

**APPLICATION OF
THE FEDERAL SENTENCING GUIDELINES
TO ORGANIZATIONS IN ANTITRUST CASES:
A PRACTICAL GUIDE**

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I. Background

Prior to 1987, the sentence imposed on a federal criminal defendant in the United States was left largely to the discretion of the sentencing judge, subject to offense-specific statutory minimum and maximum sentences. In 1984, Congress passed the Sentencing Reform Act, delegating broad authority to the United States Sentencing Commission (“Commission”) to review and rationalize the federal sentencing process. The Commission was directed to create categories of offense behavior and offender characteristics, and to accordingly prescribe guideline ranges specifying appropriate sentences. With the introduction of the Federal Sentencing Guidelines Manual (the “Guidelines”) in November 1987, judges were required to impose sentences in accordance with the Guidelines.

In 2005, the mandatory sentencing under the Guidelines changed as a result of the United States Supreme Court decision in *United States v. Booker*, 125 S. Ct. 738 (2005). The Supreme Court held in *Booker* that the mandatory application of the Guidelines violated the Sixth Amendment jury trial right. After *Booker*, then, federal judges must consider, but are not bound by, the Sentencing Guidelines in rendering a criminal sentence – in other words, the Guidelines are truly *guidelines*. Still, many district court judges are hewing closely to the Guidelines. Because the Guidelines continue to be the structure within which the parties and courts work when discussing sentence, attorneys must be familiar with how the Guidelines are applied.

II. The Sentencing Guidelines as applied to corporate antitrust offenders

Although one might think of sentencing as a step that occurs very late in the process of a criminal investigation, one ought not wait to that stage before engaging in an analysis of the Guidelines application to a potential corporate antitrust offense. The estimated fine that could result is a key factor in a corporation’s consideration of whether to cooperate in a DOJ investigation, a decision that is typically made in the earliest stages of an investigation. Therefore, at the earliest opportunity, counsel should estimate the fine range likely to be derived under an application of the Guidelines to the conduct and party at issue.

A. Determining the “Guideline Fine Range”

The Guideline Fine Range is determined using the following formula: The low end of the range is equal to the “Base Fine” times the “minimum multiplier.” The high end of the range is equal to the “Base Fine” times the “maximum multiplier.”

Thus,
Guideline Fine Range =
[“Base Fine” X minimum multiplier] to [“Base Fine” X maximum multiplier]

Obviously, then, to use this formula, one must first determine the “Base Fine,” as well as the minimum and maximum multipliers.

B. Determining Base Fine - generally

Chapter 8 of the Guidelines Manual deals with the Sentencing of Organizations. Under §8C2.4, the Base Fine is the greatest of:

- (1) the amount from a table provided in that section;
- (2) the pecuniary gain to the organization from the offense; or
- (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

Provided, however, if the applicable offense guideline in Chapter 2 has a special instruction for organizational fines, that special instruction shall be applied. (And further provided, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount shall not be used for the determination of the base fine.)

Chapter 2 (Offense Conduct) is organized according to the specific criminal offense involved. In our hypothetical involving an antitrust offense, Chapter 2 does indeed provide a special instruction for organizational fines. Section 2R1.1 relates to Antitrust Offenses (bid rigging, price-fixing and market allocation). This section, in subsection (d), provides Special Instructions for fines of organizations: “In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.”¹ As a result, the primary battleground in determining the appropriate sentence for a corporate antitrust offender is: What is the “volume of affected commerce”?

C. Determining Volume of Affected Commerce

The Guidelines and existing case law provide little guidance as to how the volume of affected commerce is to be calculated. Section 2R1.1 states (somewhat circularly) that 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. It also states that when multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

¹ Additional special instructions for organizational fines in antitrust offenses include an instruction that neither the minimum nor the maximum multiplier shall be less than 0.75, and a special instruction for use in a bid-rigging case where the organization submitted one or more complementary bids. See §2R1.1(d)(2) and (3).

One area of ambiguity is in defining what portion of the commerce was in fact “affected” by the violation. Another complication arises when an alleged conspiracy involves international commerce. In 1999, the Division announced that it normally would use the defendant’s volume of affected U.S. commerce in calculating the defendant’s Guideline range, but that foreign sales could be taken into account if the affected U.S. commerce understated the seriousness of the defendant’s role in the offense and the impact of the defendant’s conduct on U.S. victims.² Since then, the Division has indicated that it will consider only a defendant’s “domestic sales” in calculating the base fine, but suggesting that foreign sales have and may be used as an “aggravating factor” to justify an increased fine.³

In a simple case, where the company has clear U.S. sales affected by the violation, the volume of affected commerce would likely be the Company’s total U.S. sales revenues on the relevant product. For example, if you assume a five-year price-fixing conspiracy on the sale of widgets in the United States, the volume of affected commerce would likely be the Company’s total US widget sales revenues during entire 5 year term of the conspiracy.

Example: \$40m/year in sales revenue x 5 years = \$200 million affected volume of commerce

D. Calculating Base Fine

As stated above, under §2R1.1(d), for an organization charged with an antitrust offense, “pecuniary loss” is assumed to be 20% of the volume of affected commerce. Therefore, continuing our example of the widget company with \$40 million per year in U.S. sales over a five year conspiracy, the proxy for pecuniary loss is calculated as:

PL = \$200 million X 20%

PL = \$40 million

Referring back to §8C2.4(a), the Base Fine is greatest of:

- (1) the amount from a table provided in that section;
- (2) the pecuniary gain to the organization from the offense; or
- (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly;

And applying the §2R1.1(d) special instruction regarding pecuniary loss, the Base Fine for our hypothetical widget seller is \$40 million. (Unless, hypothetically, the amounts derived under §8C2.4(a)(1) or (2) provide a higher number.)⁴

² Scott D. Hammond, *Charting New Waters In International Cartel Prosecutions*, address before the National Institute on White Collar Crime (March 2, 2006) at fn 28, available at www.justice.gov/atr.

