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November 14, 2005

Via Express Mail and E-mail

Antitrust Modernization Commission
Attention: Public Comments
1120 G Street, N.W.
Suite 810
Washington, DC 20005

Re: Comments Regarding Criminal Remedies

Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response its request for comments regarding Criminal Remedies.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Donald C. Klawiter

Donald C. Klawiter
Chair, Section of Antitrust Law

COMMENTS OF THE ABA SECTION OF ANTITRUST LAW IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION'S REQUEST FOR PUBLIC COMMENT ON CRIMINAL REMEDIES

The Section of Antitrust Law of the American Bar Association welcomes the opportunity to present its views to the Antitrust Modernization Commission on the important issues raised in the Commission's request for public comment on criminal remedies.[1] The views expressed in these comments are those of the Section of Antitrust Law and have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Section is on record strongly and unconditionally supporting the U.S. Department of Justice Antitrust Division's considerable efforts to deter, detect and prosecute cartel behavior.[2] Such efforts promote the integrity of our market economy and protect consumers. The Section is also on record favoring substantial and effective penalties for those who engage in hard-core collusion among rivals affecting prices, allocation of markets or customers, and similar conduct.[3] The questions posed in the Commission's request for public comment raise important issues regarding the sufficiency, effectiveness, and fairness of certain aspects of the current antitrust sentencing regime. Consideration of these issues is particularly timely in light of the recent

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[1] 70 Fed. Reg. 46,474 (August 10, 2005)

[2] *See* ABA Antitrust Section, Comments on the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing. (March 2005) (available at http://www.abanet.org/antitrust/comments/2005/03-05/ussg-05.html.)

[3] *See* Id. and ABA Antitrust Section, Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunny Act Amendment (January 2004) (available at http://www.abanet.org/antitrust/comments/2004/reports.html.)

dramatic increase in criminal penalties for antitrust offenses[4] and the pending amendments to the United States Sentencing Guidelines for antitrust violations.[5] It is generally accepted that antitrust sentences should be sufficient, but not greater than necessary, to provide punishment reflecting the seriousness of the offense and the harm it inflicts on the economy and consumers, to deter criminal conduct, to protect the public, and to provide rehabilitation, where appropriate. The questions posed by the Commission's request for public comment on criminal remedies focus exclusively on the sentencing methodology for establishing corporate fines for antitrust criminal violations and ask, in effect, whether the current corporate sentencing process achieves the generally accepted goals of sentencing.

I. DO THE SENTENCING GUIDELINES PROVIDE AN ADEQUATE BASIS FOR DISTINGUISHING BETWEEN VIOLATIONS WITH DIFFERING DEGREES OF CULPABILITY?

The first question posed by the Commission's request for public comment is whether there should be a means, in setting antitrust corporate fines, for differentiation based on differences in the severity or culpability of the conduct. The Section believes that there should be and that the current structure of Chapter 8 of the United States Sentencing Guidelines (Sentencing of Organizations) specifically and adequately addresses this issue.

Under the Sentencing Guidelines, organizational fines are based on the seriousness of the offense and the culpability of the organization. In antitrust cases, the seriousness of the offense

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[4] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, *et seq.*, 118 Stat. 661 (2004).

[5] *See* United States Sentencing Commission, Notice of submission to Congress of amendments to sentencing guidelines effective November 1, 2005, (available at http://www.ussc.gov/FEDREG/fedr0505.html.).

is generally reflected in the pecuniary gain or loss resulting from the violation.[6] The culpability of the organization is reflected in the organization's culpability score, which differentiates organizational behavior based upon six criteria: (1) high level or substantial authority personnel involvement in or tolerance of criminal activity;[7] (2) prior criminal history of the organization; (3) criminal violation of a prior judicial order; (4) obstruction of justice; (5) existence of an effective compliance and ethics program; and (6) self-reporting, cooperation, or acceptance of responsibility. An assessment of each of these factors in each individual case results in a culpability score reflecting the relative culpability of the organization's conduct. The organization's culpability score is then used to identify the multipliers that will be applied to the base fine to determine the organization's Guidelines fine range. The Section believes that these are appropriate factors to be considered in differentiating the culpability of corporate behavior.

