2. Criminal Price-Fixing Prosecutions

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Topics

- Elements of a criminal price-fixing violation
- Criminal statute of limitations
- Criminal antitrust penalties
- DOJ prosecutorial policy
- Criminal prosecution process and protections
- DOJ leniency policy/ACPERA
- Sentencing and the Sentencing Guidelines

Elements of a Criminal Price-Fixing Violation

Definition of price fixing

- Recall the *Socony-Vacuum* definition
  - A price-fixing conspiracy is any—

> combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity[1]

Principal governing statute—Section 1 of the Sherman Act

1. Creates the offense that makes horizontal price fixing illegal
2. Authorizes the Attorney General to prosecute violations criminally
3. Specifies the maximum criminal penalties under the statute

[1] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

Sherman Act § 1

- Creates the offense of a "contract, combination . . . or conspiracy, in restraint of trade or commerce"

> **Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.** Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[1]

[1] 15 U.S.C. § 1.

Sherman Act § 1

- Makes the offense a federal crime

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. **Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony**, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

  - Historical note: There are no federal common law crimes
    - Every federal crime must be created by statute[1]
    - By implication, a statute creating a federal crime also creates a criminal cause of action for the United States

[1] United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

Sherman Act § 1

- Specifies the maximum criminal sanction under the Sherman Act for the offense

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, **on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court**.

- But the Comprehensive Crime Control Act provides for alternative maximum criminal monetary fines of—
  - twice the gross gain to the defendant, or
  - twice the gross loss to the victims[1]

Often used against large international cartels

[1] 18 U.S.C. § 3571(d) (discussed below).

Elements of a Section 1 offense

- There are four elements of *every* Section 1 offense
  1. Plurality of actors
  2. Concerted action
  3. A restraint of trade or commerce
  4. Unreasonableness
- A criminal violation also requires criminal intent

Elements of a Section 1 offense

1. Plurality of actors
   - Putative members of the combination must have the *legal capacity to combine or conspire*
     - Copperweld Corp. v. Independence Tube Corp.[1]
     - American Needle Inc. v. National Football League[2]
   - Some examples where capacity is absent
     - A corporation and its wholly-owned subsidiary
     - Two commonly, wholly-owned sister companies
     - A company and a company employee, officer, or director
       - *Exception*: When the individual as an *independent personal stake* in the object of the putative conspiracy
   - Derivative liability
     - An employee, officer or director can be liable for her involvement in the company's price fixing violation to the extent that she "authorizes, orders, or helps perpetrate the crime," even if she does not have an independent personal stake in the object of the conspiracy.[3]

[1] 467 U.S. 752 (1984).
[2] 560 U.S. 183 (2010).
[3] United States v. Wise, 370 U.S. 405 (1962).

Elements of a Section 1 offense

2. Concerted action
   - Required by the "contract, combination, or conspiracy" language of Section 1
     - Draws a critical distinction with unilateral conduct
   - The seminal Supreme Court definitions (quoted in every case or brief)—
     1. "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement,"[1] or
     2. "conscious commitment to a common scheme designed to achieve an unlawful objective"[2]
   - Does not require a formal agreement
     - Agreement may be tacit and achieved without any verbal communications among the parties
     - May be proved by direct or circumstantial evidence

[1] American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).
[2] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984).

Elements of a Section 1 offense

3. A restraint of trade or commerce
   - The object of an actionable agreement must be a restraint of trade
     - A restraint of trade imposes restrictions on one's own economic freedom of action or that of a third party
   - Some examples
     - Charge prices at a certain level or not to sell below (or above) a certain level
     - Not to deviate from certain specified credit terms
     - Not to sell certain products
     - Not to sell to a particular group of customers or outside a given territory
     - To be the exclusive dealer for a supplier and not carry the competing products of other vendors
     - Not to manufacture or sell above a set number of units
     - Not to compete with a partner in a partnership
     - Not to engage in certain R&D activities
   - The essence of a Section 1 violation is the *agreement*, not the overt acts performed in furtherance of the agreement
     - Indeed, an overt act is not an element of a Section 1 offense

Elements of a Section 1 offense

4. Unreasonableness
   - Requirement
     - Read literally, Section 1 prohibits all restraints of trade as the result of concerted action
       - Every agreement concerning trade restrains trade[1]
     - *Judicial gloss*: Section 1 prohibits only *unreasonable* restraints of trade[2]
   - A restraint is unreasonable if it is likely to produce an *anticompetitive effect* in the marketplace
     - A restraint has an anticompetitive effect if it reduces consumer welfare as a whole to some identifiable, substantial segment of customers in the market
   - Depending on the conduct in question, unreasonableness may be proved by:
     - A conclusive presumption (the "per se rule")
     - A rebuttable presumption (the "quick look")
     - Affirmative direct or circumstantial evidence (the "rule of reason")
       - The rule of reason is the absence of any presumption

[1] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
[2] Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911).

Elements of a Section 1 offense

5. Criminal intent
   - An element of *every* federal criminal violation[1]
   - Antitrust violations require *knowledge* of the probable consequences of the defendant's challenged conduct
     - Government must prove that the defendant undertook its conduct "with knowledge that the proscribed effects would most likely follow"[2]
     - Does not require knowledge of the criminality of the conduct
   - The seminal statement (*Gypsum*):

> The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.[3]

[1] United States v. United States Gypsum Co., 438 U.S. 422 (1978) (leading case); United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

[2] *Gypsum*, 438 U.S. at 444.

[3] *Id*. at 445-46.

Elements of a Section 1 offense

5. Criminal intent (con't)
   - Source of the requirement
     - *Common law*: Mens rea is an element of every criminal offense grounded in the common law absent legislative action to the contrary
       - Antitrust violations are grounded in the common law
     - *Public policy*: The Sherman Act does not always draw a bright line between permissible and impermissible conduct
   - In practice: The antitrust defendant know that—
     - It knowingly acted in concert with another person, *and*
     - It knew that the likely effect of the joint activity was to restrain trade
       - What if the defendant's *purpose* was to restrain trade?

[1] United States v. United States Gypsum Co., 438 U.S. 422 (1978) (leading case); United States v. Hudson & Goodwin, 11 U.S. 32 (1812).
[2] *Gypsum*, 438 U.S. at 444.

Elements of a Section 1 offense

5. Criminal intent (con't)
   - Knowledge of the defendant must be established by affirmative evidence
     - May be shown through circumstantial or direct evidence
     - BUT cannot be presumed, for example, from mere proof of an effect on prices
     - ALSO, it is important to distinguish between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant "should have known"
       - The latter, known as *constructive knowledge*, can be used as circumstantial evidence to *infer* the defendant's requisite knowledge, but cannot be used to *presume* that knowledge
       - The trier of fact must find the requisite knowledge on the part of the defendant on the record as a whole, including whatever evidence the defendant adduces that it did not have the requisite knowledge
   - Contrast with civil cases
     - Sherman Act § 1 civil violation can be established by proof of either—
       - an unlawful purpose, or
       - an anticompetitive effect

[1] United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Hudson & Goodwin, 11 U.S. 32 (1812).
[2] *Gypsum*, 438 U.S. at 444.

Elements of a Section 1 offense

- Special case: Corporate supervisor liability
  - Rules
    - "[A] corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity."[1]
    - A corporate supervisor is individually criminally liable if the supervisor "knowingly participate[d] in effecting the illegal conspiracy by directly participating in the conspiracy and/or indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime."[2]
  - Ninth Circuit exception
    - In the Ninth Circuit, a supervisor who only knows about the illegal actions of a subordinate and does not act to prevent the illegal activity is not liable for the subordinate's actions, provided the supervisor did not authorize or help the subordinate in the illegal activity[3]

[1] United States v. Wise, 370 U.S. 405, 416 (1962).
[2] United States v. Lischewski, 860 F. App'x 512, 515 (9th Cir. 2021) (quoting United States v. Brown, 936 F.2d 1042, 1047 (9th Cir. 1991)).
[3] *See* United States v. Brown, 936 F.2d 1042, 1047-48 (9th Cir.1991); *Lischewski*, 860 F. App'x at 515 (noting that "mere knowledge of a conspiracy without participation" is insufficient for liability).

Criminal Statute of Limitations

Criminal statute of limitations

- Subject to the general statute of limitations of five years for federal offenses[1]
  - No special antitrust statute of limitations for criminal offenses
    - Compare to the four-statute of limitation for private treble damage actions
  - Limitations period runs until filing of indictment or information
  - Institution of a grand jury is not sufficient
- Conspiracies are "continuing offenses"[2]
  - Begins with the illegal agreement
  - Subsequent acts in furtherance of the agreement restart limitations period, even if—
    - are not actionable by themselves, *or*
    - taken by one conspirator without the knowledge of the other conspirators
  - Two implications
    - Overt acts at different times can be part of the same and not separate conspiracies
    - Statute of limitations is tolled for a single conspiracy from the time of its formation until the last overt act in furtherance of that conspiracy

[1] 18 U.S.C § 3282(a).
[2] United States v. Kissel, 218 U.S. 601 (1910).

Criminal statute of limitations

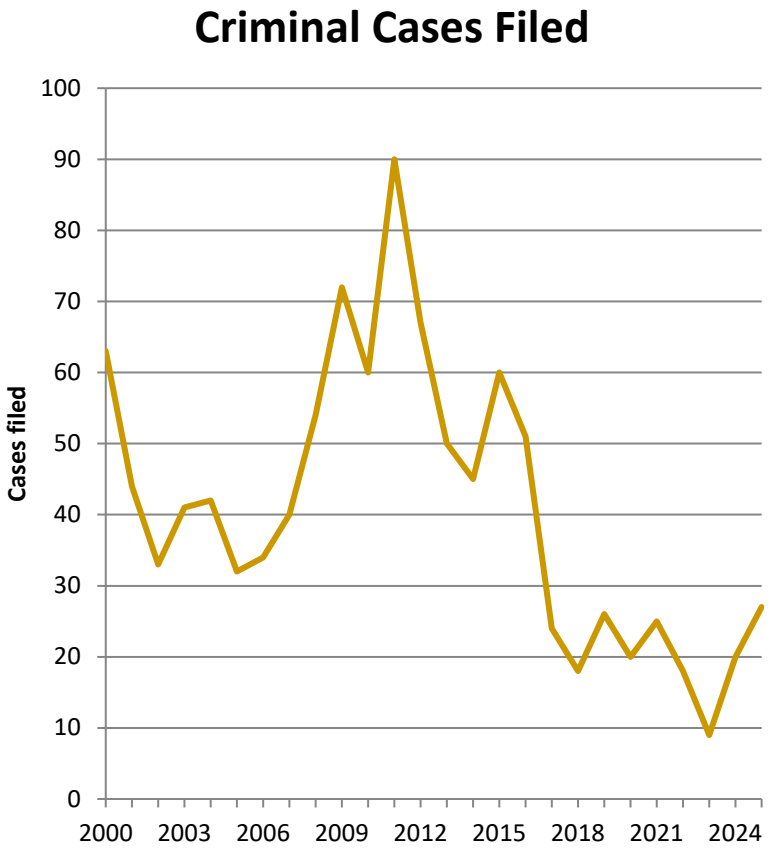
- Withdrawal from conspiracy
  - Defendant can rebut if it "abandoned" the conspiracy more than five years prior to its indictment, even if the conspiracy itself continued to operate
  - Mere cessation of involvement in conspiracy is not sufficient for withdrawal
  - Must—
    - Communicate withdrawal to coconspirators and cease acting cooperatively, *or*
    - Confess to antitrust authorities
- *Query*: If conspiracy is "continuing" and there is no showing of withdrawal, does the DOJ have to prove an overt act during the limitations period?
  - The better view is yes[1]
  - Very metaphysical:
    - An overt act is not an element of a price-fixing conspiracy violation
    - But an overt act must be shown in order to establish that the price-fixing conspiracy existed within the limitations period

[1] *See, e.g.*, United States v. Therm-All, Inc., 373 F.3d 625. 632 (5th Cir. 2004); United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1270 (10th Cir. 2018); *In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1063 (8th Cir. 2017); Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827 (11th Cir. 1999) (civil conspiracy), *amended in part*, 211 F.3d 1224 (11th Cir. 2000); *but see* United States v. Hayter Oil Co. 51 F.3d 1265, 1270-71 (6th Cir. 1995) (suggesting that conspiracy presumed to continue until there is an affirmative showing of abandonment).

