



**DEPARTMENT OF JUSTICE**  
Antitrust Division

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Antitrust Modernization Commission  
Attn: Public Comments  
1120 G Street, NW, Suite 810  
Washington, D.C. 20005

Dear Commissioners:

The Antitrust Division of the Department of Justice is providing comments regarding Topic 1 from the Commission's Request for Public Comment Concerning Criminal Remedies, 71 FR 30863, and Topic 4 from the Commission's Request for Public Comment Concerning Civil Remedies, 71 FR 34590, at the request of Commission Chair Garza.

In short, we believe that these proposals would likely have an adverse impact on criminal enforcement of the antitrust laws. We urge the Commission not to pursue these proposals.

Criminal Remedies—Topic 1

Section 3571(d) of Title 18 is a general criminal fine statute, the purpose of which is to ensure appropriately severe criminal fines by providing that the maximum potential fine for any federal crime be the greater of the statutory maximum or twice the proven gain or loss from the offense. This topic poses two questions: should the alternative fine proposal found in § 3571(d) be made inapplicable to Sherman Act prosecutions and, if it is, should maximum fines under the Sherman Act be increased?

Simply making § 3571(d) inapplicable to Sherman Act violations would cap antitrust fines at the Sherman Act statutory maximum, regardless of the appropriate Sentencing Guidelines fine. The effect would be to treat companies that caused the greatest harm to the economy the same as other violators who inflicted significantly less harm. This could have real consequences: to date, the Antitrust Division has prosecuted eight significant cartel cases that resulted in Sentencing Guidelines fines imposed above the current \$100 million Sherman Act maximum, including fines of \$300 million and \$500 million.

Sherman Act offenses are no different from other federal offenses in the need to ensure appropriate penalties for the most serious violations. To maintain appropriate fines and deterrence for the most serious offenses, the Division must have the ability to

obtain fines above the Sherman Act maximum. We cannot envision any set of circumstances that would justify eliminating the applicability of 18 U.S.C. § 3571(d) to Sherman Act prosecutions.

Congress last addressed criminal antitrust fines when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") and raised the statutory maximum corporate criminal fine for antitrust violations from \$10 million to \$100 million. At the time this legislation was passed, the Division had had approximately 30 cases in which corporations had agreed to pay Guidelines fines between \$10 million and \$100 million, and another five cases where corporations had agreed to pay more than \$100 million. Congress was concerned that so many significant cases resulting in fines above the statutory maximum had been brought that might have resulted in gain/loss litigation at sentencing or might have been capped at the \$10 million level had the court not permitted the Division to litigate under § 3571(d). Because each of these cases had been resolved through plea agreements, it was not possible to know with certainty how difficult it would have been to prove gain or loss beyond a reasonable doubt. Nevertheless, Congress struck a balance that permitted the Division to impose fines up to \$100 million without the need to prove gain or loss while retaining the applicability of § 3571(d) for fines above that level.

Since passage of the ACPERA, the Division still has not litigated gain or loss under § 3571(d), and three companies have agreed to pay fines in excess of \$100 million. While there may come a time when it will be appropriate to raise Sherman Act fine levels again, we see no reason at this time to ask Congress to revisit the changes enacted in 2004.

#### Civil Remedies--Topic 4

This proposal is designed to change the way damages are litigated in private antitrust actions. It would require that in any criminal prosecution resulting in a guilty plea or verdict, the defendants' unlawful gains would be disgorged, along with criminal fines and a civil penalty of 200 percent of the amount disgorged. The amount disgorged would be divided between direct and indirect purchasers by the criminal court in a summary proceeding to be concluded within 90 days of the entry of judgment in the criminal case. The court could award compensation from the fines and civil penalties to any private parties found to have been a material factor in the instigation or successful conduct of the government's prosecution. Finally, damages for private parties would be detrebled in cases where the government brought a criminal prosecution resulting in an acquittal. Many of the specifics -- such as timing and allocations of burdens -- are not set forth in the proposal.

While the Division shares the goal of improving the way damages are litigated in private antitrust actions, this proposal would hinder the successful prosecution of criminal antitrust violations. Various elements of this proposal would interfere with our criminal investigations, impose undesirable burdens on our prosecutors and significantly reduce incentives for defendants to plead guilty and to cooperate with the Division's investigations. We oppose the proposal.

The proposal would require the court to determine the amount of disgorgement as part of the criminal prosecution. The Division has previously submitted testimony to the Commission explaining the reasons why it is inadvisable to require the routine calculation of defendants' gain or loss as part of the criminal enforcement process in antitrust cases. These reasons -- which center on the concept that a more readily calculable proxy for actual loss (i.e., a percentage of the volume of affected commerce) will effectively achieve the general deterrence goal of sentencing in antitrust cases without unduly burdening the investigation and prosecution of antitrust offenses -- have consistently proven persuasive both to Congress and the U.S. Sentencing Commission. See Statement of Scott D. Hammond on Behalf of the Department of Justice, Antitrust Modernization Commission Hearings on Criminal Remedies, at 5-10. (Nov. 3, 2005). For the same reasons stated in that testimony, we strongly oppose any proposal that would require the determination of gain or loss for civil purposes in the ordinary course of criminal antitrust proceedings.

The timing of the determination of the amount of defendants' disgorgement under the proposal is unclear. But whether the disgorgement would be calculated after each conviction or at the end of the last conviction in a case, the proposal would interfere with the Division's prosecutions.