The Commission also asks whether there should be distinctions between different types of antitrust crimes (*e.g.*, price fixing versus monopolization). The Section strongly believes that only hard-core cartel conduct, *i.e.*, horizontal agreements to fix prices, rig bids, or allocate customers, territories, or markets, should be subject to criminal prosecution. Yet on the face of the Sherman Act, any violation of Sections 1, 2, and 3 may trigger criminal penalties. Sections 1 and 3 prohibit a broad range of unreasonable restraints of trade, while Section 2 prohibits

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[6] Under the Guidelines, the harm in an antitrust case is presumed to be 20% of the corporate defendant's affected volume of commerce, whereas in most other federal white collar economic crimes harm must be established on a case-by-case basis. (*See* Section II below.)

[7] This particular criteria also varies with the size (*i.e.*, number of employees) of the organization on the theory that "as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position" and "as organizations increase in size, the risk of criminal behavior beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive." U.S.S.G. § 8C2.5 Background.

monopolization, attempts to monopolize, or conspiracies to monopolize.[8] The criminal penalties provisions of the Sherman Act do not differentiate among the various types of anticompetitive conduct that could violate the Act.[9] The facial breadth of criminal antitrust laws has been noted in the case law. The United States Supreme Court has acknowledged that the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits. . . . "[10] Even the means of determining whether a restraint of trade is considered *per se* illegal or subject to the rule of reason are judicially created, not identified statutorily.

Nevertheless, at least two safeguards currently exist against the criminal prosecution of anticompetitive behavior other than hard-core cartel conduct – long standing prosecutorial discretion and the Sentencing Guidelines. For generations, the Antitrust Division has been judicious in limiting criminal enforcement to hard-core cartel conduct.[11] But this judgment is the product of prosecutorial discretion, not the dictates of statute. The Section applauds the

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[8] It has been many years since a monopolization case was prosecuted criminally, and a monopolization case involving hard-core cartel conduct is highly unlikely.

[9] The Robinson-Patman Act, 15 U.S.C. § 13(a), is another antitrust statute that provides for criminal sanctions.

[10] *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) (establishing the element of intent to prove a criminal antitrust violation).

[11] Indeed, then Assistant Attorney General for the Antitrust Division, R. Hewitt Pate, recently stated clearly and unequivocally that the type of conduct that will be prosecuted criminally "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 . . . clear knowledge on the part of the perpetrators of the wrongful nature of their behavior." Vigorous and Principled Antitrust Enforcement: Priorities and Goals (August 12, 2003) (available at http://www.usdoj.gov/atr/public/speeches/201241.htm). Furthermore, the current Acting Assistant Attorney General for the Antitrust Division, Thomas O. Barnett, has described the conduct that the Division prosecutes criminally as, "[n]aked agreements among competitors to fix prices, rig bids, allocate markets or customers, or reduce output, [which] are devoid of any efficiency justification, and are nothing less than direct assaults on the principles of competition that drive our market economy." Antitrust Enforcement Priorities: A Year In Review (November 19, 2004) (available at http://www.usdoj.gov/atr/public/speeches/206455.html.).

Division's self-imposed discretion and fully anticipates its continuation.[12] In addition, the commentary and very structure of the Sentencing Guidelines clearly contemplate the criminal prosecution of hard-core cartel conduct only. The Antitrust Offense Guideline specifically relates only to bid-rigging, price-fixing, or market allocation agreements among competitors. U.S.S.C. § 2R1.1 Furthermore, the commentary to the Antitrust Offense Guideline specifically notes that only one antitrust guideline, dealing with horizontal agreements in restraint of trade, has been promulgated and that the conduct covered by the guideline "almost invariably [involves] covert conspiracies [among competitors] that are intended to, and serve no purpose other than to restrict output and raise prices, and that are so plainly anticompetitive that they are recognized as illegal *per se, i.e.*, without inquiry in individual cases as to their actual competitive effect." U.S.S.C. § 2R1.1 Background.

While these safeguards are not absolute guarantees against the criminal prosecution of anticompetitive conduct other than hard-core cartel conduct, they do reflect a long-standing, near universal consensus that only such conduct is appropriately subject to criminal prosecution. Given these safeguards, the Section believes that it is unnecessary to, and highly unlikely that Congress would, 115 years after the passage of the Sherman Act, parse the statute into separate criminal and civil parts based on the type and degree of anticompetitive conduct. Nonetheless, the Commission should state in its report to Congress its view that criminal provisions of the U.S. antitrust laws should apply only to hard core cartel conduct such as price fixing, bid rigging

[12] In addition, the Antitrust Division Manual states that criminal investigation and prosecution may not be appropriate in cases in which: (1) there is confusion in the law; (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. *See* Division Manual page III-16. Given the Division's long-standing practice and clear public statements of policy, it would seem that a criminal prosecution of conduct other than horizontal hard-core cartel agreements would be inconsistent with the Division's own guidelines on criminal prosecution.

and customer, territorial, or market allocation, and should recommend to the Sentencing Commission that it adopt specific guidelines or commentary that clearly establishes that view. Such an expression of intent by the Sentencing Commission will provide direct guidance to the courts and will, together with court decisions such as the *Gypsum* case, prevent any future unwarranted expansion of the criminal prosecution of Sherman Act violations beyond the prosecution of hard core cartel behavior.