Criminal Antitrust Cases Filed

Criminal antitrust cases filed

- The number of criminal antitrust cases filed has been declining steadily since its peak in FY2012, with a slight untick in FY2025



Source: U.S. Dep't of Justice, Antitrust Div., Criminal Enforcement: Trends Charts Through Fiscal Year 2025.

Criminal Antitrust Penalties

Criminal penalties

- Sherman Act
  - Corporations
    - Criminal fines not exceeding $100 million
  - Individuals
    - Criminal fines not exceeding $1 million
    - Imprisonment not exceeding 10 years

History of Sherman Act Criminal Penalties

	1890	1955	1974	1990	2004[1]
Corporations	$5K	$50K	$1 million	$10 million	$100 million
Individuals					
Fines	$5k	$50K	$100K	$350K	$1 million
Imprisonment	1 year	1 year	3 years	3 years	10 years
	Misdemeanor	Misdemeanor	Felony	Felony	Felony

[1] Effective June 22, 2004.

Criminal penalties

- Alternatives fines provision—Comprehensive Crime Control Act
  - Statute

> 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.[1]

  - Measure
    - *Query*: Is the gain or loss based on the totality of the conspiracy or only the gain or loss caused by the defendant's acts?
      - In litigation, DOJ argues for the totality of the conspiracy
      - In settlements, DOJ typically accepts the loss or gain caused only by the defendant
  - Application
    - Committed to prosecutorial discretion
    - Applied widely but almost exclusively to organization defendants
    - Rare for DOJ to seek a fine above the Sherman Act maximum for an individual
    - Division's emphasis in sentencing individuals is on imprisonment

[1] 18 U.S.C. § 3571(d) (effective date Nov. 1, 1987).

Criminal penalties

- Sixth amendment right to jury finding
  - Southern Union v. United States[1]
    - Jury must determine any fact (other than a prior conviction) that increases a criminal defendant's maximum potential sentence
    - "Maximum potential sentence": Maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant
  - Application to criminal antitrust sanctions
    - *Sherman Act*: Permits court to impose statutory maximum penalties on the finding of only a violation
    - *Comprehensive Crime Control Act*: Permits court to impose a maximum fine based on twice the gross gain or twice the gross loss, so the gain or loss would have to be determined by the jury

[1] Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).
[2] *Id*. at 2351 n.4, 2351-52 (specifically identifying twice the gain or twice the loss under 18 U.S.C. § 3571(d) as facts that must be proved to a jury beyond a reasonable doubt).

Highest criminal fines for organizations

Defendant (FY)	Product	Fine ($ Millions)	Geographic Scope
Citicorp (2017)	FX rate	$925	International
Barclays PLC (2017)	FX rate	$650	International
JP Morgan Chase & Co. (2017)	FX rate	$550	International
AU Optronics Corporation (2012)	Liquid Crystal Display (LCD) Panels	$500	International
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	$500	International
Yazaki Corporation (2012)	Automobile Parts	$470	International
Bridgestone Corporation (2014)	Anti-vibration rubber products for automobiles	$425	International
LG Display Co., Ltd & LG Display America (2009)	Liquid Crystal Display (LCD) Panels	$400	International
Royal Bank of Scotland (2017)	Foreign currency exchange	$395	International
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)	Air Transportation (Cargo)	$350	International

See U.S. Dep't of Justice, Antitrust Div., Sherman Act Violations Yielding a Corporate Fine of $10 Million or More

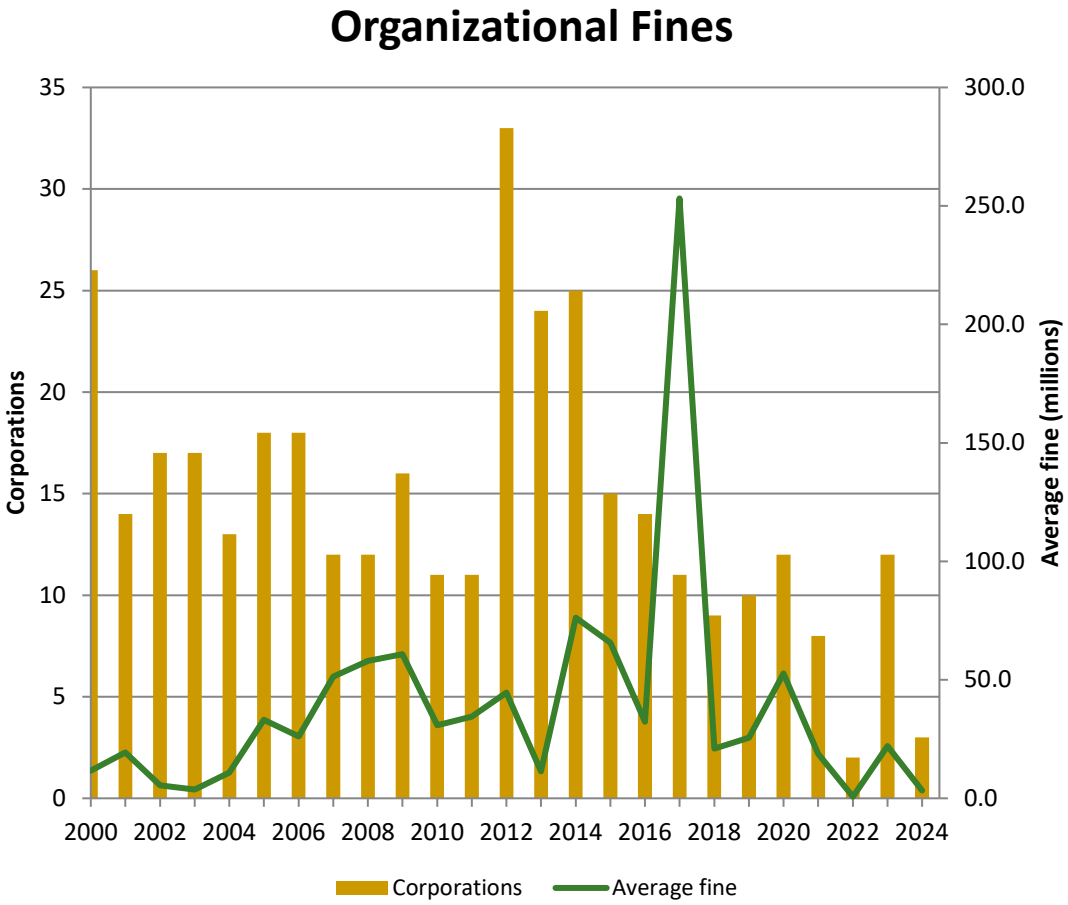
Criminal sanctions for organizations

Organizational Fines

Fiscal Year	Total Fines Assessed ($millions)	Number of Organizations Fined	Average Fine ($millions)	Rolling 5-Year Average
2014	$1904.7	25	$76.2	$42.0
2015	$985.7	15	$65.7	$46.4
2016	$452.9	14	$32.4	$45.8
2017	$2,784.8	11	$253.2	$71.9
2018	$188,527	9	$20.9	$84.4
2019	$255,114	10	$25.5	$79.1
2020	$632,931	12	$57.2	$77.0
2021	$150,785	8	$18.8	$80.2
2022	$1,350	2	$0.7	$30.0
2023	$26,3871	12	$22.0	$29.6
2024	$10,009	3	$3.3	$28.6

Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015–2024.

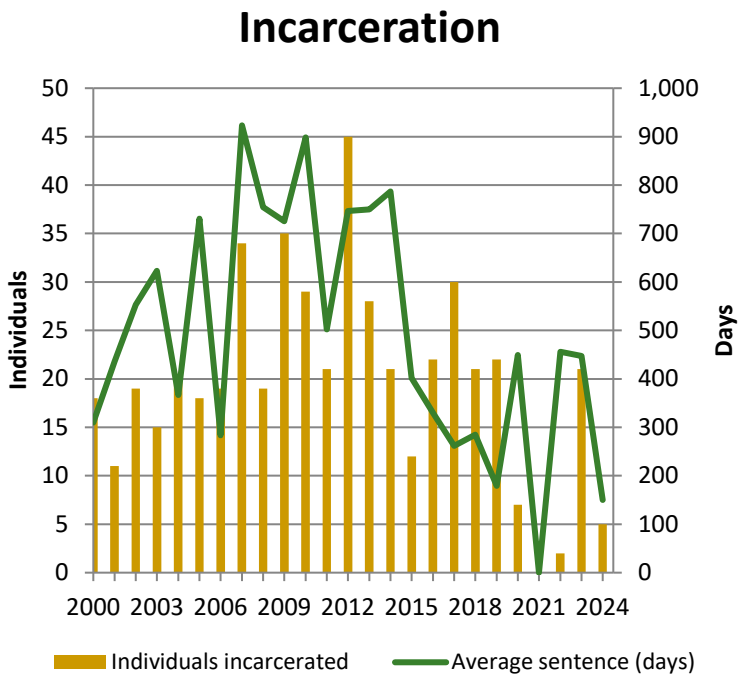
Criminal sanctions for organizations



Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024 (and earlier versions).

