



MEMORANDUM

From: AMC Staff[†]
To: All Commissioners
Date: May 4, 2006
Re: Criminal Remedies Discussion Memorandum

On July 28, 2005, the Antitrust Modernization Commission agreed to study “whether the statutes establishing criminal fines for price fixing and related offenses should be amended in light of the Supreme Court’s recent decision in *United States v. Booker* and other developments.”¹ The Commission requested comment on the following questions.

1. In setting corporate fines for criminal Sherman Act violations, should there be a means for differentiation based on differences in the severity or culpability of the behavior?
 - A. Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Sentencing Guidelines provide distinctions between different types of antitrust crimes (*e.g.*, price fixing versus monopolization)?
 - B. The Sentencing Guidelines use 20% of the volume of commerce affected as the basic method of distinguishing the severity of antitrust violations. *See United States Sentencing Commission, Guidelines Manual* § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for distinguishing the severity of offenses? If not, what other measure(s) would provide

[†] This memorandum is a brief summary prepared by staff of the 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.

¹ July 28, 2005, Meeting Trans. at 3-21; Criminal Remedies Study Plan (July 22, 2005); *see United States v. Booker*, 543 U.S. 220 (2005).

a more appropriate method for the Guidelines to establish fine levels?

2. The Sherman Act provides for a maximum fine of \$100 million (or, previously, \$10 million). The government may seek criminal fines in excess of that maximum pursuant to 18 U.S.C. § 3571(d).
 - A. Should “twice the gross gain or twice the gross loss” as provided in Section 3571(d) be calculated based on the gain or loss from all coconspirator sales or on only the defendant’s sales?
 - B. Should fines above the statutory maximum, and thus limited by Section 3571(d), be based on 20% of gross sales as provided for in the Sentencing Guidelines, as they are for fines below the statutory maximum, or should they be calculated differently? If differently, how should they be calculated?²

A hearing was held on November 3, 2005. The panelists were Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, Department of Justice, Anthony V. Nanni, of counsel at Fried, Frank, Harris, Shriver, and Jacobson, Tefft W. Smith, partner at Kirkland and Ellis, and Charles R. Tetzlaff, General Counsel, United States Sentencing Commission.³ The Commission also received comments from three members of the public: the American Bar Association (“ABA”) Section of Antitrust Law, the American Antitrust Institute’s Working Group on Criminal Remedies, and Phillip C. Zane.

I. Background

A. Sherman Act

Antitrust violations have been criminalized since the Sherman Act was passed in 1890. Criminal penalties in general are intended to deter criminal conduct, protect the public, and punish offenders. They are set at a level designed both to reflect the seriousness of the crime and to provide an optimal level of deterrence, considering all other relevant factors.

² 70 Fed. Reg. 46,474 (Aug. 10, 2005).

³ Unless otherwise noted, all references to “Trans.” are to the transcript of the November 3, 2005, Criminal Remedies hearing.

Although Sherman Act violations originally were misdemeanors punishable by up to one year in prison and a maximum of \$5,000 in fines, they subsequently became felonies punishable by much larger fines and longer prison sentences. The maximum corporate fine was increased from \$5,000 per violation to \$50,000 in 1955, to \$1 million in 1974, \$10 million in 1990, and \$100 million in 2004.⁴ The maximum individual fine increased to \$100,000 in 1974, \$350,000 in 1990, and \$1 million in 2004.⁵ The maximum prison term was increased to three years in 1974 (making Sherman Act violations felonies) and to ten years in 2004.⁶

Prior to the 1990s, most antitrust criminal enforcement focused on regional and local price fixing, territory allocation, and bid-rigging, in industries such as waste hauling, highway construction, and steel pipe.⁷ Beginning in the early 1990s, in large part as a result of an invigorated amnesty program, the Department of Justice (“DOJ”) increasingly prosecuted international cartels involving large, multinational companies and significantly larger amounts of affected commerce.⁸

⁴ Act of July 7, 1955, Pub. L. No. 84-135, 69 Stat. 282; Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974); Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2879, 2880; Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668.

