



## MEMORANDUM

From: AMC Staff<sup>†</sup>  
To: All Commissioners  
Date: July 20, 2006  
Re: Supplemental Criminal Remedies Discussion Memorandum

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The Commission deferred completion of its deliberations regarding criminal remedies on May 8, 2006, and requested additional public comment regarding Section 3571(d), the alternative fines provision of Title 18 of the United States Code. The Commission also requested additional staff research relating to this provision. This memorandum, which supplements the criminal remedies discussion memorandum,<sup>1</sup> provides additional information relevant to Section 3571(d), including discussion of comments received in response to the Commission's request.

On May 31, 2006, the Commission requested comment on the following questions:

1. Some observers have opined that application of 18 U.S.C. § 3571(d) consistent with the Constitution may be difficult in all but the most unusual circumstances after *United States v. Booker*, 543 U.S. 220 (2005), given *Booker*'s requirement that the gain or loss be proven to a jury beyond a reasonable doubt. Should 18 U.S.C. § 3571(d) be amended so that it is not applicable in Sherman Act prosecutions? If Section 3571(d) were made inapplicable to Sherman Act prosecutions, should the maximum fine under the Sherman Act be increased? If so, what should be the revised fine amount?
2. In responding to the first question, please also comment on the following:

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<sup>†</sup> This memorandum summarizes comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

<sup>1</sup> See Criminal Remedies Discussion Memorandum (May 4, 2006).

- a) What is the practical difficulty of proving gain or loss from an antitrust violation beyond a reasonable doubt?
- b) If evaluation of the amount of gain or loss requires or warrants expert testimony, can it be said as a matter of law that gain or loss cannot, in such a case, be proven beyond a reasonable doubt?
- c) Why do businesses agree, post-*Booker*, to pay fine amounts in excess of the \$10 million (now \$100 million) statutory maximum
- d) Is the threat of criminal prosecution of a greater number of individuals employed by a business, or of more serious sentences for the business's individuals, a factor that leads some businesses to agree to pay fine amounts in excess of the \$10 million or \$100 million maxima?<sup>2</sup>

The Commission received comments from the American Antitrust Institute (“AAI”), the Antitrust Section of the American Bar Association (“ABA”), and Phillip C. Zane.<sup>3</sup>

## I. Background

Section 3571(d), passed by Congress in 1987, increases any statutory maximum fine to double the pecuniary gain derived, or double the loss caused, by the offense. It is a general provision, not limited to antitrust crimes, that has been used in cases such as fraud on the government, tax evasion, and trafficking in counterfeit goods.<sup>4</sup> Section 3571(d) provides that:

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<sup>2</sup> 71 Fed. Reg. 30,863-30,864 (May 31, 2006).

<sup>3</sup> Response of the American Antitrust Institute Working Group on Criminal Remedies to AMC Request for Public Comment (June 30, 2006) (“AAI Supplemental Comments”); Comments from the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission’s Request for Public Comment on Criminal Remedies – the Alternative Fine Statute – 18 U.S.C. § 3571(d) (June 30, 2006) (“ABA Supplemental Comments”); Phillip C. Zane, Public Comment Regarding Criminal Remedies (June 30, 2006) (“Zane Supplemental Comments”).

<sup>4</sup> See, e.g., *United States v. Wilder*, 15 F.3d 1292 (5th Cir. 1994) (section 3571(d) invoked to enhance penalty in case involving defrauding financial institutions and conspiring to defraud the federal government); *United States v. Leonard*, 37 F.3d 32 (2d Cir. 1994) (section 3571(d) implicated in case tax evasion case); *United States v. Foote*, 2003 WL 2466158 (D. Kan. July 31, 2003) (section 3571(d) used to enhance penalty for trafficking of counterfeit goods); see also Trans. at 104 (Hammond) (stating that “there may be a lot of other people who would have concerns about trying to address what some perceive as a problem with the antitrust remedies and then repealing 3571 because of it”).