Criminal sanctions for individuals

- General policy
  - As a general policy, the Division seeks to indict at least one individual from each indicted organization
  - From FY2000 through FY2024, 494 individuals were sentenced to incarceration in cases prosecuted by the Antitrust Division
- Imprisonment
  - 5-year averages (for individuals sentenced to prison time)
    - FY2005-2009: 22.8 months
    - FY2010-2014: 24.6 months
    - FY2015-2019: 9.7 months
    - FY2020-2024: 10.1 months
- Fines
  - Average fines for individuals fluctuate considerably



Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

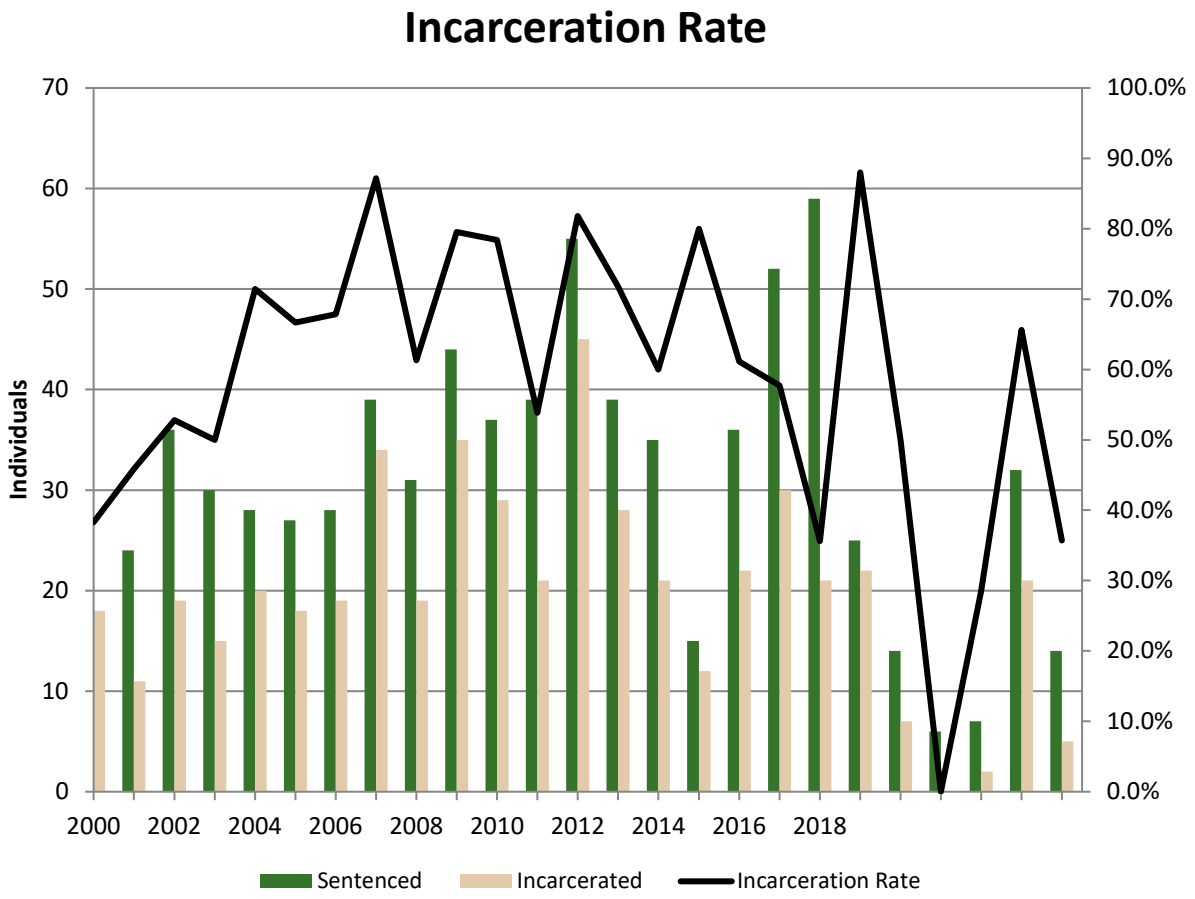
Criminal sanctions for individuals

Incarceration

Fiscal Year	Total Days of Incarceration Sentenced	Number of Individuals Incarcerated	Average Incarceration (Days)	Average Sentence (Months)
2013	20,999	28	750	25.0
2014	16,527	21	787	26.2
2015	4,824	12	402	13.4
2016	7260	22	330	11.0
2017	7860	30	262	8.7
2018	5985	21	285	9.5
2019	3938	22	179	6.0
2020	3143	7	449	15.0
2021	0	0	0	0.0
2022	912	2	456	15.2
2023	9387	21	447	14.9
2024	750	5	150	5.0

Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

Criminal sanctions for individuals



Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

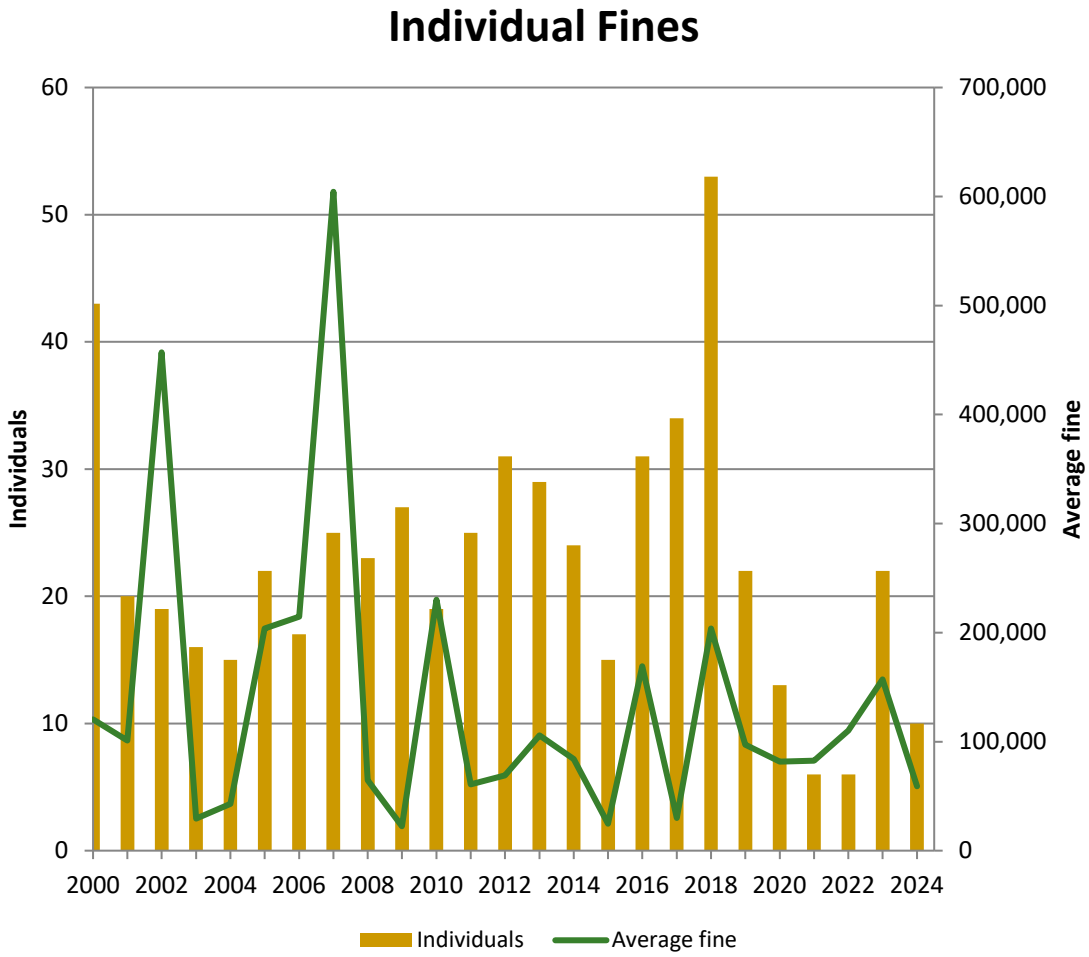
Criminal sanctions for individuals

Individual Fines

Fiscal Year	Total Fines Assessed ($000s)	Number of Individuals Fined	Average Fine ($000s)	5-Year Rolling Average ($000s)
2013	$3,069	29	$105.8	$89.4
2014	$2,016	24	$84.0	$102.5
2015	$369	15	$24.6	$73.5
2016	$5,245	31	$169.2	$98.8
2017	$1,017	34	$29.9	$88.0
2018	$10,795	53	$203.7	$123,824
2019	$2,138	22	$97	$112,440
2020	$1,061	13	$82	$111.505
2021	$495	6	$83	$92,310
2022	$661	6	$110	$107,994
2023	$3,456	22	$157	$113
2024	$592	10	$59	$110

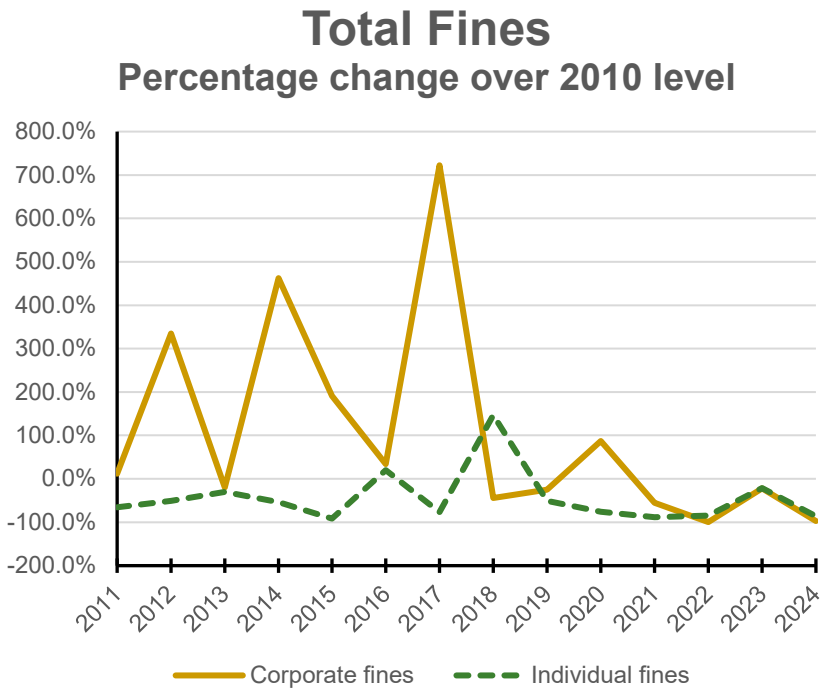
Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

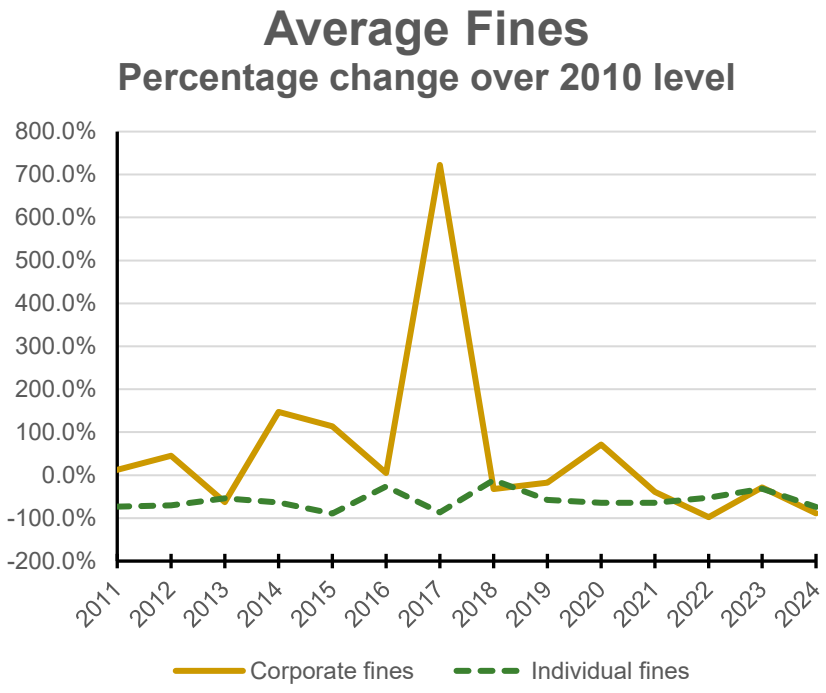
Criminal sanctions for individuals



Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

Criminal sanctions compared





Source: U.S. Dep't of Justice, Antitrust Div., Workload Statistics FY 2015 – 2024.

