COMMENTS FOR

THE ANTITRUST MODERNIZATION COMMISSION

HEARING ON

CRIMINAL ANTITRUST REMEDIES

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Executive Summary

Based on my perspective of 34 years as a criminal antitrust practitioner, I see the current state of criminal antitrust law and the Department of Justice's Antitrust Division enforcement policy as needing some statutory reform and agency refocus in several important respects.[1] The current statutory framework and agency practice is certainly not broken, but it – unnecessarily – suffers from both *over* and *under* deterrence.

The goal should – obviously – be a proper balance, geared towards:

1. deterring price-fixing in the first instance;

2. encouraging timely confessions of wrongdoing, actual cooperation in further prosecutions of the misconduct involved and enhanced future antitrust compliance;

3. fair penalties (*i.e.* "the punishment should fit the crime"), taking account of actual intent, conduct, impact on transactional prices and the timeliness of confession and the realities of the assistance for further prosecutions; and

4. transparent and principled statements about (and application of) the Division's policies for (and practices in) criminal antitrust enforcement against both corporations and their employees.

To the end of achieving just such a regime, I offer some specific suggestions for recommendation by the Antitrust Modernization Commission to Congress, the Federal Sentencing Commission, and the Department of Justice's Antitrust Division ("the Division"). These suggestions relate broadly to:

1. An increased emphasis on swiftly sending (or at least trying to send) the *right* people to jail;

2. More reality – and fairness – in the Sentencing Guidelines, which employ an arbitrary and discretionary set of impact presumptions and multipliers, thereby allowing the Division the illusion that it will not be put to its proof on the *actual*

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[1] I am the Partner-in-Charge of Kirkland & Ellis LLP's Antitrust and Competition Law Practice Group. I have handled numerous criminal antitrust matters. The opinions expressed here are my personal views. I gratefully acknowledge the assistance of Scott Abeles of Kirkland in the preparation of these remarks.

consumer price impact of the conduct involved. Thus, the Sentencing Guidelines should be modified by:

a. making the 10% impact presumption rebuttable or reducing the percentage to 3% or at most 5%;

b. eliminating the automatic "doubling" inherent in the base fine (20%) calculation;

c. eliminating (or providing more specific guidelines for) the currently vague culpability scorecard factors, which arguably allow the Division to be arbitrary and excessive relative to the actual nature of the violation and its impact; and

d. allowing "conditional leniency" for at least "second in" Leniency Program applicants, in appropriate circumstances;

3. The repeal – on both constitutional and policy grounds – of the Alternative Fines Statute, 18 U.S.C. § 3571(d) or, at least, amend § 3571 to:

a. clarify that the measure of the fine (as in the current Sentencing Guidelines) is the offending corporation's sales of the relevant product, ***not*** "all" affected industry sales;

b. provide that any determination of a fine under § 3571 must be based on a jury finding of "gain or loss," beyond a reasonable doubt; and

c. eliminate the automatic "doubling" of any gain or loss as unnecessary, given the existence of treble damages, joint and several civil liability and the realities of active and aggressive direct and indirect purchaser enforcement by a competent and well-financed body of plaintiff class action lawyers and large corporate opt-out plaintiffs;

4. An amendment to the Antitrust Criminal Penalty and Enforcement Act, 116 Stat. 745 (2004), extending the de-trebling and release of joint and several liability granted to "first-in" participants to the Division's Corporate Leniency Program to – at least – the "second-in" cooperators, *provided* that the Division certifies that:

a. the "second-in" confession was timely;

b. the company provided substantial assistance for further prosecution of other companies and the individuals responsible;

c. the company committed to making appropriate restitution to consumers actually harmed;

d. the company implemented appropriate corporate governance and antitrust compliance training programs; and

5. More transparency as to the governing principles for (and more propriety in) the treatment of corporations considering confession and cooperation, beyond the 100% pass granted to the first-in amnesty participant.

Personal Perspective and Background

I am grateful to the Commission for inviting me to submit these comments and answer questions on the issue of Criminal Antitrust Remedies.

The perspective I bring is a "real–world" one. I have 34 years of frontline experience as a trial lawyer and antitrust counselor in investigating, defending and resolving allegations of price-fixing and other criminal antitrust violations, some of which have proved valid and some not.

There has been one dominant reality in all that experience: "Crime Doesn't Pay." Nor should it. By my observation, even the most venal efforts to fix prices don't work very well. This is unsurprising given the well-established economic teaching that price-fixing is more difficult than it sounds. Each price-fixer can – at best – control the supply-side of its customer relationships. No seller has meaningful control over market demand or its co-conspirators' output. But, a *market* price *cannot* be raised artificially (*i.e.*, meaning no increase in market demand) without an OPEC-like reduction in *total* industry output.