II. DOES THE GUIDELINES' USE OF 20% OF THE VOLUME OF COMMERCE ATTRIBUTABLE TO THE DEFENDANT THAT WAS AFFECTED BY THE VIOLATION AS THE BASE FINE FOR ORGANIZATIONAL DEFENDANTS PROVIDE AN APPROPRIATE STARTING POINT FOR SETTING CORPORATE FINES?

The existing statutory structure for the sentencing of organizations in antitrust cases involves the calculation of fine ranges pursuant to the Guidelines that are capped by the Sherman Act maximum (now $100 million) or the "twice-the-gain/loss" provision of 18 U.S.C. § 3571(d), whichever is higher.[13] The fine ranges are determined based upon calculations involving the relative culpability of the conduct (culpability score) and the severity of the violation (base fine). As is the case with other federal economic crimes, the severity of an antitrust crime (base fine) is based upon the harm caused by the violation. For most federal economic crimes, the base fine for organizational defendants is the greatest of the gain or loss resulting from the offense or an amount from a fine table corresponding to an offense level, which is determined by specific characteristics of the offense, the most significant of which often is the gain or loss resulting

[13] The alternative fine statute, 18 U.S.C. § 3571(d), applies to all federal crimes which result in pecuniary gain or loss and provides a mechanism for the government to increase the maximum potential fine above the maximum stated in the statute defining the crime and setting the penalties. Under the federal sentencing statutes, the maximum fine generally is the greatest of the amount specified in the statute setting forth the offense or twice the gross gain or twice the gross loss resulting from the offense. The court has discretion to decline to consider the alternative fine if to do so would unduly complicate or prolong the sentencing process.

from the violation. For antitrust offenses, the Guidelines simplify the process by establishing a proxy for the economic impact of the conduct – 20% of the volume of commerce attributable to the defendant that was affected by the violation.[14] The government must prove the "affected volume of commerce" to establish the base fine. The government need not prove the actual harm resulting from the violation, as is required in most other federal economic crime sentencings.[15]

The Guidelines commentary provide scant discussion of the Commission's basis for selecting 20% of commerce as the presumed harm from antitrust violations or its decision to adopt a default presumed harm figure in the first place:

> It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly 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.

USSG § 2R1.1 comment (n.3).

The Guidelines thus impose a conclusive presumption concerning the overcharge or severity of the crime in antitrust cases. Of course, the presumption that all antitrust conspiracies result in the same level of harm could be inequitable and disproportionate – in both directions – in any given case. Apparently the Sentencing Commission adopted this special methodology

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[14] U.S.S.C. § 8C2.4(b) and § 2R1.1(d).

[15] Likewise, the individual fines for antitrust violators are set at 1% to 5% of the volume of affected commerce and jail sentences in antitrust cases are increased based upon the volume of affected commerce as opposed to the actual loss caused by the crime. (*See*, U.S.S.G. § 2R1.1).

because of its perception of the difficulty in calculating the actual gain or loss in an antitrust case, where determination of overcharges centers on complex economic and econometric analyses.[16]

The Section has questioned, and continues to question, whether the current presumption in determining criminal fine levels is empirically sound or good public policy.[17] Having reviewed the Sentencing Commission's analysis of the issue, the Section concluded that the presumption that the "average gain from price-fixing is 10 percent of the selling price" was unsupported by empirical economic evidence. Furthermore, while the loss from price-fixing may exceed the gain because of lost or reduced production and sales due to the "higher prices," the Section is aware of no empirical or theoretical support for the Sentencing Commission's decision to double the presumed gain to reflect such losses.

In addition, the Section questions whether the Sentencing Commission's stated reason for adopting this special methodology for calculating organizational antitrust fines - to avoid the time and expense required to determine actual gain or loss in individual cases – remains viable today, if it ever was.[18] Since at least its sentencing calculation in *United States v. Archer*

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[16] This same reasoning – that determination of actual overcharges in an antitrust case is uniquely difficult – apparently led the Sentencing Commission to increase jail sentences for antitrust violators on the basis of the volume of commerce affected by the violation (U.S.S.C. § 2R1.1) as opposed to the actual harm caused by the violation as is the case with respect to most federal white collar economic crimes (U.S.S.C. § 2B1).