Criminal fines factoid

- So where do criminal fines collected by the DOJ go?
  - Surprisingly, not to the general treasury, much less the DOJ budget
  - They go to the Crime Victim's Fund
- Crime Victim's Fund
  - Established by the Victims of Crime Act (VOCA) of 1984[1]
    - Financed by fines and penalties paid by convicted federal offenders, not from tax dollars
    - Includes deposits from federal criminal fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorneys' Offices, federal U.S. courts, and the Federal Bureau of Prisons
    - Most funding comes from federal criminal fines, of which a large portion comes from antitrust criminal fines
  - Provides funding for state victim compensation and assistance programs

[1] 42 U.S.C. § 10601.

DOJ Prosecutorial Policy

DOJ prosecutorial policy

- DOJ may prosecute Sherman Act violations either criminally or civilly
- *Prosecutorial discretion*: DOJ only prosecutes "hard core" violations criminally[1]
  - "Hard core" violation involve:
    1. clandestine activity
    2. concealment, *and*
    3. clear knowledge on the part of the perpetrators of the wrongful nature of their behavior
  - Exceptions:
    1. the case law is unsettled or uncertain;
    2. there are truly novel issues of law or fact presented;
    3. confusion reasonably may have been caused by past prosecutorial decisions; *or*
    4. there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.
- Hard core categories today
  1. Horizontal price fixing (including labor wage fixing)
  2. Horizontal bid rigging
  3. Horizontal divisions of markets (including labor no-hire and no-poach agreements)

[1] R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before the Antitrust Section of the ABA Annual Meeting (Aug. 12, 2003).

DOJ criminal enforcement activity

- Fiscal Year 2024[1]
  - 167 grand jury investigations pending at the close of fiscal year
  - Filed 20 criminal cases against—
    - 20 individuals, and
    - 5 companies
  - Examples of major on-going criminal investigations
    - Federal procurement collusion in government IT purchases
    - Generic drugs
    - Broiler chickens
    - Aerospace engineering services (labor market allocations)

[1] U.S. Dep't of Justice, Antitrust Division, Workload Statistics FY 2015 – 2024. .

Criminal Prosecution Process and Protections

The criminal prosecution process

- Grand jury indictment
- Arraignment
- Plea/plea agreement
- Trial
- Presentencing
- Sentencing
- Appeal

Selected federal criminal procedural protections

- Fifth Amendment
  - Indictment by grand jury (for federal felonies)
  - No double jeopardy
- Sixth Amendment trial rights
  - Speedy and public trial by an impartial jury
  - Notice of the accusation; confrontation; compulsory process; assistance of counsel
- Due process
  - Government must prove each element beyond a reasonable doubt

Right to indictment by a grand jury

- Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury . . . .

U.S. Const. amend V

  - Felonies are commonly regarded to be "infamous crimes"
    - *See* Fed. R. Crim. P. 7(a)(1):

> *Felony*. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:
> (A) by death; or
> (B) by imprisonment for more than one year

    - Since 1974, criminal antitrust offenses have been felonies

[1] United States v. Therm-All, Inc., 373 F.3d 625, 636 (5th Cir. 2004).
[2] 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765).

Right to indictment by a grand jury

- Fifth Amendment
  - Corporations
    - Corporations have no Fifth Amendment right to indictment by a grand jury
      - The usual argument is that “infamous crimes” are those punishable by imprisonment in a penitentiary, and since corporations cannot be imprisoned, charges against them are not "infamous" within the meaning of the Fifth Amendment
        - "The corporate defendants, unlike defendant Macklin, are not subject to any term of imprisonment if convicted of the charges against them. Accordingly, the charges against them are not 'infamous' within the meaning of the fifth amendment.“[1]
        - “Since indictment is constitutionally required only when a defendant is potentially subject to an infamous punishment, Armored Transport has no right to indictment because a fine is not such a punishment. We agree that the public's notion of what constitutes an infamous punishment varies from one age to another, but we disagree that a fine is as infamous a punishment to a corporation as a year of imprisonment or hard labor is to an individual. Deprivation of liberty takes away from an individual his ability to work, to support and live with his family, to engage in social activity, and other highly valued attributes of living in our society. A corporation in violation of 15 U.S.C. § 1 can only suffer a monetary penalty.”[2]
      - Note the Fed. R. Crim. P. 7(a)(1) requires an indictment only when the offense is punishable by death or imprisonment of more than one year
    - The practice of the DOJ, however, is to indict corporations in criminal antitrust cases

[1] United States v. Macklin, 389 F. Supp. 272, 273 (S.D.N.Y. 1975), *aff'd*, 523 F.2d 193 (2d Cir. 1975).
[2] United States v. Armored Transp., Inc., 629 F.2d 1313, 1319 (9th Cir. 1980) (internal citations and footnotes omitted).

Right to indictment by a grand jury

- Fifth Amendment
  - Variance between indictment and proof at trial
    - For a conviction to be valid, the proof at trial must establish the offense alleged in the indictment
    - A conviction may be invalidated if—
      - There was a variance between the indictment and the proof at trial, and the variance affected the defendant's substantial rights,[1] *or*
      - There was a variance between the instructions given to the jury and the crime charged in the indictment
  - Right to indictment by a grand jury may be waived by the defendant
    - DOJ may then file an *information*[1]

[1] Fed. R. Crim. P. 7(b).

Right to indictment by a grand jury

- Indictment sufficiency
  - Contents of an indictment or information[1]
    - Must contain "plain, concise, and definite written statement of the essential facts constituting the offense charged"
    - Must be signed by an attorney for the government
  - Testing sufficiency
    - Rule 12(b)(3) allows the defendant to test the sufficiency of an indictment (or information) by a motion alleging a defect, including:
      - joining two or more offenses in the same count (duplicity);
      - charging the same offense in more than one count (multiplicity);
      - lack of specificity;
      - improper joinder; and
      - failure to state an offense[2]
    - An indictment is sufficient as long as it—
      - contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, *and*
      - enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense[3]

[1] Fed. R. Crim. P. 7(c)(1). [2] *Id*. 12(b)(3). [3] Hamling v. United States, 418 U.S. 87, 117 (1974).

Right to indictment by a grand jury

- Indictment sufficiency
  - Observations
    - In ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and, more specifically, the language used to charge the crimes
      - On a motion to dismiss, the court assumes the truth of the indictment's allegations
    - Beyond a Rule 12 motion, "[a] defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime."[1]
    - "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits."[2]
      - Criminal procedure does not provide for a motion for summary judgment
      - Although a judge may dismiss a civil complaint pretrial for insufficient evidence on a motion for summary judgment, a judge cannot do the same for a federal criminal indictment
    - "[A]lthough a district court can make factual determinations in matters that do not implicate the general issue of a defendant's guilt when assessing a Rule 12 motion, it cannot resolve a factual dispute that is inextricably intertwined with a defendant's potential culpability, as that is a role reserved for the jury."[3]

[1] Kaley v. United States, 571 U.S. 320, 333 (2014).
[2] Costello v. United States, 350 U.S. 359, 363 (1956) (footnote omitted).
[3] United States v. Aiyer, 33 F.4th 97, 116 (2d Cir. 2022) (internal quotation marks omitted).

Right to trial by jury

- Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[1]

[1] U.S. Const. amend VI.

The Sixth Amendment and the per se rule

- *Query*:
  - Is this right violated when the per se rule is invoked, taking away from the jury the determination of whether the restraint was unreasonable?
  - Precedent
    - Establishes that the per se rule as a conclusive presumption of unreasonableness for horizontal price fixing[1]
    - A conclusive presumption is a rule of law, not an evidentiary presumption[2]
  - Challenges[3]
    - Lower courts have consistently rejected Sixth Amendment challenges to the use of the per se rule in criminal cases
    - The Supreme Court so far has rejected cert petitions to review the question

[1] *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) (holding that there is "a conclusive presumption that the restraint is unreasonable" when parties engage in horizontal price-fixing).

[2] *See* United States v. Manufacturers' Ass'n of Relocatable Bldg. Indus., 462 F.2d 49, 52 (9th Cir. 1972) ("The per se rule does not establish a presumption. It is not even a rule of evidence."); *accord* United States v. Giordano, 261 F.3d 1134, 1143-44 (11th Cir. 2001); United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195 (3d Cir. 1984); United States v. Koppers Co., Inc., 652 F.2d 290, 293-94 (2d Cir. 1981); United States v. Sanchez, No. 14-CR-00580-PJH-2, 2018 WL 399305 (N.D. Cal. Jan. 12, 2018); see generally FTC v. Superior Ct. Trial Lawyers Ass'n, 493 US. 411, 432-33 (1990) (holding that rather than an evidentiary presumption, per se rules are "judicial interpretations of the Sherman Act.").

[3] *See, e.g.*, United States v. Lischewski, 860 F. App'x 512, 514 (9th Cir. 2021), *cert denied*, No. 21-852, 2022 WL 1295714 (U.S. May 2, 2022) (see AppliedAntitrust.com Unit 3 for cert petitions).

Jury instructions

- Generally
  - Jury instructions explain the specific legal elements that the government must prove beyond a reasonable doubt to convict the defendant on the charges contained in the indictment
  - The court may instruct the jury before or after the arguments are completed, or at both times[1]
- Requests to instruct the jury
  - Any party may request in writing that the court instruct the jury on the law as specified in the request[2]
  - The court must inform the parties before closing arguments how it intends to rule on the requested instructions[3]

[1] Fed. R. Cr. P. 30(c). [2] *Id*. 30(a). [3] *Id*. 30(b).

Jury instructions

- Objections[1]
  - A party must be given the opportunity to object to a jury instruction out of the jury's hearing and, on request, out of the jury's presence
  - A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate
  - Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b) (harmless and plain error)
- Rule and assumptions
  - Courts operate under the "crucial assumption that jurors carefully follow jury instructions"[2]
    - *WDC*: This may be a legal fiction (especially in courts that do not provide the jury with a copy of the jury instructions to take back to the jury room)

[1] Fed. R. Cr. P. 30(d).

[2] United States v. Rafiekian, 991 F.3d 529, 550 (4th Cir. 2021); *quoted in* United States v. Brewbaker, No. 22-4544, 2023 WL 8286490 (4th Cir. Dec. 1, 2023); *see* Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions . . . and follow the instructions given them.").