It is far easier (and typical) to *talk* about the desirability of "higher than current prices" than to actually reach agreement on price ***and*** on the mechanisms for implementing and enforcing the required output restraint. The challenges of reaching agreement on terms (let alone enforcement mechanisms) are recognized by the Division's "Merger Guidelines." *See* U.S. Dep't of Justice & Federal Trade Comm'n Horizontal Merger Guidelines §§ 2.1, 2.11-12 (1992).

There are often large incentives for (and usually the ready ability to engage in) undetectable cheating – "there is no honor among thieves." As a consequence, few price-fixing efforts – even the classic, smoke-filled room cartels like in the Lysine and Food Additive cases that got the Division its first big headlines and $100 million fine in the mid-1990's – have had anything but episodic and minimal *actual* price effects.

As I have done my internal investigations, I have often heard that the price-fixing "didn't work, we were losing money and business." And, I have always asked, "then, why did you keep talking and meeting?"

The consistent confession of the battle-line price-fixers is that they felt squeezed between senior management pressures to "meet the [targeted budget] numbers" and the increasingly large, powerful buyers they perceive as regularly lying (or at least exaggerating) about the prices and deal terms they are being offered by the seller's competitors. Indeed, the tendency is for the talk and the meetings to start occurring when a recession hits and demand drops: "desperate times call for desperate measures" and – sometimes, sadly – result in desperate acts.

Thereafter, prices do rise (usually) because demand increases: "it is always darkest before dawn." This can create the *illusion* of "successful" price-fixing. So the talk continues, but the cheating *increases* because – rarely – are there *any* effective cartel enforcement mechanisms. It is too easy to misrepresent actual sales numbers, transaction prices (net of discounts and special terms), real output and inventory levels, etc.

Nonetheless, *any* price-fixing – successful or not – serves no good purpose. It steals money from consumers, or at least tries to. It erodes the personal integrity of the individuals involved in the lying, cheating and cover-ups required to engage in conduct long known to be illegal. And, price-fixing diverts corporations and their executives from their (proper) competitive focus – producing the best quality products and best service, at the lowest possible cost.

The "right" attitude is decidedly ***not*** as one infamous ADM executive said to his fellow competitors during a price-fixing meeting: "Our competitors are our friends. The customers are the enemy."

As a consequence, there is universal agreement – to which I subscribe – that price-fixing is a serious crime deserving of serious punishment. That said, there is a growing sense that the current system of calculating penalties for price-fixers is subject to arbitrary, unprincipled and unfair application by the Division, in ways that are counter-productive to achieving the Division's own stated enforcement objectives of encouraging early confession and cooperation and deterring future price-fixing.

The Division does *say* that it is focused on both hammering corporations with big fines and sending their price-fixing executives to jail. But the reality is that, despite vehement Division protestations to the contrary, a key element of the Division's enforcement approach appears to be a willingness to trade people (particularly senior executives) for money.

The Division's Corporate Leniency Policy grants amnesty to the "first-in" company (and *all* its executives). The Division has said that it gives substantial and "proportional" discounts (and "proportionally" reduced focus on the company's executives) for the "second, then third, etc.-in," ***if*** the first, second, etc.-in provide "substantial assistance" to the Division's continuing criminal prosecutions of the other companies – and the individuals – involved in the price-fixing.[2]

The Division takes this approach because it appears focused on garnering large dollar, headline-grabbing corporate fines – through *plea bargaining*. Large fines are demanded regardless of the actual societal harm caused by the conspiracy, or the degree of substantial

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2 *See Department of Justice Corporate Leniency Policy* (available at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm).

assistance that the cooperating company can provide to the Division for prosecution of other cartel members.

The Division's plea bargaining approach is characterized by a rigid application of the impact presumptions and multipliers in the Federal Sentencing Guidelines, but without regard for the Sherman Act's (now) $100 million statutory limit. This is accomplished by a questionable reliance upon the Alternative Sentencing Statute, 18 U.S.C. § 3571(d), now probably unconstitutional under the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), as explained in Section 3.[3]

The Division's Sentencing Guidelines/§ 3571 approach is often harshly applied in the *early* stages of an investigation. The Division says that it will ameliorate this harshness by granting "substantial" discounts for the "second-in" Leniency Program applicant and give "proportionately" less favorable treatment to the third and later-ins. The historical belief that the Division would grant meaningful benefits to the second, third, etc.-in, *and* would prosecute ***all*** the companies and individuals (including senior executives) involved in the price-fixing, has led to races to the Division's door to be the first or, at least, second-in.