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.<sup>5</sup>

The Antitrust Division of the United States Department of Justice (“DOJ”) has regularly used Section 3571(d) to seek obtain fines above the Sherman Act maximum.

The calculation of loss or gain under Section 3571(d) does not set the fine itself. Rather, it establishes a new, higher maximum fine above that otherwise allowed under the Sherman Act (or other statute, in non-antitrust cases). The fine range calculated under the *Sentencing Guidelines* remains the basis for setting the fine.<sup>6</sup>

## II. Discussion of Issues

*Should 18 U.S.C. § 3571(d) be amended so that it is not applicable in Sherman Act prosecutions? If Section 3571(d) were made inapplicable to Sherman Act prosecutions, should the maximum fine under the Sherman Act be increased? If so, what should be the revised fine amount?*

The Supreme Court’s ruling in *Apprendi v. New Jersey*,<sup>7</sup> called into question the continued constitutional validity of Section 3571(d). *Apprendi* held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”<sup>8</sup> As a result, *Apprendi* appears to require the fact of gain or loss to be proven to a jury beyond a reasonable doubt in order to increase the maximum

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<sup>5</sup> 18 U.S.C. § 3571(d).

<sup>6</sup> Trans. at 39 (Hammond). Unless otherwise noted, all references to “Trans.” are to the transcript of the November 3, 2005, hearing on criminal remedies.

<sup>7</sup> 530 U.S. 466 (2000).

<sup>8</sup> *Id.* at 490.

fine for Sherman Act violations.<sup>9</sup> The Supreme Court’s more recent ruling in *United States v. Booker* has confirmed that holding.<sup>10</sup> DOJ has never had to prove gain or loss under Section 3571(d) to a finder of fact; every sentence it has obtained in excess of the statutory maximum has been pursuant to a plea agreement.<sup>11</sup>

A. Concerns with Section 3571(d)

AMC witnesses and commenters, as well as others, have identified the following concerns and responses with respect to continued application of Section 3571(d) to antitrust offenses.

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<sup>9</sup> See ABA Supplemental Comments, at 7 (“[I]t is widely accepted that *Apprendi*’s holding, as amplified by *Blakely* and *Booker*, at a minimum, requires the government to prove the gain or loss in a criminal antitrust case to a jury beyond a reasonable doubt in order to support a fine above the Sherman Act maximum.”).

<sup>10</sup> See *United States v. Booker*, 543 U.S. 220 (2005); see also ABA Supplemental Comments, at 7 (noting confirmation of *Apprendi* holding).

<sup>11</sup> See Trans. at 43-44 (Hammond). As a general matter, defendants either have stipulated to a finding of gain or loss sufficient to authorize the fine in the plea agreement or have agreed to waive their right to challenge them. See, e.g., Antitrust Division and Mitsubishi Corporation Plea Agreement, No. 00-033, at 4 (May 10, 2001) (“[T]he United States and Mitsubishi stipulate that the loss to the victims and/or the gain to Mitsubishi and others from the offense is sufficient to support a fine of \$134 million [under Section 3571(d)].”), available at <http://www.usdoj.gov/atr/cases/f8200/8204.htm>; *United States v. Solvay S.A.*, Plea Agreement, No. CR 06-0159 (MMC), at 7 (Mar. 9, 2006) (where DOJ imposed a fine of \$40.87 million when the Sherman Act maximum at the time was only \$10 million, stating that “The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offenses is sufficient to justify the recommended sentence set forth in this paragraph, pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to context this calculation”); accord *United States v. Akzo Nobel Chemical Int’l B.V.*, No. CR 06-0160 (MMC), at 6 (Mar. 14, 2006); *United States v. Hynix Semiconductor, Inc.*, Case No. CR05-249 (PJH), at 4 (Apr. 20, 2006); see also Tara L. Reinhart et al., *The Business of Sentencing: Facing the Facts After Blakely, Booker*, at 4 (stating that with respect to the 3571(d) calculations, “the Division offers little more than a stipulation, which the Probation Office adopts”).