Most likely, disgorgement would be calculated as part of, or at the conclusion of, each prosecution of a member of an antitrust conspiracy. Most significant antitrust violations result in seriatim prosecutions of the participants. Requiring the computation of an appropriate disgorgement amount in each case would divert attention and resources from the continuing investigation of co-conspirators. Since we would not yet have completed our investigation of these remaining conspirators, it would be necessary to calculate disgorgement only for the particular defendant before the court rather than for the conspiracy as a whole. This would result in separate hearings to determine the appropriate distribution of each defendant's disgorgement. If victims had to prove their eligibility for damages to the court within 90 days of the conclusion of each of the government's prosecutions, even in a summary proceeding, civil discovery concurrent with the criminal investigation would be necessary. Courts generally recognize that such discovery interferes with criminal investigations and prosecutions: indeed, it is commonplace for courts to stay discovery in private actions seeking antitrust damages during the pendency of the Division's investigations of cartel violations to avoid interference with criminal proceedings.

The alternative -- calculating disgorgement and distributing damages upon the conclusion of all prosecutions resulting from an antitrust conspiracy -- also would interfere with the Division's mission. The Division currently structures its plea negotiations so as to encourage defendants to come in as early as possible and cooperate with the government. Companies that accept responsibility early in an investigation are often motivated, in part, by a desire for certainty as to the results of the investigation and to put the investigation behind them. For that reason, a company will often seek to enter its guilty plea and be sentenced at the earliest possible date. If the determination of disgorgement were delayed until the completion of the Division's entire investigation, it could take years between when the first case is filed and anyone is sentenced. This would

likely discourage early cooperation. On a related point, it often is not clear to the Division -- much less the public -- which defendant will be the last until many months later. This uncertainty would make the 90-day claims period difficult to administer.

The proposal is further troubling because it limits victims' recoveries from any defendant that is acquitted of criminal charges. The result would be to increase greatly the incentive for a defendant to eschew cooperation and take its case to trial. While a company should not be penalized for exercising its right to go to trial, it should not be given extra rewards if the government fails to meet the higher criminal standard of proof. A defendant's civil damage liability should remain the same regardless of the outcome in the criminal litigation. Presently, roughly 90-95 percent of the defendants prosecuted by the Division plead guilty, a percentage on par with other white-collar crime prosecutions. The speed and efficiency of the Division's criminal enforcement program would be harmed if more defendants went to trial in hopes of detrebling their damage exposure.

Other concerns arise from making the disgorgement determined in the criminal prosecution the entirety of the private plaintiffs' damages pool. For example, this proposal appears to place the entire burden on the Division to obtain enough disgorgement from defendants to satisfy all potential damage claims by victims, even when the charges are resolved by plea agreement. Our ability to recommend substantial assistance departures under the Sentencing Guidelines does not increase the criminal penalties owed by other defendants. Nor does it interfere with the ability of private plaintiffs fully to recover their damages. But obtaining anything less than full disgorgement in a plea agreement would result either in later defendants having to make up the difference (if disgorgement is joint and several) or in victims being less than fully compensated. As another example, in all plea agreements victims would certainly appear before the court to object to the Division's calculation of disgorgement as being inadequate and to offer their own competing estimates, since this would be their only opportunity to influence the damages pool. Today, the vast majority of the Division's corporate plea agreements include an agreed-upon joint sentencing recommendation to the court, which courts nearly always follow. Adding disgorgement to the sentencing mix would make plea agreements harder to reach and make all sentencing hearings contested.

Finally, the provision that would allow courts to award compensation to any private party found to have been a material factor in the investigation or successful prosecution in the matter is likely to create more problems than it solves. The Division currently can reward cooperation with the government through (i) our very successful leniency program; (ii) making sentencing recommendations for cooperating defendants, including substantial assistance departures; and (iii) immunizing cooperating witnesses when necessary. The Division has never paid cooperating witnesses because such payments could give defendants further opportunities to challenge the credibility of those witnesses, thereby harming our prosecutions. The Division's ability to prove guilt beyond a reasonable doubt to a jury often rests on the credibility of a key cooperating witness. Our concern is that defendants will seek to attack the credibility of a witness who was paid for his/her testimony.

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Perhaps in making the awards available to "any private party" the intention of the proposal is not that monetary rewards could go to culpable parties, but rather that they would go only to persons who come forward who are not potentially liable but merely have information concerning a violation. We have on rare occasion spoken to witnesses who ask for money in exchange for information. When told that it is not available, most such witnesses have agreed to cooperate anyway. While it is not possible to know whether the ability to pay witnesses would draw out information that we do not currently receive, it is certain that at least some witnesses who currently do cooperate would insist on being paid for their efforts (and potentially for their counsel's efforts as well), giving defendants a means of challenging those witnesses' credibility at trial. In the balance between the uncertain benefit of potentially bringing in new witnesses, and the certain detriment of giving defendants a means of attacking the credibility of existing witnesses who would insist on being paid, we believe that a bounty system would result in a net loss for the Division.

In addition, by making payments available to parties found to have been a "material factor" in the investigation or prosecution of a case, this proposal sets a seemingly low threshold for assistance. Numerous witnesses and victims, as well as members of the conspiracy, potentially could meet this test in many cases. It is not clear whether all of these persons would be eligible for compensation in some amount to be determined by the court. Further, and more seriously, if the Division would have to provide information concerning the degree of assistance provided by every claimant for a share of the fines and civil penalties, the disclosure of such detailed information about our investigation would reveal confidential methods, could deter witnesses from cooperating even on a confidential basis, and would be extraordinarily burdensome. Among other problems, we could potentially end up fighting with our own witnesses over whether they were entitled to a reward for their assistance and what amount would be appropriate.

In sum, while the Division shares the Commission's goal of improving the way damages are litigated in private antitrust actions, this proposal would significantly interfere with the Division's efforts to prosecute criminal antitrust violations, and we strongly urge the Commission not to proceed with it.

We appreciate the Commission's attention to these concerns.

Yours sincerely,



Thomas O. Barnett