But, it has become increasingly apparent to criminal antitrust practitioners that there is a disconnect between the Division's rhetoric and its actions. Of late, the Division does *not* appear to honor even *express* promises to give more meaningful, "proportional" benefits to the second *versus* later-in leniency applicants. This is somewhat understandable – the Division has been cautioned by me and others – that if the Division is too harsh to early-arriving confessors, and then seeks to really hammer the later arriving confessors, the fine demands can become large enough to transform the incentive to cooperate into an incentive to fight. Faced with a real

3 As also explained in Section 3, even before *Booker*, § 3571 provided an ***uncertain legal basis*** for the Division's mega-fine demands.

prospect of a fight, the sense is that the Division loses zeal as to later confessing companies. This fading toughness appears to reflect the Division's recognition that it does not have the ability to actually *try* a case under § 3571, as that would require proof of impact without the benefit of the Sentencing Guidelines' presumptions and multipliers.

And, the perception is also that the Division speaks loudly but only occasionally swings its biggest (and most effective) stick, *i.e.* sending people to jail. The Division talks up "individual responsibility." But the Division's application of this principle of increased "individual responsibility" is limited to *increasing the number* of carve-outs. Typically, those individuals tend to be the mid-level sales and marketing "lieutenants" directly involved in the implementation of price-fixing activities.

The Division does *not* swiftly follow-up by indicting even the individuals who are carved-out. To secure individual plea agreements, the Division offers sentences of four (4) to six (6) months and rarely more than one (1) year. This "punishment" is for a crime the Division has declared "is the equivalent of selling drugs to school children" (a crime which can carry a penalty of life imprisonment).[4]

Indeed, since implementing its Corporate Leniency Policy, the Division has tried *very* few cases against ***anyone***. The perception is that the Division's lawyers have become complacent. They are so used to companies (and the few carved-out individuals) pleading that they routinely do *not* use the required cooperation of the leniency applicants to actually prepare a case for conviction *and* sentencing of others. The Division seems to take no interest in – or develop any

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4 *See* 21 U.S.C.A. §§ 841, 860. Depending on the amount and type of drugs involved, when sold at or near schools, sentences can reach life in prison.

It is no wonder that the individual sentences appear to be "***slaps on the wrist***," particularly to the typically non-violent, drug crime-related fellow inmates of the price-fixing convicts at the "minimum security, Martha Stewart-type" prisons to which antitrust felons are typically sentenced.

facts through cooperation interviews or otherwise – related to the actual consumer price impact issue. And, experience has demonstrated that the Division is clueless about the complexities of proving what the "but-for" "competitive" price would have been, if put to the test under the Alternative Sentencing provision.[5]

This Division's diminished credibility is aggravated by the – particularly recent – lack of transparency as to the standards the Division applies when dealing with anyone other than the "first-in" amnesty applicant under the Division's Corporate Leniency Program. As a consequence, the predictability and certainty that the Division has recognized is necessary for its criminal enforcement program to be fully effective, is being lost. As European executives and lawyers have said to me, "what an unfair system for a Nation supposedly run on the rule of law."

The net result of all the foregoing is that the current state of criminal antitrust law and agency practice suffers – unnecessarily – from both *over* and *under* deterrence. The goal should – obviously – be a proper balance, geared towards deterring price-fixing in the first instance, encouraging cooperation and compliance, imposing fair penalties (*i.e.* "the punishment should fit the crime") and increasing government transparency.

What follows are my suggestions for achieving a better regime.

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5 § 3571(d) allows *any* criminal fine to be calculated based on twice the actual gain or loss resulting from "the offense," *provided* that any required ***judicial*** determination of the actual impact "will not unduly complicate the sentencing proceedings." That statute is of questionable constitutionality (as noted and discussed herein in Section 3) in light of the Supreme Court's *Booker* decision requiring determinations ***by a jury – beyond a reasonable doubt***.

As discussed there, the Division has admitted it is concerned about its ability to meet § 3571's procedural and evidentiary burdens. Therefore, the Division sought – and obtained in the 2004 Antitrust Criminal Penalty Enhancement and Reform Act – an ***added stick and carrot*** for its Corporate Leniency Program: an increase in the Sherman Act statutory maximum fine from $10 million to $100 million; *and*, to further encourage confession and cooperation, the ability to provide first-in amnesty applicants' protection from treble damages and joint and several liability in the follow-on civil cases.

Recommendations

1. There Should Be an Increased Emphasis on Prosecuting Individuals and Trying to Send the Right People to Jail – Swiftly – to Avoid *Under*-Deterrence.