## Concerns

- DOJ must prove actual gain or loss beyond a reasonable doubt, which is very difficult.<sup>12</sup> In civil proceedings (where the standard is the preponderance of the evidence), proof of gain or loss “involves complex econometric analysis about how markets would have performed in the absence of unlawful conduct.”<sup>13</sup> Some have questioned whether it is possible as a matter of law to prove gain or loss beyond a reasonable doubt.<sup>14</sup>
- Although *Apprendi* requires a jury to make findings that would increase a sentence, Congress intended for Section 3571(d) determinations to be made by a sentencing judge, and not by a jury.<sup>15</sup> Accordingly, “gain or loss calculations . . . cannot be delegated to a jury.”<sup>16</sup>
- Section 3571(d) may be used to increase the fine ceiling only if doing so would not unduly complicate or prolong the sentencing process. Accordingly, because

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<sup>12</sup> AAI Supplemental Comments, at 2; Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies, at 28 (Nov. 3, 2005) (“Smith Statement”); Trans. at 48 (Smith); Statement of Scott D. Hammond on Behalf of the United States Department of Justice Before the Antitrust Modernization Commission, 7 (Nov. 3, 2005) (“Hammond Statement”); Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission’s Request for Public Comment on Criminal Remedies, at 11 (Nov. 14, 2005) (“ABA Comments”) (“[N]o one doubts that the determination of gain or loss in antitrust cases centers on complex economic and econometric analysis.”) (citing James L. McGinnis, *Antitrust Attorneys Grapple With Impact of Booker*, The Nat’l L.J. (July 18, 2005) (internal quotations omitted))

<sup>13</sup> AAI Supplemental Comments, at 2; Smith Statement, at 28; Trans. at 48 (Smith); Hammond Statement, at 7; ABA Comments, at 11 (“[N]o one doubts that the determination of gain or loss in antitrust cases centers on complex economic and econometric analysis.”) (citing McGinnis, *Antitrust Attorneys Grapple*) (internal quotations omitted); *but see* Comments of John D. Graubert, Principal Deputy General Counsel, Federal Trade Commission, to the Antitrust Modernization Commission, at 6 (Dec. 1, 2005) (“Graubert Statement”) (stating that with respect to determining the amount of gain in disgorgement cases, the FTC has been able to resolve these cases “efficiently and relatively quickly compared with their private counterparts”).

<sup>14</sup> Zane Supplemental Comments, at 1-2; Phillip C. Zane, *Booker Unbound: How the New Sixth Amendment Jurisprudence Affects Detering and Punishing Major Financial Crimes and What to do about It*, FED. SENTENCING REPORTER VOL. 17, NO. 4, at 264 (Apr. 2005).

<sup>15</sup> Smith Statement, at 28 (“The legislative history of § 3571(d) clearly indicates that it was premised on a determination by a judge, in a truncated sentencing proceeding, *not* in a civil antitrust damages-like trial by a jury.”).

<sup>16</sup> Scott D. Hammond, *Risks Remain High for Non-Cooperating Defendants*, ABA Antitrust Section Spring Meeting, at 7 (Mar. 30, 2005) (noting critics’ view of the Division’s continued use of § 3571(d)).

of the complexity of proving gain or loss in an antitrust case, DOJ may not be able to invoke Section 3571(d).<sup>17</sup>

### Responses

- Proving gain or loss under Section 3571(d) “may not be as daunting a task as it may appear at first glance.”<sup>18</sup> Gain or loss under Section 3571(d) is the gain or loss attributable to the entire conspiracy, whereas the defendant’s individual fine is based on its volume of commerce. It may be possible to calculate a minimum gain or loss with respect to the entire conspiracy with requisite certainty to satisfy the standard of proof for criminal antitrust cases.<sup>19</sup> For example, an expert could offer testimony with 95 percent certainty that the gain or loss was at least a certain amount.<sup>20</sup>
- Because the law is silent as to whether a jury can determine gain or loss under Section 3571(d), there is no conflict with either *Apprendi* or *Booker/Fanfan*.<sup>21</sup>

Despite the concerns about Section 3571(d) that have been identified, businesses have continued to plead guilty and accept fines in excess of the applicable statutory maximum.

