

# Primer



## Antitrust Offenses



Prepared by the  
Office of the General Counsel

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## I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law relating to criminal antitrust offenses and the application of the antitrust guideline, §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). Although the primer identifies some of the key cases and concepts related to the sentencing of antitrust offenses, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

Section 2R1.1 applies to violations of the antitrust laws. The agreements among competitors (often referred to as cartels) that are covered by §2R1.1 are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices.<sup>1</sup> The agreements covered by this guideline 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.”).<sup>2</sup> There is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing<sup>3</sup> (including bid-rigging<sup>4</sup>)

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<sup>1</sup> U.S. SENT’G COMM’N, *Guidelines Manual*, §2R1.1, comment. (backg’d.) (Nov. 2018) [hereinafter USSG]; see also *Verizon Commc’ns v. L. Off. of Curtis V. Trinko*, 540 U.S. 398, 408 (2004) (collusion among competitors is “the supreme evil of antitrust”).

<sup>2</sup> USSG §2R1.1, comment. (backg’d.).

<sup>3</sup> Price-fixing includes an agreement between two or more competitors to raise, fix, or maintain a price, or any component of pricing, on goods or services sold, and can take many forms. See, e.g., U.S. DEP’T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (2021), <https://www.justice.gov/atr/file/810261/download> [hereinafter PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES]; see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (distinguishing between horizontal agreements as *per se* unlawful and vertical agreements, where rule of reason governs whether the agreements unreasonably restrain trade); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330–32 (1991) (finding with horizontal agreements to fix prices within a single state, jurisdiction is based on “a general conclusion that the defendants’ agreement ‘almost surely’ had a marketwide impact and therefore an effect on interstate commerce” (quoting *Burke v. Ford*, 389 U.S. 320, 322 (1967))); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956) (horizontal price-fixing is a *per se* violation of the Sherman Act).

<sup>4</sup> Bid-rigging is 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, e.g., AM. BAR ASS’N, SAMPLE JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES, 3.G BID RIGGING (2009). Bid-rigging schemes predetermine the winning bidder and take a number of forms, including: bid suppression, where one or more competitors agree to refrain from bidding or withdraw a bid so an agreed upon bidder’s bid will be accepted instead; complementary bidding, where competitors agree to submit falsely high bids or bids with unacceptable terms to give the appearance of competitive bidding; and bid rotation, where competitors take turns submitting the lowest bid. PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES, *supra* note 3, at 2–3; see also *United States v. Joyce*, 895 F.3d 673, 676–77 (9th Cir. 2018) (finding that bid rigging, as a form of horizontal price-fixing, is a *per se* violation of the Sherman Act, and the *per se* rule is “applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output” (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984))); *United States v. Ben M. Hogan Co., Inc.*, 769 F.2d 1293, 1297 (8th Cir. 1985) (vacating bid-rigging conviction where district court committed reversible error in instructing jury that “[c]ertain types of conduct are regarded as unreasonable *per se*. [T]he mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry” rights, because jury was instructed to apply an unconstitutional conclusive presumption of an

and market division and allocation,<sup>5</sup> 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.<sup>6</sup>

When the Commission promulgated §2R1.1, 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.<sup>7</sup> Thus, the Commission intended that prison terms for antitrust offenders “should be much more common, and usually somewhat longer” than before the guidelines.<sup>8</sup>

The background commentary to §2R1.1 states that “the guidelines require [a] period of confinement in the great 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.<sup>9</sup>

## 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”). The Sherman Act prohibits every contract, combination, or conspiracy in unreasonable restraint of trade or commerce among the states or with foreign nations.<sup>10</sup> The Supreme Court has held that

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effect on interstate commerce), *vacated*, 106 S. Ct. 3325 (1986); *United States v. Ben M. Hogan Co., Inc.*, 809 F.2d 480, 481 (8th Cir. 1987) (finding on remand that although the *per se* instruction created a conclusive presumption of an affect on interstate commerce, jury could not consider the instruction without first finding that interstate commerce was so affected, thus instructions did not constitute prejudicial error).