Proof beyond a reasonable doubt

- Standard of proof
  - The Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"[1]
    - In *Apprendi*, the Supreme Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury[2]
      - Plea bargains (Blakely v. Washington, 542 U.S. 296 (2004))
      - Sentencing guidelines (United States v. Booker, 543 U.S. 220 (2005))
      - Criminal fines (Southern Union Co. v. United States, 567 U.S. 343 (2012))
      - Mandatory minimums (Alleyne, 570 U.S. 99 (2013))
      - Capital punishment (Ring v. Arizona, 536 U.S. 584 (2002))
- Weighing the evidence
  - The jury has the sole responsibility for weighing the evidence and making credibility determinations[3]

[1] Hurst v. Fla., 577 U.S. 92, 97 (2016); *see, e.g,* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000); Sullivan v. Louisiana, 508 U.S. 275 (1993); *In re* Winship, 397 U.S. 358, 364 (1970); Miles v. United States, 103 U.S. 304, 312 (1880).
[2] *Apprendi*, 530 U.S. at 494; *accord* Hurst v. Fla., 577 U.S. 92, 97 (2016).
[3] Goldman v. United States, 245 U.S. 474, 477 (1918); accord Eastman Kodak Co. of New York v. S. Photo Materials Co., 273 U.S. 359, 375 (1927).

DOJ Leniency Policy/ACPERA

DOJ leniency policy

- Objectives
  - Provides substantial incentives for cartel participants (companies and individuals) to report cartel activity to the Antitrust Division
  - Destabilizes cartels by increasing the likelihood that some member will defect and report the cartel
- Operation
  - Leniency protects recipient from criminal prosecution
    - Corporate leniency also covers all directors, officers, and employees of the corporation who—
      1. admit their involvement in the illegal antitrust activity as part of the corporate confession, *and*
      2. assist the Division throughout the investigation
  - Requires
    - Applicant must report the existence of an actual criminal antitrust conspiracy
    - Applicant must admit to a criminal violation
  - ATD grants leniency *only* to first qualifying application
    - Creates likelihood of enormous differences in criminal liability of otherwise similarly situated cartel members
    - Attempts to create a race among cartel participants to report
    - Race may include a company against its participating employee

DOJ leniency policy

- Conditions for leniency protection—"Type A" corporate leniency
  1. No investigation
     - ATD has not received information about the illegal activity from any other source
  2. Prompt self-reporting (added in 2022)
     - Upon its discovery of the illegal activity, the applicant promptly reports it to the Antitrust Division
       - "A company that discovers it committed a crime and then sits on its hands hoping it goes unnoticed does not deserve leniency."[1]
       - The Division will measure promptness from "the earliest date on which an authoritative representative of the applicant for legal matters—the board of directors, its counsel (either inside or outside), or a compliance officer—was first informed of the conduct at issue."[2]
       - An organization will not be eligible for leniency if an authoritative representative learns of potential illegal activity and refrains from investigating further[3]

[1] Jonathan Kanter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Opening Remarks at 2022 Spring Enforcers Summit, Washington, DC (Apr. 4, 2022).
[2] U.S. Dep't of Justice, Antitrust Div., Frequently Asked Questions (Leniency Program) Q21 (Jan. 3, 2023).
[3] *Id*.

DOJ leniency policy

- Conditions for leniency protection—"Type A" corporate leniency (con't)
  3. Prompt self-reporting (added in 2022) (con't)
     - The prompt self-reporting requirement replaced the "prompt termination" requirement
       - *Superseded requirement*: Upon discovery, the corporation took prompt and effective action to terminate its participation
         - "Discovery" occurs whenever board or company counsel was first informed
         - Consequently, participation of senior executives may not preclude leniency
       - *Exception*: ATD may request continued participation to assist in investigation
     - WDC:
       - It remains to be seen how strictly the Division will enforce the new self-reporting requirement
       - *Query*: Will the uncertainty created by the Division's discretion in determining whether an applicant was "prompt" deter companies from coming forward for leniency?
  4. Candor, completeness, and cooperation
     - Corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation
  5. Corporate act
     - Confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials

DOJ leniency policy

- Conditions for leniency protection—"Type A" corporate leniency (con't)
  6. Restitution and compliance program
     - *Formal policy*: The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity
     - *Practice*:
       - Historically, restitution has not been required and instead resolved through private antitrust actions on behalf of victims
       - In its 2022 "update," the Antitrust Division now requires that an applicant must—
         - present "concrete, reasonably achievable plans" about how the applicant will make restitution before receiving a conditional leniency letter, *and*
         - Actually pay restitution before receiving final leniency letter[1]
       - However, the Division also says that "restitution can be satisfied through settlements negotiated directly with victims or in parallel private civil actions[2]
         - The defense bar has expressed concerns that the 2022 effectively require the applicant to begin settlement negotiations and reach a settlement agreement earlier in the process that historically has been the case, which, in turn, will deter applicants from applying for leniency?
  7. No leadership
     - Did not coerce another party to participate in the illegal activity
     - Clearly was not the leader in, or the originator of, the illegal activity

[1] U.S. Dep't of Justice, Antitrust Div., Frequently Asked Questions (Leniency Program) Q35 (Jan. 3, 2023). [2] *Id*. Q34.

DOJ leniency policy

- Conditions for leniency protection—"Type B" corporate leniency
  1. First to report
     - At the time the applicant reports the illegal activity, the Antitrust Division does not yet have evidence against the applicant that, in the Division's sole discretion, is likely to result in a sustainable conviction against the applicant
  2. Prompt self-reporting
     - Replaced "prompt termination" requirement in 2022
  3. Candor, completeness, and cooperation
     - Same as Type A requirement, *plus*
     - Cooperation must advance ATD's investigation
  4. Corporate act
  5. Restitution
  6. Fairness
     - ATD determines that granting leniency would not be unfair to others

DOJ leniency policy

- Type B" corporate leniency: Leniency for individuals
  - Prior to 2022, the Division's presumptively afforded protections to directors, officers, and employees of companies that admit to antitrust crimes in Type B leniency situations
  - After the 2022 update, the Division no longer apply that presumption
    - When a company seeks Type B leniency, whether the protection is extended to individual executives and employees will depend on an individual-by-individual assessment
    - Factors to be considered include—
      - Importance of the matter
      - Value of the individual's cooperation and its timing
      - Individual's relative culpability and criminal history, and
      - Interests of any victims[1]
    - Overall, the Division will—

> "extend non-prosecution protection to personnel of Type B applicants—whether through the organization's leniency letter or through agreements directly with individual employees—if the cooperation appears to be necessary to the public interest and other means of obtaining the cooperation are unavailable or ineffective."[2]

[1] U.S. Dep't of Justice, Antitrust Div., Frequently Asked Questions (Leniency Program) Q52 (Jan. 3, 2023). [2] *Id.*

DOJ leniency policy

- Marker system[1]
  - Keeps applicant's place in line for a limited amount of time while the applicant obtains support for the application
    - Recall that application must support actual criminal antitrust conduct
  - To obtain a marker, counsel must—
    1. Report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation;
    2. Disclose the general nature of the conduct discovered;
       - Evidentiary burden low when ATD is not already investigating
       - Burden higher when ATD is investigating
    3. Identify the industry, product, or service involved in terms specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and
    4. Identify the client
       - An "anonymous" marker may be available for 2-3 days
  - Duration
    - 30 days common
    - ATD might grant more time if circumstances warrant

[1] *See generally* U.S. Dep't of Justice, Antitrust Div., Use of Markers in Leniency Programs: United States, prepared for the OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, Working Party No. 3 on Co-operation and Enforcement (DAF/COMP/WP3/WD(2014)51, Nov. 20, 2014).

DOJ leniency policy

- Leniency for individuals
  - Coverage under corporate leniency
    - Recall that Type A corporate leniency also covers all directors, officers, and employees of the corporation who—
      1. admit their involvement in the illegal antitrust activity as part of the corporate confession, *and*
      2. assist the Division throughout the investigation
  - If the corporation does not come forward (or if Type B corporate leniency is granted), an individual may seek leniency
    1. No investigation
    2. Candor, completeness, and cooperation
    3. No leadership

    NB: The DOJ reserves much more discretion in denying individual leniency under Type B than Type A corporate leniency
  - Other types of immunity
    - Any individual who does not qualify for leniency under the individual or corporate leniency policies may still be considered for statutory or informal immunity

DOJ leniency policy

- Leniency for individuals
  - Statutory immunity
    - Fifth Amendment right against self-incrimination
      - Protects claimant from being compelled to provide evidence where the evidence exposes the claimant to possible criminal prosecution[1]
      - Applies only to natural persons—not to corporations and other artificial persons
      - Applies to oral testimony and personal documents
    - An immunized witness cannot refuse to testify on Fifth Amendment grounds[2]
      - *Transactional immunity*: Immunity from prosecution of the underlying offense
        - If granted, provides little incentive for witness to be cooperative
        - Statutes authorizing grant repealed in 1970
      - *Use immunity*: Cannot use the testimony in the prosecution of the witness[2]
        - Witness Immunity Act of 1970[3]—provides for the grant of use immunity
        - Only type of statutory immunity available in federal crimes
        - Witness can still be prosecuted using other evidence (government bears burden of proof)

[1] *In re* Gault, 387 U.S. 1, 47 (1976); Hoffman v. United States, 341 U.S. 479, 486-87 (1951).
[2] *See* Kastigar v. United States, 406 U.S. 441 (1972) (holding that compelling testimony under use immunity does not violate the Fifth Amendment).
[3] 18 U.S.C. §§ 6001-05.

DOJ leniency policy

- Leniency for individuals
  - Statutory immunity (con't)
    - DOJ criteria for granting statutory immunity[1]
      - Necessary conditions[2]
        1. The testimony or information sought may be in the public interest
        2. The witness has refused or is likely to refuse to testify on Fifth Amendment grounds
      - Other discretionary factors[3]
        1. The seriousness of the offense and the importance of the case in achieving effective enforcement of the criminal laws
        2. The value of the potential witness' testimony or information to the investigation or prosecution
        3. The likelihood of the witness promptly complying with the immunity order and providing useful testimony
        4. The person's culpability relative to other possible defendants
        5. The possibility of successfully prosecuting the witness without immunizing him
        6. The possibility of adverse harm to the witness if he testifies pursuant to a compulsion order
    - Procedure
      - Application must be made to a federal district court for an immunity order
      - Application must be authorized by Assistant Attorney General or Deputy Assistant Attorney General

[1] U.S. Dep't of Justice, Antitrust Div., Grand Jury Manual § V.D (1991).
[2] 18 U.S.C. §§ 6003(b).
[3] *Id*.

DOJ leniency policy

- Leniency for individuals
  - Informal immunity/agreement not to prosecute[1]
    - Nonstatutory commitment by Division officials not to prosecute
    - Usually conferred by letter addressed to the witness and signed, in most cases, by the chief or assistant chief of the investigating section
    - Provides that the Division will not use the witness' statements against her in any subsequent criminal prosecution of the witness for violations:
      - of the Sherman Act (and perhaps other specified statutes),
      - arising out of the witness' conduct in a specified geographic area, *and*
      - during a specified time period.
    - Essentially a contract between the Division and the witness
      - Binding and enforceable as a contract on the government[2]

[1] U.S. Dep't of Justice, Antitrust Div., Grand Jury Manual § V.I (1991).
[2] *See* United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796 (E.D. Pa. 1980).