Commenters and others identified the following possible reasons for this phenomenon.

- Businesses continue to plead to fines above the Sherman Act maximum because defendant companies are unwilling to take the risk of sizable criminal penalties.<sup>22</sup>

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<sup>17</sup> Tefft Smith, et al., *Harder to Prosecute? A Recent Supreme Court Decision Could Nullify Enhanced Antitrust Penalties*, LEGAL TIMES VOL. XXVII, NO. 28 (July 12, 2004) (“A §3571 hearing would essentially be the equivalent of a civil antitrust damages trial. Antitrust damage cases are amongst the most lengthy and complicated of all civil proceedings, involving multiple defendants and wide-ranging data.”).

<sup>18</sup> ABA Supplemental Comments, at 2.

<sup>19</sup> ABA Supplemental Comments, at 2 (stating that “the maximum fine under the alternative fine statute is based upon the total harm inflicted or gain obtained by all defendants”); *id.* at 12 (“[T]he percentage overcharge on the entire commerce affected by the conspiracy in order to support a Guidelines fine based on any one conspirator’s sales may be surprisingly low in most cases.”).

<sup>20</sup> AAI Supplemental Comments, at 3 (acknowledging that “[p]roof beyond a reasonable doubt is difficult to achieve without reducing the amount proven to a low number”). *But see* ABA Supplemental Comments, at 9 (questioning whether such proof would be sufficient).

<sup>21</sup> Hammond, *Risks Remain High*, at 8 (citing *United States v. Buckland*, 289 F.3d 558, 566 (9th Cir. 2002), for the proposition that “*Apprendi* compelled [the Division] to submit to a jury questions of fact that may increase a defendant’s exposure to penalties, regardless of whether that fact is labeled an element or a sentencing factor.”); *see id.* at 7-8, 14.

<sup>22</sup> Zane Supplemental Comments, at 5 (“Few defendants could afford the risk of massive damages from a criminal antitrust trial.”).

- Businesses continue to plead to fines above the Sherman Act minimum because corporate executives are unwilling to risk a lengthy jail term.<sup>23</sup> DOJ will accept high corporate fines in lieu of individual incarceration.<sup>24</sup> (DOJ witnesses took issue with this characterization of its policy, however.<sup>25</sup>)
- A company that does not plead guilty at an early stage gives up the ability to enter into a plea agreement that provides certainty as to a fine.<sup>26</sup> Moreover, delaying a plea means the company will face “sentencing at the end of the investigation when the government’s evidence against it is strongest.”<sup>27</sup> The stronger the government’s case, the more carve-outs from immunity there will be, assuming the company subsequently decides to plead.<sup>28</sup> Furthermore, as a case progresses, DOJ’s willingness “to make favorable deals with . . . ‘carved out’ executives decreases.”<sup>29</sup>
- A company that does not plead will not receive the benefit of a government motion seeking downward departure for early cooperation.<sup>30</sup>
- A company that does not plead will forfeit possible benefits under DOJ’s Amnesty Plus program.<sup>31</sup> Moreover, such a company would forfeit potential detrebling in private civil suits for “amnesty-plus products.”<sup>32</sup>

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<sup>23</sup> Written Testimony of Anthony V. Nanni Before the Antitrust Modernization Commission, at 5 (Nov. 3, 2005) (“[C]orporate executives [are] wary of trying any case with a potential 10-year jail term,” and simply are not willing to risk it) (“Nanni Statement”); Trans. at 48 (Smith) (corporations agree to pay excess fines “to buy peace; and . . . [to] buy protection for [their] people, the carve-outs.”); AAI Supplemental Comments, at 3 (companies are “willing to pay whatever price it takes to keep individual executives out of jail.”).

<sup>24</sup> Smith Statement, at 5 (stating that “a key element of the Division’s enforcement approach appears to be a willingness to trade people (particularly senior executives) for money”); Trans. at 48-49 (Smith).