⁵ Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974); Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2879, 2880; Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668.

⁶ Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974); Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668.

⁷ See Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 Antitrust L.J. 157, 159 (1988).

⁸ See Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 Geo. L.J. 169, 173 (2002).

The size of fines obtained by DOJ has increased substantially over time. From 1987 to 1997, DOJ obtained annual total fines averaging \$29 million.⁹ By the period between 1997 and 2004, the total annual fines ranged from \$204 million to over \$1 billion.¹⁰ Prison sentences have also increased. In the 1990s, the average jail sentence was 8 months.¹¹ Last year, the average jail sentence was 24 months.¹²

Jurisdictions outside the United States have also begun to prosecute cartel activity as a crime more aggressively, where they are in many cases now subject to significant fines and, in some countries, prison terms.¹³ Companies and individuals involved in international cartel activity may now be subject to prosecution in several jurisdictions for the same cartel.

B. Alternative Minimum Fine Provision of 18 U.S.C. § 3571(d)

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. Section 3571(d) provides that:

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

⁹ See Statement of Scott D. Hammond on Behalf of the United States Department of Justice Before the Antitrust Modernization Commission, at 2 (Nov. 3, 2005) (“Hammond Statement”).

¹⁰ Hammond Statement, at 2-3.

¹¹ Scott D. Hammond, An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program, Address Before the ABA Midwinter Leadership Meeting, at 3 (Jan. 10, 2005).

¹² Trans. at 53 (Hammond).

¹³ See International Competition Network Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Remedies* 55 (2005) (reporting broad range of countries with cartel penalties, including high fines and prison sentences).

fine under this subsection would unduly complicate or prolong the sentencing process.¹⁴

The Division has regularly used this statute 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 (discussed below) remains the basis for setting the fine.¹⁵

C. Sentencing Guidelines

Sentences for antitrust crimes are established with reference to guidelines issued by the United States Sentencing Commission (“Sentencing Guidelines”).¹⁶ The Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984.¹⁷ The purposes of the Sentencing Commission are to “establish sentencing policies and practices,” “advise and assist Congress” on crime policy, and “collect, analyze, research, and distribute” information about federal crime and sentencing issues.¹⁸

Criminal fines for antitrust violations by organizations are set by Section 8C2 of the Sentencing Guidelines, which establishes a base fine that is then adjusted for culpability. Section 8C2.4 calls for the base fine applicable to organizations to be calculated in one of three ways. The first alternative is to use an amount determined by the offense level, which is calculated

¹⁴ 18 U.S.C. § 3571(d).

¹⁵ Trans. at 39 (Hammond).

¹⁶ *U.S. Sentencing Guidelines Manual* (Nov. 2005) (“U.S.S.G.”). The Supreme Court’s ruling in *Booker* has made the Sentencing Guidelines advisory, rather than mandatory. *Booker*, 543 U.S. at 245-46.

¹⁷ Pub. L. No. 98-473, § 211-17, 98 Stat. 1937 (1984).

¹⁸ See Written Statement of the United States Sentencing Commission Before the Antitrust Modernization Commission, at 2 (Nov. 3, 2005) (“Tetzlaff Statement”).

based on factors such as the volume of commerce affected, pursuant to Section 2R1.1.¹⁹ The second alternative is to use gain to the organization from the offense.²⁰ The third alternative is to use the pecuniary loss caused by the organization's violation.²¹ With respect to this third alternative, the Guidelines establish a presumption of loss equal to 20 percent of the volume of commerce affected (sometimes referred to herein as the 20 percent proxy).²² In most cases, fines are based on loss, which generally results in the highest fine level of the three options.²³

The base fine is then adjusted through application of a culpability multiplier. The multiplier is determined by establishing the defendant's culpability score pursuant to Section 8C2.5.²⁴ Factors affecting the culpability score include the size of the organization (by number of employees), and whether there was involvement or willful ignorance on the part of high-level personnel or pervasive tolerance of the offense throughout the organization; previous related criminal history; the existence of an effective compliance program; and cooperation with the investigation or acceptance of responsibility.²⁵ After the culpability score is calculated, Section 8C2.6 is used to determine the range of multipliers that applies to the culpability score—the higher the culpability score, the higher the range of multipliers. For antitrust cases, the multiplier cannot be less than 0.75.²⁶ The maximum multiplier is 4.0.²⁷ The minimum and maximum

¹⁹ U.S.S.G. § 8C2.4(a)(1).