<sup>5</sup> Market division and allocation includes, *inter alia*, an agreement among potential competitors to divide specific customers or types of customers, products, or territories among themselves into distinct markets to prevent competitive supply. See PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES, *supra* note 3, at 3.

<sup>6</sup> USSG §2R1.1, comment. (backg’d.).

<sup>7</sup> 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.”).

<sup>8</sup> USSG §2R1.1, comment. (backg’d.); see also USSG Ch.1, Pt.A(1)(4)(d) (“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.’”).

<sup>9</sup> USSG §2R1.1, comment. (backg’d.).

<sup>10</sup> 15 U.S.C. § 1 (Trusts, etc., in restraint of trade illegal); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (discussing judicial interpretation of the Sherman Act); *United States v. All Star Indus.*, 962 F.2d 465, 477 (5th Cir. 1992) (a “Sherman Act conspiracy is a partnership in crime that



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.”<sup>11</sup>

Specifically, the Sherman Act prohibits (i) an agreement or concerted action toward a common goal; (ii) which unreasonably restrains trade or competition; and (iii) which affects interstate commerce.<sup>12</sup> The Supreme Court has stated that success of the agreement is not required to establish a violation of the Sherman Act, which only requires a contract, combination, or conspiracy “whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.”<sup>13</sup> While the Sherman Act requires an agreement, no formal written agreement is required, and thus one may be reached verbally.<sup>14</sup> Additionally, both direct and circumstantial evidence may be used to establish the agreement.<sup>15</sup>

The Supreme Court has allowed for application of the Sherman Act if the government demonstrates that the activity is in interstate commerce or, if the activity is local in nature, it “has an effect on some other appreciable activity demonstrably in interstate commerce.”<sup>16</sup> The Court also has limited the scope of the law, stating that “[the Sherman Act] is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.”<sup>17</sup>

Collusive activity among competitors may constitute violations of both the Sherman Act and the mail or wire fraud statute.<sup>18</sup> The First Circuit has held that a jury need not find the wire or mail fraud scheme separate and distinct from the Sherman Act conspiracy to convict for both offenses. Instead, the jury can find the conduct violated both the Sherman

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continues until all its objectives have been accomplished or abandoned,” and “[a] conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed.” (quoting *United States v. Kissel*, 218 U.S. 601, 607–08 (1910)).

<sup>11</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940) (internal citations omitted).

<sup>12</sup> See *e.g.*, *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 632–33 (9th Cir. 1987) (outlining the source of the three elements in this standard) (citations omitted).

<sup>13</sup> *Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59.

<sup>14</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (there must be evidence that tends to exclude possibility parties were acting independently).

<sup>15</sup> *Id.* (government may use direct or circumstantial evidence that reasonably tends to prove “a conscious commitment to a common scheme designed to achieve an unlawful objective.”).

<sup>16</sup> *McLain v. Real Est. Bd. of New Orleans, Inc.*, 444 U.S. 232, 242, 246 (1980) (a defendant’s conduct, although local in nature, falls within the Sherman Act when, “as a matter of practical economics,” the activities “have a not insubstantial effect on the interstate commerce involved”).

<sup>17</sup> *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 87 (1911).

<sup>18</sup> 18 U.S.C. § 1341 (Frauds and swindles); see also *United States v. Vega-Martinez*, 949 F.3d 43, 53 (1st Cir. 2020) (jury is free to find mail fraud scheme separate and distinct from Sherman Act conspiracy).

Act and constituted fraud if it determines that the fraudulent conduct was committed in the process of bid-rigging or market allocation.<sup>19</sup>

Violations of the Sherman Act are subject to a statutory ten-year maximum term of imprisonment.<sup>20</sup> In addition, individual defendants face a maximum fine of \$1,000,000, while corporations face a maximum fine of \$100,000,000.<sup>21</sup> The protections of the Sherman Act extend to United States territories and the District of Columbia, with identical penalties for violations.<sup>22</sup> Additionally, the maximum potential fine may be increased above the maximums in the Sherman Act up to either twice the gain or loss involved in the violation, under 18 U.S.C. § 3571(d).<sup>23</sup>

In addition to the Sherman Act, 18 U.S.C. § 1860 criminalizes anticompetitive behavior at public sales of federal parcels of land. Section 1860 carries a maximum penalty of not more than one year of imprisonment, a \$1,000 fine, or both.<sup>24</sup>

### **III. GUIDELINE OVERVIEW: §2R1.1**

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).<sup>25</sup> For a violation of the Sherman Act or section 1860, Appendix A specifies the offense guideline at §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

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<sup>19</sup> *Vega-Martinez*, 949 F.3d at 53.