<sup>25</sup> Trans. at 55 (Hammond) (“any suggestion that [the Division] take[s] a wink at [prosecuting individuals] in our corporate plea agreements, or that we trade money for time is dead wrong.”); March 21, 2006, Hearing Trans. at 88 (Barnett) (even if a corporate defendant proposed such a trade off, it “wouldn’t get anywhere with it”); *see also* Trans. at 55 (Hammond) (“I could not stress individual accountability more and the importance of jail sentences in our enforcement program.”).

<sup>26</sup> ABA Supplemental Comments, at 18. The ABA notes that defendants settling early typically enter into a “C-type” plea agreement, which specifies a sentence that, if rejected by the court, allows the defendant to withdraw its plea. *Id.*

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.* at 18-19.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 18.

<sup>31</sup> ABA Supplemental Comments, at 18-19. The Division’s “Amnesty Plus” program allows a defendant who did not qualify for Amnesty in the Division’s primary investigation to identify additional unrelated conspiracies. Not only will that defendant be able to apply for

- The Division will not permit defendants to enter into conditional pleas, which would allow them to plead guilty but retain the right to challenge the sentence on the Section 3571 question.<sup>33</sup>

B. Possible Statutory Responses

Several witnesses and commenters, including the Antitrust Division, argued that no change regarding the applicability of Section 3571(d) in antitrust cases was appropriate.<sup>34</sup> In particular, they argue that Congress could not be expected to increase the Sherman Act maximum high enough to allow appropriate fines sufficient to deter large-scale cartels.<sup>35</sup> These commenters identified the following reasons for retaining the applicability of Section 3571(d) to antitrust offenses:

- Section 3571(d) provides important authority to impose fines that exceeds the Sherman Act maximum in appropriate cases.<sup>36</sup> Eliminating the flexibility that

amnesty as to charges relating to those additional markets, it will also qualify for further concessions in the government's primary investigation. *See* Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, *A Review of Recent Antitrust Division Actions*, Speech Before the ABA Section of Business in Washington, D.C., at 3-4 (June 12, 2003).

<sup>32</sup> ABA Supplemental Comments, at 19.

<sup>33</sup> Hammond, *Risks Remain High*, at 10 ("The Division will not engage in plea negotiations with a company that desires to litigate gain or loss."); Trans. at 115 (Smith) (noting same); Zane Supplemental Comments, at 5.

<sup>34</sup> Hammond Statement, at 11 (Section 3571(d) is a generally applicable statute); AAI Supplemental Comments, at 1 ("We see no reason to amend the alternative fine provision . . . to make it inapplicable to Sherman Act prosecutions"); ABA Supplemental Comments, at 1 ("Despite the difficulties that will attend jury determination of the gain or loss under the alternative fine statute, there does not seem to be any compelling reason to single out antitrust crimes as exempt from the operation of this general fining statute applicable to all federal crimes."); *id.* at 21 (noting that achieving consensus on the appropriate Sherman Act maximum, and then "asking Congress to consider increasing the Sherman Act maximum corporate fine just two years after it was increased ten-fold are both highly problematic"); *see also* ABA Comments, at 15.

<sup>35</sup> AAI Supplemental Comments, at 2 (stating that in the vitamins case, Congress would have had to increase the Sherman Act maximum to \$2.5 billion to accommodate the agreed-upon fines); *see also* ABA Supplemental Comments, at 21 (suggesting that it might be difficult to persuade "Congress to consider increasing the Sherman Act maximum corporate fine just two years after it was increased ten-fold").

<sup>36</sup> AAI Supplemental Comments, at 2.