²⁰ *Id.* § 8C2.4(a)(2).

²¹ *Id.* § 8C2.4(a)(3).

²² U.S.S.G. § 2R1.1(d)(1). The use of the twenty-percent proxy is not discretionary. *See id.* § 8C2.4(b) (a “special instruction for organizational fines . . . shall be applied”) (emphasis added).

²³ ABA Section of Antitrust Law, *Sentencing Guidelines in Antitrust: A Practitioner's Handbook* 43 (1999) (Robert E. Hauberg, Jr. et al. eds.).

²⁴ U.S.S.G. § 8C2.5.

²⁵ *Id.*

²⁶ *See id.* § 2R1.1(d)(2).

²⁷ *Id.* § 8C2.6

applicable multipliers are applied to the base fine, and the sentencing judge may impose a fine anywhere within that range (or otherwise, as the Guidelines are now advisory only).

The following table is a simplified example of how a fine might be calculated under the Sentencing Guidelines.

Example: Guidelines Fine Calculation²⁸	
Base Fine [U.S.S.G. §§ 2R1.1, 8C2.4]	
Volume of commerce affected	\$175,450,000
Base fine (20% of volume of commerce) [§ 8C2.4(a)(3)]	\$35,090,000
Culpability score [U.S.S.G. § 8C2.5]	
Base score [§ 8C2.5(a)]	5
Number of employee involved [§ 8C2.5(b)]	+3
Prior criminal history [§ 8C2.5(c)]	+2
No effective program to prevent violations [§ 8C2.5(f)]	-0
No acceptance of responsibility [§ 8C2.5(g)]	-0
Total culpability score	=10
Guidelines multiplier range for culpability	
[from culpability score table, U.S.S.G. § 8C2.6]	2.0-4.0
Fine range [U.S.S.G. § 8C2.7]	
	\$70,180,000 to \$140,360,000
Actual fine	\$134,000,000

If the fine range calculated under the Guidelines falls below the Sherman Act maximum, then the fine may be imposed without more. However, if the range of fines exceeds the Sherman Act maximum, the court must rely on 18 U.S.C. § 3571(d), the alternative fine statute, to provide a maximum statutory fine above the fine calculated by the Guidelines.

²⁸ The example is drawn from Scott D. Hammond, A Review Of Recent Cases And Developments in the Antitrust Division’s Criminal Enforcement Program, Address Before the 2002 Antitrust Conference: Antitrust Issues in Today’s Economy, at 5 (Mar. 7, 2002). This is a simplified version of the example provided therein regarding the sentencing of Mitsubishi for its involvement in the graphite electrodes cartel. The calculation was made under the 1991 Guidelines, which were modified with respect to antitrust sentencing in 2003; the fundamental approach is the same, although culpability scoring has changed slightly.

Following public comment and hearings, the Sentencing Commission revised the Guidelines as they apply to antitrust crimes in 2005, in light of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“2004 Act”).²⁹ The revisions included (1) an increase to the base offense level for determining individual jail time, reflecting concern that antitrust sentences did not sufficiently reflect the social cost of the crime; (2) changes to the volume of commerce table, to increase the range of offense levels to account for antitrust crimes involving greater amounts of commerce; and (3) additional commentary regarding a defendant’s role in the offense.³⁰ The Commission did not revisit the basic method in which fines are calculated because Congress, in the legislative history of the 2004 Act, stated that

No revision in the existing guidelines is called for with respect to fines

For example, Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy.³¹

The revisions became effective November 1, 2005.