³ *Id.*

⁴ “The company’s base fine under the Guidelines is generally 20% of the company’s volume of commerce.” Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, address before the ABA Section of Antitrust Law (March 29, 2006) at fn 4; available at www.justice.gov/atr (hereinafter “Measuring the Value”).

E. Determining Multipliers

Under one of the special instructions in §2R1.1(d), the minimum multiplier must be at least 0.75, so the bottom of the Guidelines Range will be at least 15% of the affected volume of commerce. In most cases, it will certainly be higher. Section 8C2.6 addresses the Minimum and Maximum Multipliers. They are derived from a table in the Guidelines Manual, by reference to the organization's "Culpability Score." To find the organization's Culpability Score, §8C2.5 instructs that you start with 5, and then add or subtract points based on the applicability of factors set forth in that section.

Culpability Score Factors include:

- High level involvement or tolerance of the conduct (scaled according to the number of employees in the involved organization or unit);⁵
- Prior criminal history;
- Violation of an Order or injunction;
- Any obstruction of justice⁶;
- Cooperation and acceptance of responsibility.

Section 8C2.5(f) also identifies an effective compliance and ethics program as a factor which could result in a three point reduction in the culpability score. However, the Antitrust Division has consistently refused to apply this provision in its fine calculations for plea agreements, apparently reasoning that a compliance program that has failed to prevent the violation and failed to detect it in time for the organization to obtain the benefits of the Corporate Leniency Policy has been, necessarily, "ineffective."

Returning to our hypothetical widget seller, if the culpability score calculation starts with 5, but there was an addition of five points for involvement or tolerance of the conduct at high levels of an organization of 5000 or more employees (§8C2.5(b)(1)(A)(i)), and a subtraction of two points for full cooperation and acceptance of responsibility (§8C2.5(g)(2)), and no other factors apply, the hypothetical Culpability Score is 8. On the table provided in §8C2.6, a Culpability Score of 8 yields a minimum multiplier of 1.6 and a maximum multiplier of 3.2. Therefore, because:

Guideline Fine Range =
["Base Fine" X minimum multiplier] to ["Base Fine" X maximum multiplier]

⁵ "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director, an executive officer, an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance, and an individual with a substantial ownership interest. "High level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. § 8C2.5, Application Note 3.

⁶ "If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add 3 points." § 8C2.5(e).

Range = [40m X 1.6] to [40m X 3.2]
Range = \$64M minimum fine to \$128M maximum fine

The Guideline range for the fine of our hypothetical widget seller is \$64 million – \$128 million.

F. Potential Cooperation Discount

Pursuant to §8C4.1, the government can request a downward departure from the Guidelines for a defendant that has provided substantial assistance in the investigation or prosecution of another organization that has committed an offense. The Antitrust Division has indicated these “cooperation discounts” average in the range of 30% to 35% off the bottom of the Guidelines range for “second-in” companies, assuming the company did not have a significant leadership role in the conspiracy.⁷ Subsequent cooperators could also qualify for (typically lesser) discounts. For each succeeding cooperator, the percentage discount is likely to decrease, and it may be applied to higher starting points within the Guideline range.

If our hypothetical widget seller was the first organization to cooperate with the Antitrust Division, after the amnesty applicant (i.e., was “second-in”), and provided substantial assistance, its projected fine might be reduced as follows:

Bottom of Range = \$64 million
\$64M – 30% discount = projected fine of \$44.8 million

III. Statutory Maximums vs. Alternative Fine Calculation

Under the Sherman Act (and the 2004 ACPERA amendments)⁸, the statutory maximum corporate fine is \$100 million. However, 18 U.S.C. § 3571(d) (the “Alternative Fines Statute”) states:

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

In 2005, the Antitrust Division said the following:

The only change to our charging practice will occur in cases in which we are seeking a fine above the Sherman Act statutory maximum, pursuant to 18 U.S.C. § 3571(d). In that case, we will allege the amount of gain or loss in indictments. If necessary to obtain an appropriate fine, the Division will allege the gain or loss

⁷ Hammond, *Measuring the Value*, at 5-6. Another factor that could result in a lesser discount (or higher starting point) is if the company qualifies for “Penalty Plus” treatment, for failing to report a violation at the time of an earlier investigation. *Id.* at 7.

⁸ Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”) §215(a) (15 U.S.C. §1 note).

attributable to the entire cartel, not just the defendant...3571(d) provides for a fine of twice the gross gain derived from the crime or twice the gross loss of the victims of the crime, i.e. twice the gain derived by, or twice the loss caused by, the cartel rather than the defendant.⁹

It is not clear the extent to which the Division will be able to successfully pursue this theory, but they have, since 2005, entered into a number of plea agreements in which the agreed fine exceeded the statutory maximum.¹⁰

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⁹ Scott D. Hammond, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High For Non-Cooperating Defendants*, address before the ABA Antitrust Section (March 30, 2005) at 7; available at www.justice.gov/atr.

¹⁰ See U.S. Antitrust Division Chart: “Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More” (10/16/2009) available at <http://www.justice.gov/atr/public/criminal/sherman10.htm>.