[17] *See* ABA Antitrust Section, Comments on the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing. (March 2005) (available at http://www.abanet.org/antitrust/comments/2005/03-05/ussg-05.html.); and ABA Antitrust Section, Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebeling and the Tunney Act Amendment (January 2004) (available at http://www.abanet.org/antitrust/comments/2004/reports.html.)

[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. *See, e.g.*, *United States v. Anderson*, 259 F.3d 853, 858 (7th Cir. 2001). Also, the Federal Rules of Evidence are not enforced in such proceedings. *See, e.g.*, *United States v. Smith*, 280 F.3d 807, 810 (7th Cir. 2002) ("…the Federal Rules of Evidence do not apply at sentencing hearings, and 'a sentencing judge is free to consider a wide variety of information

Daniels Midland Co. in 1996,[19] the Antitrust Division has been effectively calculating alternative maximum fines under 18 U.S.C. § 3571(d), which requires the determination of the actual gain or loss resulting from the violation. These determinations have been necessary in the largest cartels the Division prosecutes, where it is seeking fines in excess of the statutory maximum fine of $10 million.[20] (The statutory maximum corporate fine was increased to $100 million on June 22, 2004.) The Division's effective use of the alternative fine statute to obtain fines well in excess of the statutory maximum based upon the gain or loss resulting from the offense has had a great impact on the size of criminal fines the Division has obtained over the past 10 years, and is in substantial conflict with the expressed need for a default presumed harm sentencing methodology.[21] If subsequent events have shown that the determination of gain or loss in

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that would be inadmissible at trial, including hearsay.'… All that is required is that the information have 'sufficient indicia of reliability to support its probable accuracy.'"). Thus, in certain respects, the burden of proving loss in a criminal sentencing proceeding (as opposed to proving loss to support an increase in the potential maximum sentence under 18 U.S.C. § 3571(d)) is significantly less than that which must be confronted by the civil claimants. Furthermore, the standard of proof, even in civil cases, of the loss incurred because of anticompetitive conduct is relatively low. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). The amount of damage can be determined using "a just and reasonable estimate… based on relevant data" including both "probable and inferential as well as direct and positive proof." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

[19] Crim.. No. 96-CR-00690 (N.D. Ill. Oct. 15, 1996).

[20] Since 1996, the Antitrust Division has regularly obtained corporate fines well in excess of the statutory maximum fine. Indeed, since 1996, the Antitrust Division has obtained fines in excess of the statutory maximum $10 million in 43 cases, with its highest fine being $500 million. The Division was able to achieve these results by use of the alternative maximum fine provision of 18 U.S.C. § 3571(d), which provides that the government can set as an alternative to the statutory maximum fine an amount that is twice the gain or twice the loss from the conduct. The Division's success in this area has been achieved through the negotiation of plea agreements with corporate defendants. There have been no contested sentencing hearings at which the Division has had to prove an alternative fine figure.

[21] Furthermore, the calculation of loss or gain is made and supported by competent evidence in every antitrust civil damage case, which also suggests that the determination of overcharges in such cases may not be as complex and time consuming as the Sentencing Commission thought in 1991.

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.

However, it is generally accepted that antitrust damages are not susceptible of determination with precision.[22] The Supreme Court has noted that "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."[23] Furthermore, no one doubts that the "determination of gain or loss [in antitrust cases] . . . . [c]enters on complex economic and econometric analysis."[24] The inability to measure antitrust harm with precision and the complexity of the process, even if undertaken pursuant to a reduced burden of proof, may explain, and lend continuing support to, the Sentencing Commission's decision to adopt a proxy for harm in antitrust cases rather than have courts engage in "complex economic and econometric analysis" in determining the appropriate penalty for *per se* criminal conduct.[25]

Finally, the Supreme Court's recent sentencing decisions have focused renewed and substantial attention on the sentencing process. One of the fundamental aspects of the decision in

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[22] *See* ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 873.

[23] *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). Of course, for that reason the courts have generally adopted a lesser burden of proving damages in antitrust civil cases than in other types of damage cases.