²⁹ Pub. L. No. 108-237, § 201-21, 18 Stat. 665, 665-69.

³⁰ Tetzlaff Statement, at 5-6.

³¹ *Id.* at 4 (citing Supplemental Legislative History by Reps. Sensenbrenner and Conyers, 150 Cong Rec. H3658 (daily ed. June 2, 2004)).

II. Discussion

- A. In setting corporate fines for criminal Sherman Act violations, should there be a means for differentiation based on differences in the severity or culpability of the behavior?
1. *Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Sentencing Guidelines provide distinctions between different types of antitrust crimes (e.g., price-fixing versus monopolization)?*

The Sherman Act broadly prohibits any conduct that restrains trade unreasonably without differentiating between specific types of conduct. It thus subjects not only “hard-core” agreements to fix price or output, rig bids, and divide markets that are condemned as unlawful *per se*, but also a broad range of collaborative and unilateral conduct that in many, if not most, cases is competitively neutral or even pro-competitive, and therefore reviewed under a “rule of reason.”

Notwithstanding the breadth of the Sherman Act, the Department of Justice has in its prosecutorial discretion limited its criminal enforcement activities to hard-core, covert conspiracies to fix price or output, rig bids, and allocate customers or markets. Former Assistant Attorney General Pate has explained that the “conduct we are talking about is hard core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior.”³² Deputy Assistant Attorney General (“DAAG”) Hammond confirmed the Division’s policy at the AMC hearing: the Division will not prosecute cases in which “there is some innocent explanation here

³² R. Hewitt Pate, Vigorous And Principled Antitrust Enforcement: Priorities And Goals, Address Before the Antitrust Section of the ABA Annual Meeting, at 6 (Aug. 12, 2003).

or some inadvertence, that they crossed the line without meaning to.”³³ Nothing in the law, however, necessarily prohibits the Justice Department from expanding the scope of its criminal enforcement policy to target conduct other than such hard-core, covert activities.³⁴

Some commenters and witnesses have suggested to the Commission that the Sentencing Guidelines should be clarified to limit expressly their application to hard-core price-fixing, bid-rigging, and market allocations.³⁵ One witness suggested that, to the extent the Justice Department sought to prosecute violations of more ambiguous illegality, that ambiguity would be a mitigating factor at sentencing.³⁶

The Antitrust Division submitted testimony explaining that the title of the relevant section of the Sentencing Guidelines—“Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors”—makes clear that they are limited to those horizontal offenses.³⁷ Indeed, the Sentencing Guidelines already appear to be specifically limited in their scope.

³³ Trans. at 84 (Hammond).

³⁴ Written Testimony of Anthony V. Nanni Before the Antitrust Modernization Committee, at 6-7 (Nov. 3, 2005) (“Nanni 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 4-5 (“ABA Comments to AMC”) (applauding the Division’s “self-imposed discretion,” but still advocating that this Commission make it clear that only hard-core antitrust violations be prosecuted criminally).

³⁵ Comments of the ABA Section of Antitrust Law on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines, at 5 (Mar. 2005) (“ABA Comments to Sentencing Commission”).

³⁶ Nanni Statement, at 7 (suggesting that at sentencing the court should consider the four factors used by the Justice Department in determining whether to prosecute conduct that appears *per se* unlawful, to wit: confusion in the law, the presence of novel issues of fact or law, confusion based on past prosecutorial decisions, and clear evidence that the defendants were not aware of, or did not appreciate, the consequences of their actions (citing Antitrust Division Manual, Chapter 3 at ¶ C.5)).

³⁷ U.S.S.G. § 2R1.1; Hammond Statement, at 4; Trans. at 92-93 (Hammond).

There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.³⁸

Based on the current practices of DOJ, no witness or commenter recommended any change to the Guidelines regarding types of conduct. Two commenters, including the ABA, suggested that the Commission's report generally should endorse the continued limitation of criminal prosecutions to hard-core cartel conduct.³⁹

One commenter suggested that specific culpability factors within the existing Guidelines be changed. The AAI suggested that the role of an organization in a cartel is not adequately taken into account, and that an enhancement for a leadership role is appropriate.⁴⁰ AAI did not propose a specific change to the Guidelines. The Guidelines do call for the leadership role of an organization to be taken into account in determining where within the Guidelines range the actual fine should fall.⁴¹ The Commission did not receive any other comments or testimony regarding this proposal.