<sup>20</sup> 15 U.S.C. § 1. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increased the statutory maximum term of imprisonment from three to ten years, and increased the maximum fine from \$350,000 to \$1,000,000 for individuals and from \$10,000,000 to \$100,000,000 for corporations. Pub. L. No. 108-237, § 215, 118 Stat. 661.

<sup>21</sup> 15 U.S.C. § 1.

<sup>22</sup> *Id.* § 3(b) (Monopolizing trade a felony).

<sup>23</sup> 18 U.S.C. § 3571 (Sentence of fine) provides that persons who derive pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, may be fined up to the greater of twice the gross gain or twice the gross loss, unless imposition of a fine “would unduly complicate or prolong the sentencing process.” *See also* PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES, *supra* note 3, at 1.

<sup>24</sup> 18 U.S.C. § 1860 (Bids at Land Sales).

<sup>25</sup> USSG §1B1.2 (explaining how to determine the applicable guidelines).

**A. BASE OFFENSE LEVEL**

The base offense level at §2R1.1 is 12.<sup>26</sup> The base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under a different Chapter Two guideline.<sup>27</sup>

**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;<sup>28</sup> and
- (2) The volume of commerce attributable to a defendant.<sup>29</sup>

Section 2R1.1 also provides special instructions regarding fines for both individuals<sup>30</sup> and organizations.<sup>31</sup>

**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,<sup>32</sup> generally involves 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.<sup>33</sup> Bid-rigging behavior includes, *inter alia*, an agreement among competitors that predetermines the winner, and that concerns the prices to be bid, who the successful bidder should be, who should bid high, who should bid low, or who should refrain from bidding or withdraw a bid, or any

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<sup>26</sup> USSG §2R1.1(a). The commentary notes the Commission's intent that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders. USSG §2R1.1, comment. (n.5).

<sup>27</sup> See USSG App. C, amend. 678 (effective Nov. 1, 2005).

<sup>28</sup> USSG §2R1.1(b)(1).

<sup>29</sup> USSG §2R1.1(b)(2).

<sup>30</sup> USSG §2R1.1(c)(1).

<sup>31</sup> USSG §2R1.1(d).

<sup>32</sup> See *supra* note 4.

<sup>33</sup> In 2020, five of the nine cases sentenced under §2R1.1 received an enhancement for bid-rigging at §2R1.1(b)(1). See U.S. SENT'G COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS GUIDELINE CALCULATION BASED 66 (2020), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use of SOC Guideline Based.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use%20of%20SOC%20Guideline%20Based.pdf) [hereinafter GUIDELINE CALCULATION BASED].



other agreement with respect to bidding that affects, limits, or avoids competition among competitors.<sup>34</sup> The Commission recognized that relying solely on the volume of commerce, addressed at §2R1.1(b)(2), could understate the measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission specified a 1-level increase for bid-rigging.<sup>35</sup>

Section 2R1.1(b)(1) uses the term “non-competitive bids” but does not provide a definition. Circuit courts have interpreted the term differently. The Seventh Circuit has found the term to be synonymous with the term “bid-rigging,” pointing to the background commentary, which states that the guideline has a 1-level increase for “bid-rigging.”<sup>36</sup> The court additionally found the term “bid-rigging” to be synonymous with “bid rotation,” which it saw referenced in Application Note 6 as “complementary bids.”<sup>37</sup> The Fourth Circuit has disagreed, finding instead that the language in the enhancement is “broad and non-exclusive” and not limited to bid rotation cases.<sup>38</sup> That court further stated that the “complementary bids” noted in Application Note 6 are a sub-category of bid-rigging.<sup>39</sup>

## 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. <sup>40</sup>

<sup>34</sup> See *supra* note 4.