"Amnesty plus"

- Scenario
  - Company is too late to obtain leniency for one conspiracy, but has information on a second conspiracy
- Operation
  1. Company obtains leniency for the second conspiracy, *and*
  2. ATD recommends substantial reduction in fines in first conspiracy
     - Greater than reduction that company would have received for cooperation only with respect to the first conspiracy

Leniency applications in practice

1. "Marker" request
   - Marker request (secure place in line) while counsel conducts a rapid internal investigation and preserves evidence
2. Proffer to the Division (typically through counsel)
   - What you know, how you know it, and who/what to preserve
3. Conditional leniency
   - Subject to continuing duties: Full cooperation, document preservation/production, restitution, and a compliance program
4. Individual exposure and protection
   - Type A vs. Type B coverage
   - Protection is conditioned on complete, continuing cooperation and compliance
5. Immunity as an alternative when leniency is unavailable
   - Use immunity under 18 U.S.C. §§ 6002–6003
   - Requires approval process and limits prosecution use of compelled testimony

Leniency and M&A safe-harbor declinations

- Corporate leniency is the Division's voluntary self-disclosure policy
  - If a company self-reports but does not meet the corporate leniency conditions, it "will not be eligible for a declination"
- Acquiror-discovered Sherman Act misconduct
  - A presumption of declination for the *acquiror only* if the both merging parties—
    - satisfy the relevant leniency requirements
    - voluntarily disclose to DOJ (and to the FTC if it is reviewing the deal) before closing
    - enter an agreement acceptable to DOJ (and FTC when relevant) that suspends the review period until a conditional leniency letter issues or the marker lapses, and/or
    - commits not to close for a specified period after a conditional letter issues or the marker expires
  - Practical implication:
    - For antitrust cartel issues, "safe harbor" may require pre-closing disclosure and can affect deal timing

Leniency applications in practice

6. "Amnesty Plus/Penalty Plus" dynamics
   - *Amnesty Plus*: Second in Cartel A, but if first to report Cartel B, may get leniency in B and a credit/benefit in A
   - *Penalty Plus*: if you cooperate in Cartel A but conceal Cartel B and DOJ later discovers B, you risk an aggravated outcome in A (and charges in B)
7. Final leniency letter
   - After satisfaction of all conditions, typically after the Division's investigation/prosecutions are complete

Revoking leniency

- Leniency grants conditional on—
  1. Truthfulness of the representations predicating the initial grant, *and*
  2. Continued full and complete cooperation with the authorities
- *Stolt-Nielsen*[1]
  - Only instance to date where the DOJ has sought to revoke leniency
    - Alleged failure to take "prompt and effective action to terminate its part in the activity upon discovery of the activity"
    - Alleged failure to provide full and truthful cooperation
  - Stolt-Nielsen brought civil action for enforcement of agreement and to bar DOJ prosecution
    - *District court*: Enjoined DOJ from revoking agreement
    - *Third Circuit*:
      - Reversed on separation of powers grounds (i.e., could not issue preventive injunction)
      - BUT Stolt-Nielsen could invoke agreement as a defense to an indictment
    - *On criminal prosecution*: District court held that DOJ had no reasonable basis to revoke agreement and ordered dismissal of indictments.[2] DOJ did not appeal.

[1] Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir. 2006).
[2] United States v. Stolt-Nielsen, 524 F. Supp. 2d 609 (E.D. Pa. 2007).

ACPERA

- Antitrust Criminal Penalty Enhancement and Reform Act of 2004[1]
  - Problem
    - Leniency recipients have to confess to—and provide evidence regarding—a criminal violation, inviting private treble damage actions against them
      - Antitrust co-conspirators are jointly and severally liability for all conspiratorial damages in a private treble damage action
      - Presented a significant disincentive to seek leniency
  - ACPERA
    - Limited leniency recipient's liability to actual damages caused by the recipient's wrongful acts
      - No treble damages
      - No joint and several liability
    - Applies to federal and state private actions
    - Conditioned on leniency recipient's "satisfactory cooperation" with the private claimants
      - Court makes this determination at time of imposing judgment
    - Expiration
      - Original legislation contained 5-year sunset provision—been extended twice
      - 2020 legislation eliminated sunset provision

[1] Pub. L. No. 108-237, tit. II, 118 Stat. 661, 665, *as amended by* Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), and Pub. L. No 116-159, tit. III, 134 Stat. 709, 742 (Oct. 1, 2020) (codified as 15 U.S.C.A. § 1 note).

DOJ Whistleblower Rewards Program

DOJ Whistleblower Rewards Program[1]

- Purpose and scope
  - Introduced July 8, 2025
  - Rewards voluntary tips on criminal antitrust violations and related offenses, so long as there is a "Postal Service nexus"
- Statutory authority: Uses USPS—
  - Authority to collect/remit criminal fines in matters affecting USPS[2]
  - Reward authority for violations affecting USPS (revenues or property)[3]

[1] For more details, see Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department's Antitrust Division Announces Whistleblower Rewards Program (July 8, 2025); U.S. DEP'T OF JUSTICE, ANTITRUST DIV., WHISTLEBLOWER REWARDS PROGRAM: REPORTING ANTITRUST CRIMES AND QUALIFYING FOR WHISTLEBLOWER REWARDS (webpage); and Memorandum of Understanding Regarding the Whistleblower Rewards Program and Procedures Between the Antitrust Division, U.S. Dep't of Justice and the United States Postal Service and the Office of Inspector General, United States Postal Service (May 7, 2025).
[2] 39 U.S.C. § 2601(a)(2) (collection/remittance authority).
[3] 39 U.S.C. § 404(a)(7) (reward authority).

DOJ Whistleblower Rewards Program

- Threshold and core requirements
  - Voluntary, original, specific, credible, timely information not already known to DOJ/USPIS/USPS OIG
  - Must lead to a resolution with at least $1 million in criminal fines (or equivalent recovery via DPA/NPA)
    - Deferred Prosecution Agreement (DPA)
      - DOJ files (or could file) a criminal charge but agrees to defer prosecution for a set period if the company satisfies conditions (typically cooperation, compliance enhancements, sometimes payment)
      - If the company complies with DPA, DOJ dismisses the charge at the end of the term; if it breaches, DOJ can proceed with the prosecution
    - Non-Prosecution Agreement (NPA)
      - DOJ agrees not to file criminal charges so long as the company meets specified conditions (again often cooperation/compliance/payment)
      - If the company breaches, DOJ can revoke the agreement and pursue charges
- Award range
  - Awards are discretionary
  - If eligible, the presumptive award is 15%–30% of the criminal fine or recovery (with a 30% total cap, including shared awards)

Program mechanics

- Intake and evaluation
  - Tips may be submitted to DOJ, USPIS, or USPS OIG
  - DOJ screens for—
    - An Eligible Criminal Violation,
    - Specificity/credibility, *and*
    - Originality (independent knowledge or analysis; not already known to DOJ/USPIS/USPS OIG)
- USPIS as the statutory gatekeeper for the "Postal Service nexus"
  - DOJ sends qualifying reports to a designated USPIS official
  - USPIS determines whether the allegations "reasonably articulate" violations affecting USPS, its revenues, or property
  - USPIS has final approval authority over DOJ's criteria/methodology for the public program

Program mechanics

- Payment and award mechanics
  - If the matter yields a covered resolution (≥ $1 million), DOJ approves USPS remittance of a portion of the fine
  - Award amount is determined in consultation with USPIS and USPS OIG, but is in DOJ's sole discretion
  - USPS pays the whistleblower from the remitted amount
    - USPS retains the remaining amount
- Effectiveness to date
  - As of December 22, 2025, the DOJ has not publicly reported the number of submissions received or awards paid

Sentencing and Sentencing Guidelines

Sentencing

- Elements of sentences—
  - Criminal fine
  - Incarceration (for natural persons)
  - Probation
  - Restitution to injured victims
  - Special assessment for the Crime Victims Fund
- Section 3553 factors to be considered in imposing a sentence[1]—
  1. The seriousness of the offense
  2. The justness of the sentence
  3. The need to afford adequate deterrence to criminal conduct (general deterrence)
  4. The need to protect the public from further crimes by the defendant (specific deterrence)
  5. The need to provide the defendant with educational training, medical care, or other correctional treatment

[1] 18 U.S.C. § 3553(a)(2).

Sentencing Guidelines

- Background
  - Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984[1]
    - Created the United States Sentencing Commission
    - Original guidelines effective November 1, 1987, with periodic amendments
  - Guidelines mandatory from 1987 to 2005
  - *Booker*[2]
    - Sixth Amendment right to jury trial applies to federal sentencing
    - *Stevens opinion*: Judge cannot enhance sentences based on facts not found by jury
    - *Breyer opinion*: Mandatory application of Sentencing Guidelines unconstitutional, but can be "advisory"
  - Post-*Booker* standard
    - Unreasonableness (a particularly deferential form of abuse of discretion)
    - Most courts employ a presumption of reasonableness if within Guidelines' range

[1] Pub. L. No. 98-473, §§ 211-17, 98 Stat. 1937 (1984).
[2] United States v. Booker, 543 U.S. 220 (2005).

Sentencing Guidelines

- Sentencing Guidelines § 2R1.1
  - Only section that addresses antitrust offenses
  - Explicitly applies to:
    - Bid rigging
    - Price fixing
    - Market allocations
  - Antitrust Division policy
    - Guidelines address only to per se illegal horizontal cartel offenses
      - Would not apply to other offenses if prosecuted criminally
    - All ATD recommendations must comply with Sentencing Guidelines
    - ATD will appeal sentences that are below Guidelines' range

Sentencing Guidelines: Organizations

- General approach
  1. Set a base fine for each count
  2. Determine culpability score
  3. Use culpability score to determine minimum and maximum multipliers
  4. Apply multipliers to base fine to create *Guidelines fine range* of minimum and maximum fines
- Guidelines apply separately for each count

Sentencing Guidelines: Organizations

- Base fine
  - Greatest of:
    1. the amount determined by the offense level, which is calculated based on factors such as the volume of commerce affected
    2. the pecuniary gain to the organization from the offense
    3. the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly

USSG § 8C2.4—Base Fine
USSG § 2R1.1—Antitrust Offenses

Sentencing Guidelines: Organizations

- Base fine
  - Practically, the third alternative is almost always the one applied
    - Produces the largest fine range, since USSG presumes loss equal to 20% of *affected commerce*[1]
      - This is a presumption of the pecuniary loss caused by the defendant for the purpose of applying the alternative fine provision of the Comprehensive Crime Control Act
      - *DOJ position*: Based on the conspiracy's volume of commerce, not merely that of the individual defendant[2]
      - Rebuttable presumption that all sales should be included in the volume of commerce
        - Defendant's burden to show that certain transactions were "completely unaffected" by the conspiracy
    - Basis: Commission assumed 10% overcharge *plus* harm to customers that were priced out of the market (presumed to be another 10%)
      - Substantial empirical debate over the correctness of the 10% presumption
    - The Guidelines make the presumption almost conclusive[3]

USSG § 8C2.4—Base Fine
USSG § 2R1.1—Antitrust Offenses

[1] USSG § 2R1.1(d)(1) & Application Note 3 (originally adopted in 1991).
[2] Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Statement on Behalf of the United States Department of Justice, Before the Antitrust Modernization Commission Hearings on Criminal Remedies (Nov. 3, 2005).
[3] USSC § 2R1.1 Application Note 3.