³⁸ U.S.S.G. § 2R1.1 cmt. background.

³⁹ ABA Comments to AMC, at 5-6; *see also* Nanni Statement, at 6 (“no reason to depart from” current practice).

⁴⁰ Comments of the American Antitrust Institute's Working Group on Criminal Remedies, at 3 (Sept. 30, 2005) (“AAI Comments”). AAI also argued that an increase to the offense level (which is used to set the base fine) for bid-rigging is not supported empirically. *Id.* at 2-3. Because the base fine is typically set by the volume of commerce, rather than by calculation of the offense level, it is unlikely this enhancement has practical consequences in a large number of cases.

⁴¹ *See* U.S.S.G. § 8C2.8(a)(2) & application n.1 (“[T]he guideline fine range in an antitrust case does not take into consideration whether the organization was an organizer or leader of the conspiracy. A higher fine within the guideline fine range ordinarily will be appropriate for an organization that takes a leading role in such an offense.”). In addition, the Antitrust Division's corporate leniency policy prevents an organization that was the leader or the originator of the cartel activity from obtaining leniency (amnesty). Antitrust Division, U.S. Department of Justice, Corporate Leniency Policy, § A.6 (1993).

2. *The Sentencing Guidelines use 20% of the volume of commerce affected as the basic method of distinguishing the severity of antitrust violations. See United States Sentencing Commission, Guidelines Manual § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for distinguishing the severity of offenses? If not, what other measure(s) would provide a more appropriate method for the Guidelines to establish fine levels?*

In calculating the base fine for antitrust sentences, the Guidelines use 20 percent of the volume of commerce affected as a proxy for the actual pecuniary gain or loss resulting from a violation. As explained by DAAG Hammond, in adopting the 20 percent proxy in 1987, the Sentencing Commission concluded that the amount of the fine does not need to be based on precise calculation of actual gain or loss because general deterrence of violations does not require an exact correlation harm and penalty and because of the difficulty of determining the precise amount of loss or gain.⁴² The limited empirical data available with respect to pre-Guidelines practices indicated that fines and the length of prison terms increased with the volume of commerce.⁴³ In addition, empirical data available in 1987 indicated that price-fixing overcharges tended to be about ten percent of the volume of affected commerce.⁴⁴ The doubling of that amount to arrive at 20 percent reflects both the notion that fines need to exceed the amount of overcharge to be a deterrent and that the losses from antitrust violations actually exceed the amount of overcharge (*i.e.*, due to the misallocation of resources).⁴⁵ The legislative history of the 2004 amendments endorsed the use of the 20 percent proxy (or presumption), as described above, and explained that the “presumption is sufficiently precise to satisfy the

⁴² Hammond Statement, at 6-7.

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ U.S.S.G. § 2R1.1 cmt. n.3.

interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations.”⁴⁶

The Sentencing Guidelines also provide that “[i]n cases in which the actual . . . overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.”⁴⁷ Accordingly, if there is evidence that the amount of the overcharge is substantially more or less than ten percent of the volume of affected commerce, the Guidelines expressly allow for the fine to be increased or reduced accordingly.⁴⁸ Finally, because the Guidelines are only advisory after *Booker*, a defendant presumably could seek to prove that a Guidelines-based fine was not appropriate because the actual harm was significantly less than 20 percent of the total amounted commerce affected.

The 20 percent proxy has been criticized on a number of grounds:

- There is insufficient current empirical data and public consensus to support the use of a 20 percent presumption.⁴⁹
- A presumption that all antitrust conspiracies result in the same level of harm is inequitable and disproportionate “in both directions.”⁵⁰

⁴⁶ 150 Cong. Rec. H3658 (daily ed. June 2, 2004) (Supplemental Legislative History submitted by Reps. Sensenbrenner and Conyers).