<sup>35</sup> USSG §2R1.1, comment. (backg’d.); see also USSG §2R1.1, comment. (n.6) (understatement of seriousness of offense is “especially likely in cases involving complementary bids,” for example, where a defendant agreed not to submit a bid or to submit an unreasonably high bid in exchange for the opportunity to win a subsequent bid that he does not in fact win, and therefore his volume of commerce is zero, even though he contributed to the harm that was possibly substantial. In that case, the court should consider a sentence near the top of the guideline range).

<sup>36</sup> *United States v. Heffernan*, 43 F.3d 1144, 1146 (7th Cir. 1994) (citing §2R1.1, comment. (backg’d.) and finding the guideline does not define “bid-rigging”).

<sup>37</sup> *Id.* at 1146, 1149 (reversing application of §2R1.1(b)(1) because conduct was indistinguishable from ordinary price-fixing, and “to punish [the defendant] more heavily than an ordinary price fixer . . . would be irrational.”).

<sup>38</sup> *United States v. Romer*, 148 F.3d 359, 371 (4th Cir. 1998).

<sup>39</sup> *Id.*

<sup>40</sup> The Commission adjusted this table for inflation in 2015, and the amounts are derived from the

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.<sup>41</sup> The Commission further determined that volume of commerce is a more readily measurable substitute than establishing the damage caused or profit made by the defendant.<sup>42</sup> 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, the volume of commerce, rather than loss, serves as the basis for the offense level enhancements.<sup>43</sup>

For purposes of the enhancement at §2R1.1(b)(2), 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,"<sup>44</sup> and multiple counts or conspiracies should be treated cumulatively to determine a combined offense level.<sup>45</sup>

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 Sixth Circuit was the first to address this issue, holding that the "volume of affected commerce" that was "affected by the violation" includes all the sales made by the defendant within the scope of the conspiracy.<sup>46</sup> A few years later, the Second and the Seventh Circuits disagreed with the Sixth Circuit and held that the term "volume of affected commerce" includes only those sales actually influenced by the conspiracy.<sup>47</sup> After analyzing these three opinions, the Eleventh and First Circuits held that there is a rebuttable presumption

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Consumer Price Index. *See* USSG App. C, amend. 791 (effective Nov. 1, 2015).

<sup>41</sup> USSG §2R1.1, comment. (backg'd.).

<sup>42</sup> 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. Giraudo, No. 14-cr-00534, 2018 WL 2197703, at \*4 (N.D. Ca. 2018) (the guideline provides volume of commerce as the only method for calculating harm, rather than more direct measures); United States v. Diaz, 731 F. App'x 703, 704–05 (9th Cir. 2018) (the relevant amount is overall amount of commerce involved in scheme, not decrease in value resulting from scheme).

<sup>43</sup> USSG §2R1.1 comment. (backg'd.).

<sup>44</sup> USSG §2R1.1(b)(2). In 2020, four of the nine cases sentenced under §2R1.1 also received a 2-level enhancement under §2R1.1(b)(2)(A) for volume of commerce between \$1,000,000 and \$10,000,000. Another two cases received a 4-level enhancement under §2R1.1(b)(2)(B) for volume of commerce between \$10,000,000 and \$50,000,000. Additionally, one case received an 8-level enhancement under §2R1.1(b)(2)(D) for volume of commerce between \$100,000,000 and \$300,000,000 and one case received a 12-level enhancement under §2R1.1(b)(2)(F) for volume of commerce between \$600,000,000 and \$1,200,000,000. *See* GUIDELINE CALCULATION BASED, *supra* note 33, at 66.

<sup>45</sup> USSG §2R1.1(b)(2); *see also* Giraudo, 2018 WL 2197703, at \*2 (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).

<sup>46</sup> United States v. Hayter Oil Co., of Greeneville, Tenn., 51 F.3d 1265, 1273-74 (6th Cir. 1995).