[24] James L. McGinnis, "Antitrust Attorneys Grapple With Impact Of *Booker*," The National Law Journal (July 18, 2005). *See also*, Stephen J. Squeri, "The Booker Decision And The Future Of Sentencing In Antitrust And Other Federal Cases," ABA Section Of Antitrust, Criminal Practice and Procedure Committee Newsletter 7, 15 (June 2005) and Thomas Mueller and David Olsky, "Antitrust Sentencing After *Booker*," Global Competition Review 39, 40 (March 2005).

[25] The transparency provided by the Sentencing Guidelines' default harm methodology also allows corporate targets of antitrust criminal investigations and their counsel to accurately assess risk and potential liability thereby facilitating early resolution in many cases.

United States v. Booker[26] is concern for the "reasonableness" of the sentence in light of the factors enumerated in 18 U.S.C. § 3553(a).[27] In *Booker*, the Court held that the Guidelines are no longer mandatory, but stated, "[the Federal Sentencing Act] requires a sentencing court to consider Guideline ranges,… but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)."[28] The Supreme Court also focused on the importance of these factors in reviewing a sentence on appeal. The Court stated, "Those factors [§ 3553(a)] in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." Unquestionably, the Supreme Court has focused on the importance of the factors listed in § 3553(a) to contribute to reasonable sentencing decisions. In the Section's view, the advisory status of the Guidelines under *Booker* amplifies the need for the Sentencing Commission to offer empirical support for its recommendations and methodology so that courts will have sufficient understanding of the premises of the Guidelines to exercise their sound sentencing discretion and impose, as they are required to do, reasonable sentences.

Therefore, the Section continues to believe that the Sentencing Commission should review the rationale for the continuation of a special sentencing methodology for antitrust cases in light of the significant developments since it was adopted in 1991 and against the backdrop that the Division has regularly determined gain or loss to increase the maximum fine recommendation pursuant to 18 U.S.C. § 3571(d).[29] Such a review also should examine any

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[26] *United States v. Booker*, 125 S. Ct. 738 (2005).

[27] The Court's opinion in *Booker* also can be read to lend support to the view that criminal sentences should be based on real facts provable in court, rather than upon assumptions or proxies for important offense characteristics.

[28] Id. at 757. *See also* U.S.S.G. § 5A, intro. comment.

[29] In its Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebeling and the Tunny Act Amendment (January 2004), the Section urged Congress to instruct the Sentencing Commission to

empirical evidence supporting the adoption of 20% of affected commerce as the proxy for harm. The Section believes that such a review could result in much higher fines in egregious cases of significant overcharges and much lower fines in appropriate cases and would achieve a greater degree of fairness and reasonableness in sentencing antitrust organizational defendants.[30]

III. DOES 18 U.S.C. § 3571(d) REFER TO THE GAIN OR LOSS FROM ALL COCONSPIRATOR SALES OR ONLY TO THE DEFENDANT'S SALES

The alternative fine statute, 18 U.S.C. § 3571(d), applies to all federal crimes which result in pecuniary gain or loss and provides a mechanism for the government to increase the maximum potential fine above the maximum fine stated in the statute defining the crime and setting the penalties. Under the federal sentencing statutes, the maximum fine generally is the greatest of the amount specified in the statute setting forth the offense or twice the gross gain or twice the gross loss resulting from the offense. The court has discretion to decline to consider the alternative fine if to do so would unduly complicate or prolong the sentencing process.

In a criminal antitrust case, the difference between the gain or loss resulting from the sales of any one defendant and the gain or loss resulting from sales in the entire market is likely to be huge and the potential maximum fine faced by an antitrust defendant could vary dramatically depending upon the resolution of that issue. Therefore, whether § 3571(d) refers to

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undertake such a study. Congress declined, however, and expressed its view in supplemental legislative history that "[n]o revision in the existing guidelines is called for with respect to fines, as 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." (Supplemental Legislative History, Cong. Rec. H 3658, June 2, 2004).

[30] Where the Division has difficulty obtaining evidence from abroad or elsewhere, the Sentencing Commission can – and should – make allowances for that situation, in the same way that the Commission made allowances for bid rigging offenses where there could be no volume of commerce attributed to the conspirators who did not win the bids. (*See* U.S.C.C. § 2R1.1(d)(3). The calculation of gain or loss rather than the twenty percent presumption will allow the Antitrust Division the flexibility to assess fines based on the actual effect of the conduct – either higher or lower than twenty percent – which is a more equitable way to evaluate the proper punishment and is more consistent with how penalties are imposed in other white collar prosecutions.

the sales of the defendant only or the entire volume of affected sales in the market is an issue of enormous importance to both the Antitrust Division and defendants facing antitrust charges. For that reason, it is surprising that the answer is not more clear.