⁴⁷ U.S.S.G. § 2R1.1 cmt. 3.

⁴⁸ However, the Antitrust Division apparently will not enter a plea agreement if the defendant seeks to preserve the ability to avail itself of this Guidelines provision. Trans. at 115 (Smith); Scott D. Hammond, Risks Remain High for Non-Cooperating Defendants, Address Before the ABA Section of Antitrust Spring Meeting, at 10 (March 30, 2005) (“Hammond, Risks Remain High”) (“The Division will not engage in plea negotiations with a company that desires to litigate gain or loss.”).

⁴⁹ See ABA Comments to Sentencing Commission, at 21.

⁵⁰ See *id.*; see Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies, at 21 (Nov. 3, 2005) (“Smith Statement”) (stating that “[t]here is *no* sound economic or empirical basis for a 10% impact presumption,” and that “the fairness and appropriateness of the 10% presumption has been consistently questioned”).

- The 20 percent presumption is a random figure that “often bear[s] *no* relation to the social costs of the offense.”⁵¹
- Coupled with the “overhang of treble damage liability,” the 20 percent presumption discourages confession and cooperation.⁵²
- The 20 percent presumption is too low based on more recent empirical data indicating that the average overcharge is materially greater than ten percent of the volume of commerce affected.⁵³
- Using a presumption rather than actual proof is inconsistent with the requirements of *Apprendi* and *Booker/Fanfan*.⁵⁴
- Calculation of actual commerce affected is not as difficult as assumed by the Sentencing Commission.⁵⁵

In response to the AMC’s question what other measure or measures would provide a more appropriate method for the Sentencing Guidelines to distinguish the severity of violations, three alternatives were proposed.

The first is that the 20 percent proxy should be a rebuttable presumption.⁵⁶ Opponents argue, however, that employing a rebuttable presumption would undermine effective enforcement sought by Congress by introducing costly and complex damages calculations into all antitrust sentencing proceedings.⁵⁷

⁵¹ Smith Statement, at 18.

⁵² *Id.* at 19.

⁵³ AAI Comments, at 5-6.

⁵⁴ ABA Comments to Sentencing Commission, at 20 (stating that it is possible that the Sentencing Commission “has not considered whether [*Booker*] requires amendment or removal of the current method of calculating the base fine for an organization that commits an antitrust violation”).

⁵⁵ See ABA Comments to AMC, at 8-9.

⁵⁶ See Smith Statement, at 20.

⁵⁷ Trans. at 104 (Hammond) (it “creates a bigger headache”); see Hammond Statement, at 3-4 (quoting from House Judiciary Committee’s Supplemental Legislative History, 150 Cong. Rec. H3658 (daily ed. June 2, 2004), which states that “the increases to the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at

Second, the proxy should be reduced to between 6 and 10 percent (reflecting a presumed overcharge of 3 percent to 5 percent).⁵⁸ Under one version of this proposal, if the government could prove the overcharge was greater than 10 percent, then it could obtain a higher base fine.⁵⁹

Third, some commenters argued that recent data suggest that the amounts of overcharge are more than, rather than less, than ten percent of the volume of commerce affected, and that a “doubling or tripling” of the presumed overcharge is appropriate.⁶⁰

In addition, the ABA has proposed that the Sentencing Commission should review and explain the bases for the 20 percent presumption for the benefit of courts deciding whether to follow the Guidelines. First, the ABA suggests that the most recent empirical research may not support an assumption that cartels result in overcharges in the amount of 10 percent of the total commerce affected, or the doubling of that amount to account for reduced production and/or sales resulting from the overcharge.⁶¹ Second, the ABA argues that it may in fact not be so difficult and costly to prove the amount of overcharge.⁶²

current Guidelines levels without the need to engage in damages litigation during the criminal sentencing process”).

⁵⁸ Smith Statement, at 21; *see also* Nanni Statement, at 9-10 (supporting proxy of 10%).