Section 3571(d) provides would mean that the Division could not obtain fines at a level that would adequately deter large-scale cartel conduct.<sup>37</sup> Similarly, Congress is not likely to establish a maximum fine that is sufficiently high to deter the largest cartels.<sup>38</sup>

- Because the maximum statutory fine was increased recently to \$100 million, there will be fewer instances in which Section 3571(d) is used to increase the fine above the Sherman Act maximum.<sup>39</sup>
- If use of Section 3571(d) is barred in antitrust cases, the Division will likely resort to charging defendants with multiple offenses.<sup>40</sup>
- Concerns about the ability of the Division to prove gain or loss beyond a reasonable doubt may be overstated. Gain or loss under Section 3571(d) is the gain or loss attributable to the entire conspiracy; a defendant's individual fine is based on the volume of commerce affected by the defendant. Accordingly, in many cases the low end of the estimated gain or loss caused by the entire conspiracy will be sufficient to permit each individual's fine as calculated under the *Sentencing Guidelines*.<sup>41</sup>
- Replacing Section 3571(d) with a higher maximum fine will reduce the Division's burden of proof in certain cases, because it will no longer have to prove gain or loss, and would be able to rely solely on the *Guidelines* calculation.<sup>42</sup> This would also reduce the defendant's bargaining power in negotiating plea agreements.<sup>43</sup>

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<sup>37</sup> ABA Supplemental Comments, at 11.

<sup>38</sup> See AAI Supplemental Comments, at 2 (statutory maximum not likely to be increased sufficiently to provide adequate fines for largest cartel cases); Zane Supplemental Comments, at 1 (same).

<sup>39</sup> ABA Supplemental Comments, at 10.

<sup>40</sup> AAI Supplemental Comments, at 1.

<sup>41</sup> ABA Supplemental Comments, at 11-12.

<sup>42</sup> ABA Supplemental Comments, at 10-11 (stating that the alternative fine statute is reserved for "those rare cases" where the Division will seek fines above \$100 million, and that "[i]f the alternative fine statute were amended to make it inapplicable to antitrust offenses, then the participants in the largest, most widespread, and most harmful cartels prosecuted by the government would face a relatively smaller—and perhaps less effective—penalty than corporate participants in smaller local or regional conspiracies").

<sup>43</sup> See Trans. at 23 (Nanni) (stating that "leverage is always part of the criminal system"). Nanni Statement, at 4-5 ("While even large corporations are subject to massive exposure under 18 U.S.C. § 3571(d), at least under that statute the government must prove beyond a reasonable doubt at trial an actual loss from the offense sufficient to justify a fine in excess of \$100 million (or \$10 million for crimes committed before the latest increase). Smaller firms that would be devastated by fines at or below \$100 million do not have that protection as the government need not prove any actual loss and is only required under the Sentencing Guidelines to prove the volume of commerce by a preponderance of the evidence."); see also ABA Supplemental

- Section 3571(d) contains a proviso that prevents the government from proving gain or loss if doing so would “unduly complicate or prolong the sentencing process.”<sup>44</sup> Exempting antitrust violations from Section 3571(d), while increasing the Sherman Act maximum, would eliminate this limitation.<sup>45</sup>
- It is not appropriate to amend a generally applicable criminal sentencing statute to carve out antitrust matters.<sup>46</sup>

Other AMC witnesses and commenters advocated eliminating the use of Section 3571(d) in antitrust cases.

One witness, Tefft Smith, argued that Section 3571(d) should be made inapplicable to antitrust violations.<sup>47</sup> He argued that fines calculated under this provision generate more uncertainty for antitrust defendants than fines currently capped by the Sherman Act’s \$100 million maximum.<sup>48</sup> Although he favored no increases to the maximum fine, Smith argued that

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Comments, at 15 n.18 (“Unlike proof of guilt, the government’s burden of proof at a sentencing hearing, pursuant to the now-advisory guidelines, is by a preponderance of the evidence.”).

<sup>44</sup> 18 U.S.C. § 3571(d); *see* ABA Comments, at 6 n.13 (“The court has discretion to decline to consider the alternative fine if to do so would unduly complicate or prolong the sentencing process.”).

<sup>45</sup> Although the *Guidelines* have a similar limitation on calculating gain or loss, its twenty-percent proxy in antitrust cases renders this limitation moot. *Compare* U.S.S.G. § 8C4.2(c) (stating that “to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine”), *with* U.S.S.G. § 2R1.1(d) (creating a special instruction that allows the government to use a 20% proxy in lieu of proving loss under § 8C2.4).