No case directly addresses the point because no contested antitrust sentencing proceeding has occurred under the alternative fine statute.[31] But well known arguments are made on both sides of the issue. The Antitrust Division recently re-stated its long-held view that gain or loss refers to the overcharge of the entire conspiracy, not just the sales of the defendant being sentenced.[32] The Division's view is that § 3571(d)'s use of the term "gross" gain or loss must mean that of the whole conspiracy. It also points to the contrast between the "gross" gain or loss language in § 3571(d) and the guidelines' explicit limitation of the 20% overcharge resumption to "the volume of affected commerce attributable to an individual participant in a conspiracy." U.S.S.G. § 2R1.1(b)(2). In other words, "gross" gain or loss must mean something different and broader than the language of § 2R1.1(b)(2) according to the Division.[33] Others argue that Congress would not have chosen the word "gross" if it intended to draw the distinction the Division urges. "Gross" typically means, and could mean here, that no deductions or

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[31] In *United States v. Andreas*, the only antitrust litigation involving § 3571(d) of which the Section is aware, the district court refused to use the "twice-the-gain/loss" standard because it believed the Division did not comply with its order to provide pricing information to the defendants. *United States v. Andreas*, 96-CR-762 (N.D. Ill., June 2, 1999).

[32] *See* Scott Hammond, "Antitrust Sentencing In The Post-*Booker* Era: Risk Remains High For Non-Cooperating Defendants," address before the American Bar Association Section of Antitrust Law (March 30, 2005), at 5, available at www.usdoj.gov/atr/ public/ speeches/208354.htm; and Gary R. Spratling, "The Trend Towards Higher Corporate Fines: It's A Whole New Ball Game," address before The Eleventh Annual National Institute On White Collar Crime (March 7, 1997), at 6, available at www.usdoj.gov/atr/ public/ speeches/4011.htm.

[33] Spratling address, at 6. The Division's argument is consistent with the view that the alternative fine statute established a maximum fine for the offense (based on all the harm done) while the guidelines establish an appropriate fine for each individual defendant (based on the harm caused by that defendant's affected volume of commerce).

adjustments can be made to the overcharge figure. Webster's defines "gross" as "overall total, as of income, before deductions are taken." Webster's New World Dictionary 1022 (3d ed. 1988). The maximum fine, according to this argument, simply is the gross overcharge, not the net overcharge.[34]

Very little legislative history relates to the interpretation of § 3571(d).[35] Those who favor an interpretation that limits the fine to twice defendant's volume of affected commerce point to the legislative history accompanying the passage of § 3571(d)'s predecessor, § 3263(c)(1). The House of Representatives' report explained that § 3263(c) authorized the judge to impose a fine of "up to twice the pecuniary gain derived by the defendant" and noted that the law was patterned after Model Penal Code § 6.03(5) and the recommendation of the National Commission on Reform of Federal Criminal Law.[36] Both of these latter sources spoke of gain from the offense by the offender, not the entire conspiracy. See Model Penal Code § 6.03(5) (1962); Nat'l Comm'n on Reform of Fed. Crim. Laws, Final Report § 3301(2), at 295 (1971).

Those who favor the "all-affected-sales" interpretation point to this same legislative history and draw the opposite conclusion. They note that § 3571(d) is identical to its predecessor, § 3263(c)(1), except that § 3263(c)(1) was directed to "the defendant" deriving pecuniary gain whereas § 3571(d) is directed to "any person." They argue that the change from "defendant" in § 3263(c)(1) to "person" in § 3571(d) is meaningful in this context. They also point to the connection between § 3571(d) and § 3572 as support for the "all-affected-sales"

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[34] *See*, James L. McGinnis, "Antitrust Attorneys Grapple With Impact Of *Booker*," The National Law Journal (July 18, 2005). McGinnis also notes that if the statute is ambiguous, the rule of lenity would require choosing the defendant-only interpretation.

[35] See *U.S. v. Andreas*, No. 96-CR-762, 1999 U.S. Dist. Lexis 2462, at *10 (N.D. Ill. 1999). "[Section] 3571(d) is a catch-all fine provision applied to all criminal statutes. Neither the statutory text nor legislative history defines gain or loss."