⁵⁹ Nanni Statement, at 9-10.

⁶⁰ *See* AAI Comments, at 6; *see also* Hammond Statement, at 9 (acknowledging empirical support for proxy at least as large as current 20 percent).

⁶¹ ABA Comments to AMC, at 8.

⁶² *Id.* at 9-10 & n.21 (“If subsequent events have shown that the determination of gain or loss in antitrust cases is not as complex as the Sentencing Commission assumed in 1991, there is no need to continue to base antitrust fines or jail sentences on volume of affected commerce as opposed to actual harm as is done in most other federal economic crimes.”).

B. The Sherman Act provides for a maximum fine of \$100 million (or, previously, \$10 million). The government may seek criminal fines in excess of that maximum pursuant to 18 U.S.C. § 3571(d).

1. *Should “twice the gross gain or twice the gross loss” as provided in Section 3571(d) be calculated based on the gain or loss from all coconspirator sales or on only the defendant’s sales?*

Section 3571(d) does not specify whether punishment is to be based on the total amount of gain or loss attributed to the entire conspiracy, or only that amount attributed to the individual defendant. The statute provides only that “the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss”⁶³ There is no case law because there have been no contested antitrust sentencing proceedings under the statute.⁶⁴ Some observers believe that the courts will not have an opportunity in the future to consider the question because defendants face strong pressure to settle and the Justice Department will not enter plea agreements with defendants seeking to challenge the issue.⁶⁵

DOJ’s Antitrust Division takes the position that Congress intended punishment to be based on the total amount of gain or loss attributed to the entire conspiracy, not just the sales of the particular defendant.⁶⁶ According to the Division, the “plain language of § 3571(d) . . . strongly suggest[s] that the gross gain or loss is that of the violation as a whole and not the gain or loss attributable to individual participants.”⁶⁷ DOJ further argues that, as under the common

⁶³ 18 U.S.C. § 3571(d).

⁶⁴ Trans. at 43-44 (Hammond) (stating that the Division has never attempted to prove gain or loss to a court or jury).

⁶⁵ Hammond, *Risks Remain High*, at 10 (“The Division will not engage in plea negotiations with a company that desires to litigate gain or loss.”).

⁶⁶ Hammond, *Risks Remain High*, at 7.

⁶⁷ Hammond Statement, at 10. Furthermore, the legislative history reflects that Congress intended Section 3571(d) to broaden the scope of the former fine enhancement statute, 18 U.S.C. § 3263(c)(1), which limited the defendant’s liability to his or her own pecuniary gain. Hammond Statement, at 11 (citing H.R. Rep. No. 100-390, at 6 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2137, 2142); *see also* ABA Comments to AMC, at 14 (noting similar argument). *But see* ABA

law where coconspirators are liable for each other's acts, "gross gain in an antitrust conspiracy must mean the gross gain by all coconspirators combined."⁶⁸ Finally, DOJ points to the word "gross" as distinguishing Section 3571(d) from the narrower provision in the Sentencing Guidelines calling for calculation of the fine based on the individual's conduct.⁶⁹

Other commenters and witnesses, however, have argued that the gain or loss under Section 3571(d) should be only the portion of gain or loss attributable to the particular defendant. They call for legislative clarification of this interpretation.⁷⁰ They note that, under the Sentencing Guidelines, a fine is set on the basis of a particular defendant's effect on commerce, and argue that Section 3571(d) should be interpreted similarly, to apply only to the loss caused by the defendant.⁷¹ They reject the argument that use of the term "gross" was intended to distinguish from the Guidelines' focus on the individual because the usual meaning of the word would not provide such a distinction.⁷²

The ABA has urged the AMC not to recommend a legislative amendment to the statute, notwithstanding the lack of agreement and clarity.⁷³ It notes that since Section 3571(d) applies to the sentencing of individuals and organizations convicted of any federal crime resulting in pecuniary gain or loss, any change in the statute would have impact beyond the sentencing of

Comments to AMC, at 14 (noting argument that legislative history also shows derivation from model penal code provision that applies only to individual).