The Division rightly recognizes that, "[i]n our experience, individual accountability through the imposition of jail sentences is the single greatest deterrent."[6]

The Division's practice, however, appears to be one of aggressively securing plea-bargained agreements to big-dollar corporate fines, but then being less aggressive in the timely indictment and prosecution of the executives (including senior executives) arguably responsible for the price-fixing. This disconnect sends a diminished deterrence message to corporate executives: the corporation pays, but the *probabilities* are that there will be limited "individual accountability."

This – *under*-deterring – message is fostered by three (3) further Division enforcement realities. *First,* the individuals typically carved-out in the corporate plea agreements (which give a pass on prosecution, assuming cooperation with any Division investigative requests, to all but the "carve-outs") tend to be mid-level sales and marketing executives with "direct participation" or "knowledge" and "an ability to stop" the price-fixing. They tend ***not*** to be the senior executives, even when sometimes (in the Division's view) the senior executives are said by the Division to have been "willfully ignorant" of the misconduct.[7]

Second, the Division has been slow to follow-up on actually prosecuting even the carve-outs, particularly those carve-outs that they demand – in greater numbers – in plea negotiations

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6 Scott D. Hammond, *Ten Strategies for Winning the Fight Against Hardcore Cartels*, Oct. 18, 2005, speech before the Paris Working Party No. 3 Prosecutors Program.

7 Notably, as discussed in Section 2, *infra,* discussing the Division's use of the Federal Sentencing Guidelines in its corporate fine demands, the Division is aggressive in seeking to enlarge the "multiplier," by expanding the scope of executives chargeable with participation in price-fixing, using a "***willful ignorance***" standard. That approach, as explained there, produces *over*-deterring corporate fine calculations.

with the third, and later-in firms, *versus* the second-in. Rather the Division lawyers wait (and hope) – ***again*** – for plea agreements. The Division seems willing to exchange short sentences for individual plea agreements. The carve-out sentences are typically four (4) to six (6) months, rarely more than one (1) year.[8]

Third, in my experience, the Division appears indifferent as to what the companies do with even the carved-out individuals (let alone the other executives who may have been identified as having been directly involved in the price-fixing). They need not be fired, disciplined or even re-assigned to non-sales and marketing-oriented jobs. And, naturally, given the limited supply of specific, industry-knowledgeable sales and marketing personnel, companies – like the Division – have difficulty matching their "walk with their talk."

Thus, the corporate antitrust compliance materials – and training sessions (attended typically by the mid-level executives, with the rare presence of any senior executives) – say "if you are caught (or fail to report) price-fixing or other antitrust violations, you can go to jail for [now] ten (10) years with up to a [now] $1 million fine, and you will be subject to disciplinary actions, including possible [or probable] termination." But, what they see are few actual prosecutions, limited prison sentences for those who are targeted, and many "known," but not carved-out price-fixers marching up (or already near or at the top of) the corporate ladder.

The resulting cynicism is the source – in my experience – of *under*-deterrence among executives. That may explain some of the recidivism the Division has witnessed from a number of corporations over the past decade, despite paying large corporate fines. And, notwithstanding the mega-fine to HLR in 1999 of $500 million, the 2001 recession produced a whole new round

8 While the Division asserts that the "average" sentence is 15-18 months, this appears to be the product of a few, multi-year sentence ***outliers***.

of price-fixing (which is currently being prosecuted by the Division in a diverse set of industries from basic manufacturing to high tech).

The fact is that human beings – not corporate entities – are the ones who engage in the price-fixing. Companies do not price-fix. It is individuals, not inanimate corporations, that talk about prices, meet in hotel rooms, set prices (or targets), punish defections, and ultimately cooperate in an investigation (or elect not to).

As a consequence, criminal antitrust enforcement needs to be *personalized* ***if*** it is to be fully effective in deterring future price-fixing and providing credible and fair retribution. There should be *certainty* that the *right* people will be *persistently* prosecuted and sent to jail.[9]

In fairness, the Division has declared its commitment to "sending people to jail." It did secure an increase in the maximum prison term for Sherman Act violations from three (3) to ten (10) years (and an increase in the personal fine from $350,000 to $1 million), as part of the 2004 Antitrust Criminal Penalty Enhancement and Reform Act. 116 Stat. 745 (2004). It did (now long ago) send "Mick" Andreas, ADM's Vice-Chairman and son of the CEO, and one other ADM executive to jail for a then maximum of three (3) years, for egregious, direct personal participation in explicit, organized price-fixing meetings.

