MEMORANDUM

From: Criminal Procedure and Remedies Working Group

To: All Commissioners

cc: Andrew J. Heimert and Commission Staff

Date: December 21, 2004

Re: Criminal Procedure and Remedies Issues Recommended for Commission Study

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The Antitrust Modernization Commission assigned to the Criminal Procedure and Remedies Working Group the responsibility to analyze issues relating to antitrust criminal procedure and remedies, and, based on that analysis, to make recommendations to the Commission as to the issues within that category that warrant substantive review. This memorandum outlines those recommendations. The memorandum addresses first the issues the Working Group recommends for substantive consideration and then addresses those issues not recommended for further study at this time. In each instance, comments are provided to allow insight into the Working Group's analysis. The issues are listed in approximate order of priority that the Working Group believes each issue should have for Commission study.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?**
2. **Should the statutes establishing criminal fines for price fixing and related offenses be amended in light of recent Supreme Court decisions casting doubt on the status of the Federal Sentencing Guidelines?**

Issues not recommended for study. The Working Group recommends that the Commission not study the following issues:

3. **Should a statutory definition of conduct subject to antitrust criminal prosecution (perhaps limiting prosecution to hard-core *per se* violations) be enacted?**
4. **Should criminal enforcement of Section 2 of the Sherman Act be eliminated?**
5. **Should corporations be subject to criminal liability?**
6. **Should the Antitrust Division have wiretap authority for investigations of cartels?**
7. **Should antitrust criminal investigations be made more efficient and shorter?**
8. **Can additional mechanisms be put in place to enhance the detection of cartel activity?**

DISCUSSION OF RECOMMENDATIONS

Issues recommended for study

The Working Group recommends that the Commission study the following issues:

1. **Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?**

Section 3 of the Robinson-Patman Act imposes criminal liability for price discrimination and for selling goods at "unreasonably low prices" in order to destroy competition or eliminate a competitor. 15 U.S.C. § 13a. Such conduct is arguably subject to criminal liability under other criminal provisions or perhaps should not be subject to criminal sanctions at all. Moreover, these criminal sanctions apparently have not been enforced for over 30 years, and have rarely ever been enforced. *See, e.g.*, Meredith E. B. Bell and Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 357 n.2 (1999); Terry Calvani and Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 775 (1991).

Comments: The lack of enforcement may make the provision's continued existence harmless and not worthy of the Commission's attention. However, repeal would be a relatively simple change likely without broader implications, and consideration of such a recommendation would likely not require extensive work by the Commission. The Working Group concurs with the recommendation of the Single-Firm Conduct working group that the Commission study Robinson-Patman generally and this provision in particular.

2. **Should the statutes establishing criminal fines for price fixing and related offenses be amended in light of recent Supreme Court decisions casting doubt on the status of the Federal Sentencing Guidelines?**

The current maximum corporate fine provided for in the Sherman Act is $100 million, an amount that was increased from $10 million in 2004. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified as amended at 15 U.S.C. §§ 1-3). DOJ, however, has routinely sought higher fines based on the alternative-fines provision of 18 U.S.C. § 3571(d), which authorizes a fine of up to twice the gain or loss attributable to the crime. As a matter of practice, DOJ has set the fine for organizations at 20 percent of the defendant's sales affected by the conspiracy using Section 2R1.1(d)(1) of the federal Sentencing Guidelines. *See* U. S. Sentencing Commission, *Guidelines Manual* § 2R1.1(d)(1) (2004).

It appears highly likely, however, that continued use of the Guidelines to allow a judge to impose fines above the $100 million statutory threshold without a sufficient factual predicate proven to a jury is barred by recent Supreme Court decisions. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that the Sixth Amendment requires 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." 530 U.S. at 490. Accordingly, a sentencing enhancement could not be applied if found applicable by the judge (instead of the jury). *Id.* at 491-92. The Court extended its holding in *Apprendi* to Washington's sentencing guidelines in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In *Blakely*, the Court held that an enhancement of a defendant's sentence pursuant to sentencing guidelines, where the enhancement was based on a judge's finding of certain facts, also violated the Sixth Amendment right to a jury trial. 124 S. Ct. at 2537. These decisions have called into question the continued constitutionality of the federal Sentencing Guidelines. *See, e.g.*, *United States v. Booker*, 375 F.3d 508 (7th Cir.), *cert.*

granted, 125 S. Ct. 11 (U.S. Aug. 2, 2004) (No. 04-104) (granting *certiorari* to determine whether *Blakely* applies to federal Sentencing Guidelines); *United States v. Fanfan*, 2004 WL 1723114 (D. Me.), *cert. granted*, 125 S. Ct. 12 (U.S. Aug. 2, 2004) (No. 04-105) (same).