⁶⁸ Hammond Statement, at 10.

⁶⁹ ABA Comments to AMC, at 13 (citing Gary R. Spratling, The Trend Towards Higher Corporate Fines, Address Before the Eleventh Annual National Institute on White Collar Crime (Mar 7, 1997)).

⁷⁰ Smith Statement, at 29.

⁷¹ *See id.*

⁷² *See* James L. McGinnis, *Antitrust Attorneys Grapple with Impact of Booker*, Nat'l L.J. (July 18, 2005) (describing argument).

⁷³ ABA Comments to AMC, at 15.

antitrust defendants.⁷⁴ DOJ expressed the same view.⁷⁵ In addition, the ABA argues that the issue should arise infrequently now that the maximum fine under the Sherman Act has been increased to \$100 million for organizations.⁷⁶ Section 3571(d) is relevant only when the Justice Department seeks fines exceeding that amount; yet the Justice Department recovered fines in excess of \$100 million only eight times in the past ten years.⁷⁷

2. *Should fines above the statutory maximum, and thus limited by Section 3571(d), be based on 20% of gross sales as provided for in the Sentencing Guidelines, as they are for fines below the statutory maximum, or should they be calculated differently? If differently, how should they be calculated?*

DOJ currently uses the Sentencing Guidelines' 20 percent presumption to establish the applicable fine regardless of whether the fine so calculated exceeds the Sherman Act maximum fine.⁷⁸ Some observers have criticized this approach on the ground that, once gain or loss is proved for the purpose of establishing the maximum fine under Section 3571(d), that same gain

⁷⁴ *Id.* at 15 & n.37 (stating that “the resolution of this issue has implications far beyond the sentencing of antitrust organizations,” and that “the [ABA] Section believes that this issue of statutory interpretation is appropriately left to resolution by the courts”).

⁷⁵ Hammond Statement, at 11 (Section 3571(d) is generally applicable statute).

⁷⁶ ABA Comments to AMC, at 15 n.37; *see also* Supplemental Legislative History by Reps. Sensenbrenner and Conyers, 150 Cong Rec. H3658 (daily ed. June 2, 2004) (stating that “the increases in the Sherman Act statutory maximum fines are intended 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”).

⁷⁷ U.S. Department of Justice, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of \$10 million or More (Jan. 30, 2006).

⁷⁸ Hammond Statement, at 14.

or loss should be used for the purpose of calculating a base fine.⁷⁹ Indeed, the ABA suggests that not doing so may be unconstitutional after *Booker*.⁸⁰

DOJ contends that the two calculations are appropriately distinct. It argues that establishing the gross pecuniary gain or loss under Section 3571(d) is different from establishing the appropriate base fine for a particular defendant, given that the Sentencing Commission has found that the amount of the base fine need not be based directly on pecuniary gain or loss, but should also account for the deadweight loss to society that results from cartel activity.⁸¹

No commenter or witness recommended statutory change specifically on this point.⁸² The ABA opined that the issue is best left to judicial resolution.⁸³

Anthony Nanni suggested that when actual gain or loss is proven, that should be used for calculation of the fine under the Guidelines.⁸⁴

⁷⁹ ABA Comments to AMC, at 17; Nanni Statement, at 12-13.

⁸⁰ ABA Comments to AMC, at 17. The ABA suggests leaving for judicial resolution the question of whether proof to a jury of actual gain or loss under Section 3571 was intended by Congress, and could be done consistent with *Booker*. *Id.* at 17 n.38.

⁸¹ Hammond Statement, at 14-15.

⁸² One witness argued that Section 3571(d) should be repealed entirely. Smith Statement, at 27. *Compare id. with* Nanni Statement, at 12-13 (identifying same concern, but not calling for legislative change), *and* ABA Comments to AMC, at 17 (same).

⁸³ ABA Comments to AMC, at 18.

⁸⁴ Nanni Statement, at 12-13.