[36] H.R. Rep. No. 98-906, at 17 (1984).

position. Section 3572 describes factors, many of them focused on the defendant, to be considered by the court in determining the amount of a fine. It follows, according to this argument, that § 3571(d) establishes a ceiling of twice the gain or loss and that consideration of the factors listed in § 3572, including the guidelines calculation based on the individual defendant's volume of affected commerce, determines the appropriate fine amount. If, they argue, § 3571(d) were limited to individual gain or loss, there would be no reason for many of the provisions of § 3572.

Whether "gross," as used in § 3571(d), simply forecloses a defendant from arguing for a net overcharge figure, or potentially subjects all defendants to a fine based on damages stemming from the whole conspiracy is not clear. While the Section – and probably the Division – would like to see this issue resolved, the Section does not believe that a recommended legislative "fix" by this Commission is the appropriate method to resolve this issue. Section 3571(d) is applicable to the sentencing of individuals and organizations convicted of any federal crime from which any person derives pecuniary gain or which results in pecuniary loss. Therefore, the resolution of this issue has implications far beyond the sentencing of antitrust organizational defendants. For better or worse, the Section believes that this issue of statutory interpretation is appropriately left to resolution by the courts.[37]

[37] In the future, this issue may arise less frequently than it has in past cases. Any antitrust corporate defendant convicted of engaging in a conspiracy lasting beyond June 22, 2004 will be subject to a Sherman Act maximum fine of $100 million. Therefore, the alternative fine statute will come into play in antitrust cases only when the Division seeks to obtain a fine in excess of $100 million. In the past ten years the Division has used the alternative fine provision to obtain fines in excess of the Sherman Act maximum of $10 million 44 times, but only 8 of those fines have been in excess of $100 million.

IV. SHOULD GUIDELINE FINE RANGES ABOVE THE STATUTORY MAXIMUM BE CALCULATED ON THE SAME BASIS AS GUIDELINE FINE RANGES THAT FALL WITHIN THE SHERMAN ACT MAXIMUM?

The Section already has stated its view that the Guidelines' underlying hypothesis in support of adopting a "default harm" methodology for sentencing of antitrust organizational defendants may be flawed and that, in any event, the "default harm" assumptions are not adequately supported by empirical evidence and should be subjected to a rigorous review by the Sentencing Commission. (See Section I above.) That view applies regardless of the size of the recommended Guideline fine. Abandoning the default base fine of 20% of the defendant's volume of affected commerce is even more compelling in those cases where the government seeks to increase the potential maximum fine above that stated in the Sherman Act.

When the government seeks to rely upon the alternative fine statute to increase the potential maximum fine, it must prove the amount of the gross gain or loss, *i.e.*, the government has to prove damages to obtain a fine under the alternative fine statute as opposed to the Sherman Act. Until the Supreme Court's decision in *U.S. v. Apprendi*, 530 U.S. 466 (2000), the Department of Justice and the private bar assumed that these calculations would be made by a judge at the time of sentencing based on a preponderance-of-evidence standard. *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." Id. at 490. *Apprendi* squarely raised the issue, if not the certainty, that, for purposes of increasing the maximum potential fine above the stated statutory maximum, the amount of an illegal overcharge could no longer be determined by a judge under a preponderance standard, and raised the specter of the Division having to plead damages – and prove them beyond a reasonable doubt to a jury – to continue obtaining fines above the Sherman Act maximum. The reasoning of the Supreme

Court's later decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *United States v. Booker*,125 S. Ct. 738 (2005), re-emphasized that conclusion. At this point no one doubts that under § 3571(d), as applied in antitrust cases, the facts that increase the penalty beyond the prescribed statutory maximum, *i.e.*, the pecuniary gain or loss, would, at a minimum, have to be submitted to a jury and proved beyond a reasonable doubt.[38] When the government has to prove harm to a jury beyond reasonable doubt to establish the potential maximum fine, it seems inappropriate – if not unconstitutional[39] – to base the calculation of the actual fine on a "presumed harm" of 20% of the defendant's affected volume of commerce.

