigging case in which the organization submitted one or more complementary bids,[43] use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.*

Chapter Eight (Sentencing of Organizations) of the *Guidelines Manual* sets forth the guidelines and policy statements that apply when the defendant is an organization and provides the criteria by which organizations convicted of federal criminal offenses will be punished.[44] Section 8C2.1 (Applicability of Fine Guidelines) specifies that the provisions of §§8C2.2 through 8C2.9, which provide the rules for calculating the fine range for organizations, apply to antitrust offenses. Using these guidelines, the court must first determine the base fine amount by either using the table at §8C2.4(d) (Base Fine), using pecuniary gain, or using pecuniary loss, whichever is greatest. However, §8C2.4(b) contains an exception which instructs that where the offense guideline in Chapter Two contains a special instruction for organizational fines, the court shall apply that special instruction. Section 2R1.1 includes such a special instruction and directs courts to calculate the organizational fines based upon 20 percent of the volume of affected commerce.[45] The Commission established this 20 percent figure based on its estimate "that the average gain from price-fixing is 10 percent of the selling price."[46]

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43 Complementary bidding occurs "when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer," bids that are not intended to secure acceptance by the buyer but instead to give the appearance of competitive bidding. *See* PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES, n.2, *supra*.

44 *See* USSG, Ch. 8.

45 USSG §2R1.1(d)(1). Relatedly, individual fines are also calculated using volume of commerce. *See* §2R1.1(c)(1) (instructing courts to set a fine of one to five percent of the volume of commerce, with a floor of $20,000).

46 *See* USSG §2R1.1, comment. (n. 3) ("Because the loss exceeds the gain in price-fixing, the guidelines mandate that 20 percent of the volume of affected commerce should be used instead of the pecuniary loss under §8C2.4(a)(3).").

Once the base fine is determined, the court must then determine the fine range using minimum and maximum multipliers in Chapter 8.[47] In most cases, these multipliers range from 0.05 to 4.00,[48] depending on the defendant's culpability score.[49] In antitrust cases, however, the Commission established a minimum fine multiplier in all organizational antitrust cases. This minimum fine multiplier ensures that no matter what mitigating steps a corporation has taken, its fine can never be less than 75 percent of the total amount otherwise applicable under the guidelines.[50]

The commentary to §2R1.1 explains the reason for focusing on the volume of commerce, rather than the gain or loss, noting that the average gain from price-fixing is estimated at a mere 10 percent of the sales price, while the amount of loss fails to capture intangible harms such as consumers priced out by the anti-competitive behavior.[51] Relying on the affected volume of commerce avoids the time and expense needed to calculate the actual gain or loss, and in cases in which the behavior appears to be either substantially more or substantially less than the estimated 10 percent figure, the court is encouraged to consider that factor when selecting the fine within the established range.[52] Another factor for the court to consider in setting the appropriate fine is the tendency of the degree of price fixing to decline as the volume of commerce increases.[53]

47 *See* USSG §8C2.6 (Minimum and Maximum Multipliers).

48 *See id.*

49 *See* USSG §8C2.5 (Culpability Score). The culpability score is the baseline used to determine a sentence for an organization, and adds points if an organization was involved in or tolerated criminal activity, if it had a prior history, or a prior violation of an order or obstruction of justice. In addition, points are subtracted for organizations that have effective compliance and ethics programs and which self-report, cooperate with authorities or accept responsibility. *Id*.

50 *See* USSG §2R1.1(d)(2). The Commission added this 75% floor to §2R1.1 when it first promulgated the organizational guidelines. *See* USSG App. C, amend. 422 (effect. Nov. 1, 1991). As the Commission noted in the background commentary added at that time, "this multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses." The Commission further noted that "a minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge." *See* USSG §2R1.1, comment. (backg'd.).

51 USSG §2R1.1, comment. (n. 3) ("The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices.").

52 *Id*.

53 USSG §2R1.1, comment. (n. 4).

V. Chapter Three Adjustments

A. Section 2R1.1 Application Note 1; §§3B1.1; 3B1.2; 3C1.1

Application of Chapter Three (Adjustments) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense.[54] For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.[55]

Application Note 1 clarifies the potential relevance of certain enhancements in determining the seriousness of the defendant's offense and gives guidance on the types of roles in an antitrust conspiracy that will satisfy the criteria for Chapter Three adjustments. It also suggests that the mitigating role adjustment should be applied more narrowly than in other circumstances, and only when the defendant was responsible only in some minor way for the firm's participation in the conspiracy.

The commentary further suggests that prison terms for defendants under §2R1.1 should be both much more common and somewhat longer than in pre-guidelines practice.[56]

B. GROUPING; §3D1.2 (Groups of Closely Related Counts)

Antitrust offenses are covered by the grouping rules at Chapter Three, Part D, which provides rules for determining a single offense level that encompasses multiple counts of conviction.[57] The grouping rules also cover conspiracies and attempts to commit antitrust offenses.[58]

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54 USSG §2R1.1, comment (n. 1).

55 *Id.*

56 USSG §2R1.1, comment. (backg'd.).

57 USSG §3D1.2(d).

58 *Id.*