<sup>46</sup> Trans. at 104 (Hammond); Hammond Statement, at 11; ABA Supplemental Comments, at 2 (there is “compelling reason to single out antitrust crimes as exempt from the operation of this general fining statute applicable to all federal crimes.”); AAI Supplemental Comments, at 1 (stating that “[w]e see no reason to amend the alternative fine provision . . . to make it inapplicable to Sherman Act prosecutions”).

<sup>47</sup> Smith Statement, at 29 (“The [a]lternative [f]ine [s]tatute at least needs to be amended.”). Section 3571(e) appears to allow specific statutes to be exempted from the alternative fine provision. *See* 18 U.S.C. § 3571(e); *see also* *United States v. Andreas*, 1999 WL 116218, \*2 (N.D. Ill. Feb. 24, 1999) (Section 3571(e) means that “[t]he alternative fines are intended to apply unless exempted by the governing statute—here, the Sherman Act.”); *United States v. Looney*, 152 Fed. Appx. 849, 859 (11th Cir. Oct. 12, 2005) (similar).

<sup>48</sup> *Id.* at 28 n.30 (stating that from a counseling standpoint, it would be better to replace Section 3571(d), and replace it with a higher Sherman Act maximum that is definitively capped);

increasing the maximum fine while making Section 3571(d) inapplicable to antitrust offenses would be preferable to the current arrangement.<sup>49</sup>

One commenter proposed a more comprehensive revision to the Sherman Act's fine provision. He proposed to make Section 3571(d) inapplicable to antitrust cases, but to amend the Sherman Act to set the maximum fine to be equal to 10 percent of the defendant's world-wide gross sales.<sup>50</sup> He identified the following benefits of such an approach (no one has submitted comments regarding this proposal):

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- Automatically adjusts for inflation, because it is based on the value of sales. It thus eliminates the need for Congress periodically to revise the maximum fine.<sup>51</sup>
- Larger fines can be imposed for large offenders, smaller fines can be imposed for smaller offenders.<sup>52</sup>

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*see also* R. Hewitt Pate, Assistant Attorney General Antitrust Division, *Vigorous and Principled Antitrust Enforcement: Priorities & Goals*, Before the Antitrust Section of the ABA, at 4-5 (Apr. 12, 2003) (stating that calculations under Section 3571(d) can be “considerably more difficult to administer, [and] less certain” than the *Guidelines*' methodology).

The legislative history of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”) suggests that Congress increased the Sherman Act maximum from \$10 million to \$100 million in 2004 in order to alleviate DOJ's burden of proving gain or loss. *See* 50 Cong. Rec. H3658 (daily ed. June 2, 2004); *id.* (stating that the rationale behind raising the Sherman Act maximum was “to permit courts to impose fines for antitrust violations at current Guideline levels without the need to engage in damages litigation during the criminal sentencing process”); *see* Hammond Statement, at 3, 7 (stating that Congress increased the Sherman Act maximum in 2004 to avoid the “time-and resource-consuming litigation over gain or loss [necessary] to take advantage of the alternative maximum fine provision in 18 U.S.C. § 3571(d), and that “it is difficult and time consuming to establish gain or loss in antitrust cases”).

<sup>49</sup> Trans. at 103 (Smith) (stating that he noted this would be a preferable option in his written submissions to the AMC); *see* Smith Statement, at 28 n.30 (stating that “[e]ven if § 3571(d) were replaced by a still higher Sherman Act maximum fine, this would be an improvement”) (emphasis omitted); *cf.* Trans. at 105 (Hammond) (acknowledging rationale behind disabling Section 3571(d) for antitrust purposes, and increasing the Sherman Act maximum to \$500 million).

<sup>50</sup> Zane Supplemental Comments, at 2-3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

- Eliminates the need for the government to charge multiple indictments to avoid proving gain or loss.<sup>53</sup>

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<sup>53</sup> *Id.* at 5.