Sentencing Guidelines: Organizations

- Culpability score
  1. Based on a point system with upward and downward adjustments
  2. Start with a beginning score of 5
  3. Upwards adjustments
     - Size of the organization (by number of employees)
     - Whether there was involvement or willful ignorance on the part of high-level management or pervasive tolerance of the offense throughout the organization
     - Previous related criminal history
     - Whether the organization willfully obstructed or impeded the investigation.
  4. Downward adjustments
     - Existence of an effective compliance program and for self-reporting of the violation
     - Cooperation with the investigation
     - Acceptance of responsibility

USSG § 8C2.5—Culpability Score
USSG § 2R1.1—Antitrust Offenses

Sentencing Guidelines: Organizations

- Determine the Guidelines fine range
  1. Determine minimum and maximum multipliers based on culpability score
  2. Apply multipliers to base fine to determine fine range
  3. Special considerations in antitrust cases
     - Lower bound on minimum multiplier in antitrust cases is 0.75
       - Results in a minimum fine of 15% of affected commerce in least serious case
- Determine specific fine within the Guidelines fine range
  - Long list of policy considerations, including the need for the sentence to—
    1. reflect the seriousness of the offense
    2. promote respect for the law
    3. provide just punishment
    4. afford adequate deterrence (general deterrence)
    5. protect the public from further crimes of the organization (specific deterrence)

USSG § 8C2.6—Minimum and Maximum Multipliers
USSG § 8C2.8—Determining the Fine
USSG § 2R1.1—Antitrust Offenses

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber case*[1]
  - Step 1: Determine base fine and total culpability score

		Guidelines Calculation	
1		Base Fine (20% of $324 million (Volume of Affected Commerce) (§ 2R1.1(d)(l) & § 8C2.4(b))[2]	$64.8 million
2		Culpability Score	
	i.	Base (§ 8C2.5(a))	5
Upward adjustments	ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5
	iii.	Prior History (§ 8C2.5(c))	0
	iv.	Violation of Order (§ 8C2.5(d))	0
	v.	Obstruction of Justice (§ 8C2.5(e))	0
Downward adjustments	vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
	vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g)(2))	-2
		Total Culpability Score:	8

[1] United States v. Kayaba Industry Co., No. 1:15-cr-00098 (S.D. Ohio indictment filed Sept. 16, 2015).
[2] This was a sentence recommendation based on a plea agreement. The volume of affected commerce resulted from an agreement of the parties supported by evidence provided by the defendant and did not need to be found by a jury under *Booker*.

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Step 2: Find multipliers and apply them to base fine to find Guidelines range (§ 8C2.6)

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

Base Fine = $64.8 million
Apply multipliers:

Guidelines range:
$103.68 million - $207.36 million

DOJ recommendation:
$62 million
(reflecting downward adjustment)

Note: Lower bound on minimum multiplier in antitrust cases is 0.75 (§ 2R1.1(d)(2))
Yields a minimum fine of 15% of affected commerce in least serious case

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Step 3: Apply Section 3553 and 3572 factors
    - Relevant Section 3553 factors
      1. The seriousness of the offense (§ 3553(a)(2)(A)):
         - Antitrust offenses are very serious
      2. The history, characteristics, and cooperation of the defendant (§ 3553(a)(1)):
         - No prior history of being charged with a crime
         - Defendant's cooperation in the investigation was timely and complete
         - Defendant "has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct"
      3. Deterrence and protecting the public from further crimes of the defendant (§3553(a)(2)(B)-(C)):
         - Recommended fine of $62 million provides adequate general and specific deterrence
         - Defendant has implemented new antitrust compliance policy
      4. The need to provide to provide the defendant with educational training, medical care, or other correctional treatment (§3553(a)(2)(D)
         - Unlikely to ever apply in antitrust cases (as opposed, for example, to drug cases)

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Step 3: Apply Section 3553 and 3572 factors (con't)
    - Relevant Section 3572 factors
      1. Preventing recurrence of the offense—Compliance (§ 3572(a)(8))
         - Complied fully with the investigation once contracted by the DOJ
         - Instituted policies to ensure that it would not violate the antitrust laws again
           - Senior management fully committed to make compliance a top priority
           - Provides for training, testing, prior approval of contacts with competitors, certifications by employees of independent pricing and no exchange of information with competitors, anonymous hotline reporting, proactive monitoring and auditing, and disciple of employees who violate the policy
      2. Discipline of culpable actions (§ 3572(a)(8))
         - Two high-ranking employees who were personally involved were demoted and no longer have sales responsibility
         - Lower level employees may also have been disciplined
      3. The defendant's financial position (§ 3572(a)(1))
         - Defendant is solvent and has agreed to pay $62 million within 15 days of the final judgment
      4. Other relevant Section 3572 factors captured in Guidelines calculations:
         - Pecuniary loss inflicted on others (§ 3572(a)(3))
         - Need to deprive defendant of illegally obtained gains (§ 3572(a)(5))
      5. Restitution (§ 3572(a)(4))
         - Unnecessary in most antitrust cases since victims may sue for treble damages

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Step 4: Motion for Downward Departure from the Guidelines range (Guidelines § 8C4.1)
    - Factors
      1. The significance and usefulness of the defendant's assistance
      2. The nature and extent of the defendant's assistance
      3. The timeliness of the defendant's assistance
    - Recommended sentence
      - $62 million fine
      - No order of restitution
        - Typical in antitrust actions in light of the availability of civil treble damage actions
      - No term of probation
        - Fine to be paid in full 15 days after final judgment
        - Defendant has already instituted and is fully committed to a new compliance program
      - $400 "special assessment" required by 18 U.S.C. § 3013(a)(2)(B)
        - Special assessment (of varying amounts) is made on every person for each count of a federal offense on which it is convicted
        - Contributed by law to the Crime Victims Fund (a separate account in the Treasury Department)
    - Recommended sentence was accepted and ordered by the court

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Probation
    - Note that the court did not order probation in *Kayaba*, but it could have
    - Corporations may be sentenced to probation[1]
      - If imposed, must be for a minimum of one year[2]
      - Cannot be for a term longer than five years[3]
    - Sentencing Guidelines call for probation as a means of ensuring that—
      - Convicted corporations comply with their obligations to pay a fine or special assessment
      - Make restitution
      - Establish a compliance program
      - Perform community service, or
      - Comply with the court's remedial orders[4]
    - Mandatory condition
      - The only mandatory condition of corporate probation that the corporation not engage in any further criminal conduct[5]

[1] U.S.S.G. § 8D1.1(a)(7); 18 U.S.C. § 3551(c).
[2] U.S.S.G. § 8D1.2(a)(1); 18 U.S.C. § 3561(c)(1) (for felonies).
[3] U.S.S.G. § 8D1.2(a); 18 U.S.C. § 3561(c) (for felonies).
[4] U.S.S.G. §§ 8D1.1(a)(1), (2), (3).
[5] 18 U.S.C. § 3563(a)(1), U.S.S.G. § 8D1.3(a)(1).

Sentencing Guidelines: Organizations

- *Application 1*: Kayaba Industry Co. in the *Shock Absorber* case
  - Probation
    - Failure to comply with conditions of probation: the court may—
      1. resentence the corporation,
      2. extend the term of its probationary period, *or*
      3. impose additional probationary conditions.[1]

[1] 18 U.S.C. § 3565(a); U.S.S.G. § 8F1.1.

Sentencing Guidelines: Organizations

- *Application 2*: AUO and AUOA in the *TFT-LCD* cartel case[1]
  - Step 1: Determine base fine and total culpability score

		Guidelines Calculation	AUO	AUOA
	1	Base Fine (20% of $2.34 billion (Volume of Affected Commerce) (§ 2R1.1(d)(I) & § 8C2.4(b))[2]	$486 million	$486 million
	2	Culpability Score		
	i.	Base (§ 8C2.5(a))	5	5
Upward adjustments	ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5	1
Upward adjustments	iii.	Prior History (§ 8C2.5(c))	0	0
Upward adjustments	iv.	Violation of Order (§ 8C2.5(d))	0	0
	v.	Obstruction of Justice (§ 8C2.5(e))	0	3
Downward adjustments	vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0	0
Downward adjustments	vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g)(2))	0	0
		Total Culpability Score:	10	9

[1] Superseding Indictment, United States v. AU Optronics Corp., No. 3:09-CR-00110 (N.D. Cal. filed June 10, 2010).
[2] In its sentencing memorandum, the government, supported by an expert economic declaration, claimed that the volume of affected commerce was $2.34 billion. The defendants argued for a lower number. There was no jury finding on the volume of affected commerce (although there was a jury finding on the gain to the conspirators of$500 million).

Sentencing Guidelines: Organizations

- *Application 2*: AUO and AUOA in the *TFT-LCD* cartel case
  - Step 2: Find multipliers and apply them to base fine to find Guidelines range (§ 8C2.6)

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

Base Fine = $486 million

Multipliers:
AUO: 2.0 – 4.0
AUOA: 1.8 – 3.6

Guidelines range:
AUO: $936 million - $1.872 billion
AUOA: $843.4 million - $1.684 billion
Recommendations:

	AUO	AUOA
DOJ	$1 B	$0
Probation	$0.5B	$0
Defendant	$0.285 B	$0

Note: The alternative fines provision provides a maximum penalty of twice the gain or twice the loss resulting from the illegal activity. The jury in its verdict found that the gain from the illegal conspiracy was at least $500 million. Therefore, the maximum fine would be $1 billion, whatever the Guidelines range. Since the government used the Guidelines range only to argue for a sentence within a range set independently by statute, the jury did not need to make a finding on the volume of affected commerce.

Sentencing Guidelines: Compliance programs

- "Effective compliance and ethics program" (for line 2(vi))
  - Sentencing Guidelines permit a three-point reduction in culpability score if the defendant had an "effective compliance and ethics program" in place at the time of the offense[1]
  - To have an "effective compliance and ethics program," the organization must—
    1. exercise due diligence to prevent and detect criminal conduct; *and*
    2. otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law[2]
  - DOJ historical approach
    - The Antitrust Division has not recommended any reduction in the culpability score for the existence of an antitrust compliance program
    - Leniency program already rewards effective compliance programs
    - Organizations that do not detect and self-report violations do not have effective compliance programs
      - Often because high-level employees are in, or at least tolerating, price-fixing activities

[1] USSG § 8C2.5(f)(1).
[2] USSG § 8B2.1(a). Further detail is provided in Sections 8B2.1(b) and (c).

Sentencing Guidelines: Compliance programs

- DOJ approach *may* be changing
  - Recently, the DOJ has recommended a reduced sentence, not because the defendant had an effective preexisting compliance program, but because it agree to implement one with the following attributes:[1]
    1. Fully commits senior management to make compliance a top priority
    2. Provides for training and testing of senior management and all sales personnel
    3. Requires prior approval of contacts with competitors and active monitoring of follow-up reports on any contracts
    4. Requires certifications by employees of independent pricing and no exchange of information with competitors
    5. Provides for anonymous hotline reporting of possible violations
    6. Provides for disciple of employees who violate the policy
  - *Query*: Will the DOJ give credit to a defendant's preexisting compliance program with these attributes where the defendant's employees nonetheless engaged in price fixing?