<sup>47</sup> United States v. Andreas, 216 F.3d 645, 677–79 (7th Cir. 2000); United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 91 (2d Cir. 1999).

that all sales made by the defendant are included in the term “volume of affected commerce.”<sup>48</sup>

Specifically, 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.”<sup>49</sup> The Sixth Circuit further noted that the background commentary to §2R1.1 states that price-fixing agreements are deemed illegal “without any inquiry in individual cases as to their actual competitive effect.”<sup>50</sup> The Second Circuit disagreed with the approach taken by the Sixth Circuit 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.”<sup>51</sup> 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.”<sup>52</sup>

Addressing the standards from each of the other circuits, 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.<sup>53</sup>

The First Circuit followed the Eleventh Circuit 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.”<sup>54</sup>

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<sup>48</sup> United States v. Peake, 804 F.3d 81, 100 (1st Cir. 2015); United States v. Giordano, 261 F.3d 1134, 1146 (11th Cir. 2001).

<sup>49</sup> *Hayter Oil Co.*, 51 F.3d at 1273 (finding its interpretation to be consistent with purposes of the Sherman Act, where because price-fixing agreements “are so ‘plainly anticompetitive,’ and so often ‘lack . . . any redeeming virtue,’ ” they have been recognized as illegal *per se* (quoting *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979))) (citations omitted).

<sup>50</sup> *Id.*

<sup>51</sup> *SKW Metals & Alloys*, 195 F.3d at 91.

<sup>52</sup> *Andreas*, 216 F.3d at 677–78.

<sup>53</sup> *Giordano*, 261 F.3d at 1146 (internal citations omitted).

<sup>54</sup> United States v. Peake, 804 F.3d 81, 100 (1st Cir. 2015)

For cases involving foreign transactions, the Foreign Trade Antitrust Improvements Act (“FTAIA”), may control the determination of the volume of commerce.<sup>55</sup> FTAIA generally excludes foreign transactions from consideration under the Sherman Act unless those foreign transactions: (1) 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.<sup>56</sup>

**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 sentence.<sup>57</sup> 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 from the offense (including salary, bonuses, and career enhancement).<sup>58</sup> If the court finds a defendant unable to pay the guideline fine, the court should impose community service in lieu of a portion of the fine, and such community service should be equally as burdensome as a fine.<sup>59</sup> Another consideration in setting the amount of the fine is that the average level of mark-up from price-fixing may decline with the volume of commerce involved in the offense.<sup>60</sup>

Section 2R1.1(c)(1) ties the amount of the fine imposed to the volume of commerce. Thus, the Sixth Circuit reversed and remanded where the district court determined the fine amount based on an incorrect calculation of the volume of commerce.<sup>61</sup> 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 ten percent of the sales price, while the amount of loss fails to capture intangible harms such as consumers priced out by the anticompetitive behavior.<sup>62</sup> 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

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<sup>55</sup> 15 U.S.C. § 6a (Conduct involving trade or commerce with foreign nations).

<sup>56</sup> *Id.*

<sup>57</sup> USSG §2R1.1, comment. (backg’d.).

<sup>58</sup> USSG §2R1.1, comment. (n.2).

<sup>59</sup> *Id.*

<sup>60</sup> USSG §2R1.1, comment. (n.4).

<sup>61</sup> *United States v. Hayter Oil Co., Inc. of Greenville, Tenn.*, 51 F.3d 1265, 1272 (6th Cir. 1995) (district court incorrectly determined price-fixing scheme to have been in effect only 40 weeks out of 234-week conspiracy (17% of the conspiracy); remanding order of fine in amount of 17% of \$4.2 million in sales).