The use of the Sentencing Guidelines to increase a fine beyond $100 million (or, for crimes committed prior to the 2004 increase, $10 million) would impose a fine above that called for by statute based solely on findings by a judge, not a jury. As a result of *Apprendi* and *Blakely* — and in expectation of consistent decisions in *Booker* and *Fanfan* — DOJ now has the alternatives of either (1) limiting fines to $100 million, or (2) attempting to prove to a jury the actual loss (or gain) from a conspiracy. The second alternative is unwieldy, given the complexities of proving actual loss and gain in a price-fixing case. *See generally* Tefft W. Smith, James H. Mutchnik, & Scott M. Abeles, *Harder to Prosecute?*, LEGAL TIMES, July 12, 2004. The Commission should study whether further increases to the maximum Sherman Act fines are appropriate or whether the structure of corporate fines under the Sherman Act might be amended in other ways.

Comments: The Commission can provide useful guidance regarding antitrust-specific issues in sentencing. Although the issues of the constitutionality of sentencing for antitrust crimes are little different from the same issues in other areas of federal criminal law, the Commission's expertise in antitrust matters may be important if the federal sentencing regime is modified.

Issues not recommended for study

The Working Group recommends that the Commission not study the following issues:

3. **Should a statutory definition of conduct subject to antitrust criminal prosecution (perhaps limiting prosecution to hard-core *per se* violations) be enacted?**

Comments: Some have expressed concerns that the antitrust statutes do not provide a sufficiently clear definition of conduct that may result in the imposition of criminal penalties, and rely excessively on prosecutorial discretion and the common law. However, others believe the law is sufficiently clear, and prosecutorial discretion adequately cabined, while efforts to enact more precise boundaries risk doing more harm than good. Although the issue is of some importance, the courts are well suited to ensuring that the statutes are interpreted so as to ensure at least the constitutional guarantees of clarity.

4. **Should criminal enforcement of Section 2 of the Sherman Act be eliminated?**

Comments: DOJ has not sought criminal penalties in Section 2 cases for decades; this suggests that the authority is not needed. The anomalous existence of a criminal remedy that is never pursued is confusing at best and affirmatively misleading at worst. However, others argue that the government might need the option of criminal enforcement while prosecutorial discretion suffices to prevent inappropriate prosecutions, resulting in little basis for concern.

5. **Should corporations be subject to criminal liability?**

Comments: Some argue that corporate liability is less effective as a deterrent than individual liability, and harms shareholders. However, corporate criminal liability gives corporations appropriate incentives to promote antitrust compliance by their officers and employees.

6. **Should the Antitrust Division have wiretap authority for investigations of cartels?**

Current wiretap authority does not include a provision for wiretaps seeking evidence of cartel activity. *See* 18 U.S.C. § 2516 (providing wiretap authority for various enumerated crimes both within Title 18 and outside it, in certain circumstances).

Comments: There does not appear to be a good justification for not extending wiretap authority to investigations of criminal cartel activity. However, given that most cartel behavior involves mail or wire fraud, the absence of wiretap authority for antitrust crimes is unlikely to have a material impact on investigations. *See, e.g.*, *United States v. Ames Sintering*, 927 F.2d 232 (6th Cir. 1990) (affirming conviction for bid-rigging under wire-fraud statute). Moreover, we are not aware of any strong evidence that the Department of Justice's cartel investigation efforts have been hampered by the absence of express authority for wiretaps to investigate violations of Title 15.

7. **Should antitrust criminal investigations be made more efficient and shorter?**

Comments: If there are certain systematic problems (*e.g.*, absence of internal deadlines or resource constraints) causing protracted investigations in criminal investigations, these could be addressed by the Commission. However, the length of criminal investigations varies according to the circumstances, so there appears to be little that the Commission can usefully propose in this area.

8. **Can additional mechanisms be put in place to enhance the detection of cartel activity?**

Recent changes have enhanced the Department of Justice's Corporate Leniency Program by adding provisions that limit the liability of companies qualifying for leniency if they cooperate fully with both the Department and private plaintiffs. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §§ 212-14, 118 Stat. 665, 666-68

(codified as amended at 15 U.S.C. § 1 note). Others have proposed even greater incentives, such as a "whistleblower" or "*qui tam*" statute, which would allow individuals reporting clandestine cartel activity to obtain a portion of any fines collected by the Department of Justice. *See generally* William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001). Under such an approach, private parties would be authorized to bring *qui tam* actions for antitrust violations, similar to the authority private parties have to bring actions on behalf of the government under the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. §§ 3729-31). Under existing *qui tam* provisions, a "relator" providing evidence of a violation to the government may receive up to 25 percent of the government's recovery (plus attorney's fees) if the government pursues an action, or up to 30 percent if he proceeds alone. The Commission could study whether further additions to the Leniency Program, such as a *qui tam* provision, are warranted and whether other approaches would be appropriate.

> *Comments*: The recent statutory additions to the Leniency Program should be given an opportunity to work before being revisited. Only if the current approaches appear unsuccessful should more radical approaches, such as a *qui tam* statute, be considered. On the whole, however, it appears that the Department's amnesty program has been very successful. *See* Thomas O. Barnett, Antitrust Enforcement Priorities: A Year in Review, Speech at the Fall Forum of the Antitrust Law Section of the American Bar Association (Nov. 19, 2004) (noting 2004 had second-highest level of criminal cartel fines and that enhancement of Leniency Program will be helpful going forward), *available at* http://www.usdoj.gov/atr/public/speeches/206455.htm.