[1] *See* United States Sentencing Memorandum and Motion for a Downward Departure Pursuant to United States Sentencing Guidelines § 8C4.1, United States v. Kayaba Industry Co., No. 1:15-cr-00098-MRB (S.D. Ohio Oct. 5, 2015); *see also* Plea Agreement ¶ 13, United States v. Barclays PLC, No. 3:13-cr-00077-SRU (D. Conn. May 20, 2015) (noting that Barclays and the United States agreed upon the fine amount "considering, among other factors, the substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense").

Sentencing Guidelines: Compliance programs

- DOJ approach *may* be changing
  - *Query*: Will the DOJ give credit to a defendant's preexisting compliance program with these attributes where the defendant's employees nonetheless engaged in price fixing?
  - In 2019, the DOJ issued a document stating that the presumption that a compliance program is not effective when the company engages in price fixing is rebuttable:

> Prosecutors should consider whether the Guidelines' presumption that a compliance program is not effective applies and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2.5 (f)(3)(C)(i)–(iv). Relevant to this inquiry is whether: (i) individuals with operational responsibility for the compliance program had direct reporting obligations to the governing authority of the company (e.g., an audit committee of the board of directors if applicable); (ii) the compliance program detected the antitrust violation before discovery outside of the company or before such discovery was reasonably likely; (iii) the company promptly reported the violation to the Antitrust Division; and, (iv) no individual with operational responsibility for the compliance program "participated in, condoned, or was willfully ignorant" of the antitrust violation. U.S.S.G. § 8C2.5.[1]

[1] U.S. Dep't of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 17 (rev. Nov. 2024).

Sentencing Guidelines: Individuals

- Sentencing Commission objectives
  1. Increase frequency of prison terms
     - Guidelines provide for confinement of almost all individual violators
  2. Increase average length of imprisonment
  3. Fines tend to be small, reflecting a primary emphasis on imprisonment

Sentencing Guidelines: Individuals

- Imprisonment
  1. Begin with base offense level of 12
     - Increased from 10 in 2005
  2. Add additional points for
     - Bid-rigging (1 point)
     - Volume of defendant's affected commerce (up to 16 points)
     - Obstruction of justice (2 points)
     - Other aggravating factors (including degree of involvement in conspiracy)
  3. Subtract points for
     - Minor involvement in conspiracy (2 to 4 points)
     - Defendant's acceptance of responsibility (2 points)
  4. Determine sentencing range from total offense level

USSG § 3B—Role in the Offense
USSG § 3C—Obstruction
USSG § 2R1.1—Antitrust Offenses
USSG ch. 5 pt. A (Sentencing Table)

Sentencing Guidelines: Individuals

- Application: Hsuan Bin Chen and Hui Hsiung (aka Kuma) in the *TFT-LCD* cartel case
  - Imprisonment calculation: Step 1—Calculate total offense level

Guidelines Calculation		
a	Base Offense Level (§ 2R1.1(a))	12
b	Volume of Affected Commerce (§ 2R1.1(b)(2)(G)) (More than $1.5 billion)[1]	+16
c	Total Adjusted Offense Level	28
d	Victim-Related Adjustments (§ 3A)	+0
e	Role in the Offense Adjustments (§ 3B)	+4
f	Obstruction Adjustments (§ 3C)	+0
g	Acceptance of Responsibility (§ 3 E1.1(a) and (b))	+0
h	Total Offense Level	32
i	Criminal History Category (§ 4A1.1)	I

Volume of Commerce Adjustments		
(A)	More than $1,000,000	add 2
(B)	More than $10,000,000	add 4
(C)	More than $40,000,000	add 6
(D)	More than $100,000,000	add 8
(E)	More than $250,000,000	add 10
(F)	More than $500,000,000	add 12
(G)	More than $1,000,000,000	add 14
(H)	More than $1,500,000,000	add 16

USSG § 2R1.1(b)(2)

[1] "[T]he 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." USSG § 2R1.1(b)(2).

Sentencing Guidelines: Individuals

- Imprisonment
  - Imprisonment calculation: Step 2—Apply total offense level to obtain sentencing range

Individual Sentencing Ranges

Offense Level	Months
25	57-71
26	63-78
27	70-87
28	78-97
29	87-108
30	97-121
31	108-135
32	121-151
33	135-168
34	151-188

Guidelines range

But since the Sherman Act provides only for maximum of 120 months, the Guidelines range is 120 months

Sentencing Guidelines: Individuals

- Fines
  - USSG set Guidelines fine range to be from 1% to 5% percent of the affected volume of commerce, but not less than $20,000[1]
    - Guidelines range: $23.4 million - $117 million (1% and 5% of $2.34 billion)
    - Within the maximum set by the alternative fines provision
      - Twice the gain or loss resulting from the illegal activity
      - Guidelines presume that the overcharge is 20% of the affected commerce
    - But above Sherman Act maximum of $ 1 million
  - Considerations[2]
    - Role in the offense
    - Degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement)
    - If the defendant lacks the ability to pay the guideline fine, the court should impose community service in lieu of a portion of the fine.
      - The community service should be equally as burdensome as a fine

[1] USSG § 2R1.1(c)(1).
[2] USSG § 2R1.1 Application Note 2.

Sentencing Guidelines: Individuals

- Sentence recommendations

	Chen		Hsiung	
	Prison	Fine	Prison	Fine
Guidelines	120 m	$23.4 m - $117 m	120 m	$23.4 m - $117 m
DOJ	120 m	$1 m	120 m	$1 m
Probation	120 m	$0.5 m	120 m	$0.5 m
Defendant	< 7 m	$0.03 m	< 7 m	
Court	36 m	$0.2 m	36 m	$0.2 m

Sentencing Guidelines: Cooperation

- The Guidelines provide for departures from the Guidelines range when the defendant has provided substantial assistance to the authorities
  - Organizations—nonexclusive factors[1]
    1. Significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered
    2. Nature and extent of the defendant's assistance
    3. Timeliness of the defendant's assistance
  - Individuals—nonexclusive factors[2]
    1. Above factors plus
    2. Truthfulness, completeness, and reliability of any information or testimony provided by the defendant
    3. Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance

[1] USSG § 8C4.1.
[2] USSG § 5K1.1.

Sentencing Guidelines: Appeal

- Standard of review
  - De novo review of a district court's interpretation and application of the sentencing guidelines
  - Abuse of discretion review for the sentencing court's fact-based application of the guidelines

Appeals

Appeals in criminal cases[1]

- Appeal of a plea agreement
  - No appeal
    - Defendant waives right to appeal when entering pleas agreement
- Appeal of a not guilty verdict
  - Government cannot appeal: Fifth Amendment Double Jeopardy Clause bars a second trial after a not guilty verdict[2]
- Appeal of a guilty verdict or sentence
  - Government can appeal the sentence
  - Defendant can appeal the verdict and/or the sentence

[1] *See generally* United States v. Therm-All, Inc., 373 F.3d 625 (5th Cir. 2004).
[2] *See* U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.").

Appeals in criminal cases

- Standards in the appeal of a guilty verdict
  - *On the proper application of the law*: De novo[1]
  - *On the sufficiency of the evidence*: Beyond a reasonable doubt
    - Evidence viewed in the light most favorable to the government
    - Will reverse only if a reasonable jury could not have found one or more elements of the violation proved beyond a reasonable doubt
      - All reasonable inferences and credibility choices must be made in the government's favor[1]
      - Must uphold a jury verdict if a rational trier of fact could have found the evidence established the essential elements of the offense beyond a reasonable doubt
    - Consistency of the evidence as among defendants
      - No requirement of consistency
      - Corporate defendants can be convicted even if all alleged agents are acquitted[2]
  - *On an evidentiary ruling*: Abuse of discretion
    - Objection necessary to preserve error

[1] *See* United States v. Brewbaker, No. 22-4544, 2023 WL 8286490, at *2-*13 (4th Cir. Dec. 1, 2023) (reversing conviction where the indictment charged a per se horizontal price-fixing agreement, the court denied a motion to dismiss, where the indictment alleged, and the proof at trial showed, that the two parties to the agreement were a manufacturer and its distributor in a dual distribution arrangement to which the per se rule did not apply).
[2] Glasser v. United States, 315 U.S. 60, 80 (1942).
[3] United States v. Therm-All, Inc., 373 F.3d 625, 630-31 (5th Cir. 2004).

Appeals in criminal cases

- Standards in the appeal of a sentence[1]
  - *Grounds*: That the sentence—
    1. was imposed in violation of law or as a result of an incorrect application of the sentencing guidelines; *or*
    2. is greater (for the defendant) or less (for the government) than the sentence specified in the applicable guideline range to the extent that
       - the sentence includes a greater/lesser fine or term of imprisonment, probation, or supervised release than the maximum/minimum established in the guideline range, or
       - includes a more/less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum/minimum established in the guideline range; or
    3. was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable
  - Standards: Vacate and remand if the sentence was—
    - Imposed in violation of law or as a result of an incorrect application of the sentencing guidelines
    - Outside the applicable guideline range *and*
      - the district court failed to provide the required statement of reasons in the order of judgment and commitment, *or*
      - the departure is based on an impermissible factor, *or*
      - is to an unreasonable degree, *or*
      - the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable

[1] 18 U.S. Code § 3742.

Appeals in criminal cases

- Appeal from a denial of a motion for a new trial
  - Challenge to jury instructions
    - Based on either—
      - Failure to give requested instruction, *or*
      - Giving of an instruction to which the defendant objected
    - Reviewed for abuse of discretion when there is an objection
      - Review "de novo whether those instructions correctly state the elements of the offense and adequately cover the defendant's theory of the case"[1]
      - If an instruction is erroneous, courts generally "apply harmless error analysis to determine whether an improper instruction constitutes reversible error"[2]
    - Reviewed for plain error in the absence of an objection
      - If a defendant fails to object with sufficient specificity to a jury instruction, courts review for plain error[3]
    - Observations
      - Courts must review jury instructions as a whole
        - The court must "determine whether the instructions, viewed as a whole, were misleading or inadequate to guide the jury's deliberation"[4]

[1] United States v. Liew, 856 F.3d 585, 596 (9th Cir. 2017).
[2] United States v. Munguia, 704 F.3d 596, 598 (9th Cir. 2012).
[3] *See* United States v. Conti, 804 F.3d 977, 981 (9th Cir. 2015).
[4] United States v. Kaplan, 836 F.3d 1199, 1215 (9th Cir. 2016); *see* United States v. Lischewski, 860 F. App'x 512, 514 (9th Cir. 2021).

Appeals in criminal cases

- FRCrP 52(a): Harmless error

> (a) *Harmless Error*. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.[1]

- FRCrP 52(b): Plain error

> (b) *Plain Error*. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.[2]

[1] Fed. R. Cr. P. 52(a).
[2] *Id*. 52(b)