<sup>62</sup> 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.”).

estimated ten percent figure, the court is encouraged to consider that factor when selecting the fine within the established range.<sup>63</sup>

**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,<sup>64</sup> 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 ordinarily apply when the defendant is an organization, rather than an individual, and provides the criteria by which organizations convicted of federal criminal offenses will be punished.<sup>65</sup> 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.<sup>66</sup> Using §8C2.4 (Base Fine), the court first must determine the base fine amount by using either the table at subsection (d), the pecuniary gain to the organization, or the pecuniary loss caused by the organization, whichever is greatest.<sup>67</sup> However, §8C2.4(b) contains an exception instructing that where the offense guideline in Chapter Two contains a special instruction for organizational fines, the court shall apply that special instruction instead.<sup>68</sup> Section 2R1.1(d)(1) includes such a special instruction and directs courts to calculate the organizational fines based on 20 percent of the volume of affected commerce instead of the pecuniary loss caused by the organization.<sup>69</sup> The Commission established this 20 percent

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<sup>63</sup> *Id.*

<sup>64</sup> Although not defined in the guidelines, the Department of Justice has stated that 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,” in short, 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, *supra* note 3, at 3.

<sup>65</sup> *See* USSG Ch.8.

<sup>66</sup> USSG §8C2.1. For more information about fines for organizations, see U.S. SENT’G COMM’N, FINES FOR ORGANIZATIONS PRIMER (2021), <https://www.uscc.gov/guidelines/primers/fines-under-organizational-guidelines>.

<sup>67</sup> USSG §8C2.4(a).

<sup>68</sup> USSG §8C2.4(b).

<sup>69</sup> USSG §2R1.1(d)(1). Relatedly, individual fines also are calculated using the volume of commerce. *See* USSG §2R1.1(c)(1) (instructing courts to set a fine of 1 to 5% of the volume of commerce, with a floor of \$20,000).



figure based on its estimate “that the average gain from price-fixing is 10 percent of the selling price” and that loss exceeds gain.<sup>70</sup>

Once the base fine is determined, the court then must determine the fine range using the minimum and maximum multipliers in §8C2.6 (Minimum and Maximum Multipliers).<sup>71</sup> In most cases, these multipliers range from 0.05 to 4.00,<sup>72</sup> depending on the defendant’s culpability score from §8C2.5 (Culpability Score).<sup>73</sup> In antitrust cases, however, the Commission established a minimum fine multiplier in all organizational antitrust cases at the special instruction at §2R1.1(d)(2). 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.<sup>74</sup>

As with fines for individuals, 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.<sup>75</sup>

## V. CHAPTER THREE ADJUSTMENTS

### A. AGGRAVATING AND MITIGATING ROLES, OBSTRUCTION OF JUSTICE—§§3B1.1, 3B1.2, 3C1.1

Application Note 1 to §2R1.1 clarifies the potential relevance of certain adjustments 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

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<sup>70</sup> USSG §2R1.1, comment. (n.3) (“Because the loss from price-fixing exceeds the gain [§21.1(d)(1)] provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3).”).

<sup>71</sup> USSG §8C2.6

<sup>72</sup> *See id.*

<sup>73</sup> *See* USSG §8C2.5 (Culpability Score). The culpability score is the baseline used to determine a sentence for an organization. It adds points if an organization was involved in or tolerated criminal activity, or 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 that self-report, cooperate with authorities, or accept responsibility. *Id.*

<sup>74</sup> *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 (effective 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.).

<sup>75</sup> USSG §2R1.1, comment. (n.4).

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.<sup>76</sup>

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.<sup>77</sup>

#### **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.<sup>78</sup> The grouping rules also cover conspiracies and attempts to commit antitrust offenses.<sup>79</sup>

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<sup>76</sup> USSG §2R1.1, comment. (n.1).

<sup>77</sup> *Id.*; see also *United States v. Maloof*, 205 F.3d 819, 830 (5th Cir. 2000) (court erred in determining employees were “participants” for purposes of §3B1.1(a) in a conspiracy to commit wire fraud and in restraint of trade without first determining each was criminally responsible for commission of offense). *But see United States v. Andreas*, 216 F.3d 645, 679–80 (7th Cir. 2000) (court should have considered defendant's control over foreign co-conspirators in calculating minimum number of participants for §3B1.1).

<sup>78</sup> USSG §3D1.2(d).

<sup>79</sup> USSG §3D1.2, comment. (n.6).