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[38] Some argue that *Booker* has called into question – if not sounded the death knell for – the continued constitutional validity of § 3571(d). The Department's view is that § 3571(d) remains viable, based on the reasoning of the 9th U.S. Circuit Court of Appeals in *U.S. v. Buckland*, 289 F.3d 558 (9th Cir. 1992), so long as the determination of gain or loss is charged in the indictment and proved to a jury beyond a reasonable doubt.. See Hammond address, at 5. But that construction does not speak to the *Book*er-based challenge. In *Booker*, the court ruled that the Guidelines' enhancement factors would have to be assessed by a jury. *Booker*, 125 S. Ct. at 756. Yet Congress' intention clearly was otherwise. Id. at 750. Therefore, the only way to save the Guidelines was to render them advisory. Id. The determination of gain or loss arguably is far more complex and far less suited for a jury determination. The analysis of overcharges centers on complex economic and econometric analyses. Surely, Congress could not have intended that calculation to be undertaken by a jury pursuant to a reasonable-doubt standard. Furthermore, the *Booker* solution (making judge-determinations of the gain/loss figures advisory) would be meaningless in the context of the alternative fine statute since the only reason for undertaking the twice the gain/twice the loss analysis is to determine the "fact(s) that increase[] the penalty for a crime beyond the prescribed statutory maximum." Nevertheless, § 3571(d) may contain an escape valve of sorts. The alternative fine calculation may be undertaken "unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." It could be argued that this provision saves § 3571(d) from a *Booker* challenge by foreclosing the alternative fines when the analysis is "unduly complicated." Perhaps, the argument goes, this provision reflects a Congressional intent that the gain or loss calculation be made by a jury unless the judge finds that it would be too complex or take too much time. Like the interpretation of "gross" gain or loss, this is another high-stakes and unanswered legal question, which appropriately will have to be answered through litigation. These arguments are spelled out in, and this footnote is substantially taken from, James L. McGinnis, "Antitrust Attorneys Grapple With Impact Of *Booker*," The National Law Journal (July 18, 2005).

[39] Some have argued that the rationale of *Apprendi and Booker* call into question the constitutional validity of Guidelines' default harm assumption of 20% even in cases where § 3571(d) is not in play. *See* James L. McGinnis, "Antitrust Attorneys Grapple With Impact Of *Booker*," The National Law Journal (July 18, 2005). *See also* ABA Antitrust Section, Comments on the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing. (March 2005) (available at http://www.abanet.org/antitrust/comments/2005/03-05/ussg-05.html.).

The Section does not believe that a recommended legislative "fix" by this Commission is the appropriate method to resolve this issue. This issue has been brought into sharp focus by recent amendments to the Sherman Act increasing the maximum corporate fines and recent Supreme Court decisions regarding the operation of the Sentencing Guidelines. The Section believes that this issue is appropriately left to resolution by the courts.

V. CONCLUSION

As these comments suggest, the Section of Antitrust Law believes that the current Sentencing Guidelines provide for an adequate basis for distinguishing between violations with differing degrees of culpability and, coupled with long-standing Antitrust Division policy, and Supreme Court precedent, appropriately limit criminal prosecution to hard-core cartel conduct. The Section believes that this Commission should state its clear view that the criminal provisions of the U.S. antitrust laws should apply only to hard core cartel conduct such as price fixing, bid rigging and customer, territorial or market share allocation and should recommend to the Sentencing Commission that it adopt specific guidelines or commentary that clearly establishes that view. Such an expression of intent by the Sentencing Commission will provide direct guidance to the courts and will, together with court decisions such as the *Gypsum* case, prevent any future misuse of this effective enforcement tool.

The Section also believes that this Commission should recommend to Congress that Congress direct the Sentencing Commission to undertake a thorough review of the rationale for the continuation of a special sentencing methodology for antitrust cases – as well as any empirical evidence supporting the adoption of 20% of affected commerce as the proxy for harm - in light of developments since it was adopted in 1991. The Section believes that such a review could result in much higher fines in egregious cases of significant overcharges and much lower

fines in appropriate cases and would achieve a greater degree of fairness and reasonableness in sentencing antitrust organizational defendants.

Whether "gross," as used in § 3571(d), simply forecloses a defendant from arguing for a net overcharge figure, or potentially subjects all defendants to a fine based on damages stemming from the whole conspiracy is not clear. While the Section would like to see this issue resolved, the Section does not believe that a recommended legislative "fix" by this Commission is the appropriate method of resolution. The resolution of this issue has implications far beyond the sentencing of antitrust organizational defendants, and for better or worse, the Section believes that this issue of statutory interpretation is appropriately left to resolution by the courts. Likewise, the Section believes that issues concerning the appropriateness of resorting to a "presumed harm" calculation of an individual defendant's guideline fine range in cases where the government has to prove harm to a jury beyond a reasonable doubt to establish the potential maximum fine, should be tested in the crucible of the courtroom and left to the courts to resolve on a case-by-case basis.

Respectfully submitted,

Section Of Antitrust Law
American Bar Association