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9 *See* Donald I. Baker, THE USE OF CRIMINAL LAW REMEDIES TO DETER AND PUNISH CARTELS AND BID-RIGGING, 69 GEO. WASH. L. REV. 693, 698 (October/December 2001), where the former Head of the Antitrust Division explains that the ***lack of prosecutions*** of non-plea [individual] defendants hurts the Division's cause. Baker says that "***deterrence*** is the critical issue in prosecuting those who participate in [price-fixing] … [d]eterrence is created by a combination of the prospect of being subject to reasonable ***predictable*** (and unpleasant) penalties and the serious likelihood of being caught while engaged in the illegal activity … Imposing criminal liability only on the enterprise may have some of the same effects, but they are likely to be ***diluted***." *Id.* at 713-14.

Baker believes – and I agree – that for effective deterrence, "it is more important that the potential [individual] defendant know to some degree of ***certainty***" that they will be punished than the length of the sentence. *Id.* at 706. However, the sentence should be meaningful, *i.e.*, more than the current – perceived – average of six (6) months (as noted, the Division claims 15 to 18 months).

The Division also recently prosecuted and convicted Alfred Taubman, CEO of Sotheby's. The Division has (after a long battle) seemingly secured its first extradition order from England for prosecution of an alleged price-fixer, Ian Norris. The Division is seeking a statute to allow wire-tapping for antitrust investigations. *And*, the Division does have an "Individual Leniency" policy (seldom, if ever, used) that encourages individuals to come forward regardless of what their company is doing.

But contrast the Division's overall record of – limited and long-delayed – individual enforcement (particularly in the big cartel cases, with the big corporate fines) with what we have – recently – been seeing from the Department of Justice Criminal Fraud Division, the Securities Exchange Commission and the New York State Attorney General in their prosecutions of corporate governance abuse and accounting fraud.

Just by way of a few, headline – and senior executive attention – grabbing examples: Tyco's ex-CEO Dennis Kozlowski and ex-CFO Mark Swartz were prosecuted, receiving 8 to 25 year prison sentences for their role in Tyco's accounting and other financial abuses; and John Rigas, the founder of Adelphia Communications, and Timothy Rigas, his son, were sentenced to 15 and 20 years in prison, respectively for their roles in a similar misconduct. Despite uncertainties in the strength of its case, the DOJ went after WorldCom CEO Bernie Ebbers. Notwithstanding Ebbers' protestations that, "I'm not an accountant" [*read* "not involved in price setting"], he was convicted and sentenced to 25 years in prison for his role in spawning a culture of accounting fraud that resulted in the collapse of WorldCom.

In sum, the Division should become more timely and persistent in prosecuting more individuals for price-fixing. These targets should be those executives that send the best message for deterrence – to the *right* people. The more senior the executive, the better will be the message.

Increased certainty of individual prosecution will require more money, more Division lawyers and harder work by the Division to prepare cases for trial. But it will be worth it in terms of deterrence as well as fairness in retribution. Increased individual enforcement – especially of the right people – will also make antitrust compliance training more credible and of greater priority to the senior corporate managers who may see themselves as increasingly threatened with "individual accountability" exposure for any price-fixing done by their employees.

That is a *good* thing.

2. The Antitrust Portions of the Federal Sentencing Guidelines Should Be Modified in Important Respects To Avoid *Over*-Deterrence.

(a) Over-Deterrence Is Bad for Effective Criminal Antitrust Enforcement.

The Division recognizes that over-deterrence is a *bad* thing for its criminal enforcement program.

In arguing against efforts to expand the jurisdiction of the U.S. courts to price-fixing claims for foreign-based purchasers in *Empagran v. Hoffman-LaRoche*, the Division warned that overly expansive liability would hurt the Division's ability to secure confessions and cooperation through its Corporate Leniency Program. The Division has recently acknowledged that its Leniency Program "has cracked more cartels than all other tools at our disposal combined".[10]

As the Division explained to the D.C. Court of Appeals in *Empagran*, giving class action treble damage relief to foreign citizens for their foreign purchases "threatens to impair the ability

[10] Scott D. Hammond, the Division's Chief Criminal Deputy, *Cracking Cartels With Leniency Programs*, Oct. 18, 2005, speech before the Paris Working Group No. 3 Prosecutors Program.

of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce in the United States."[11]

Not only is *over*-deterrence bad for the ability of the Division to uncover cartels, it is bad for consumers and unfair to the price-fixers ("criminals have rights too"). Economic theory teaches that the appropriate corporate punishment for achieving "optimal deterrence" of antitrust violations – the primary and proper aim of a criminal antitrust enforcement regime – should be "limited to fines calculated to ensure that a potential offender expects to bear the *full social costs*" of the offense.[12]

The Antitrust Federal Sentencing Guidelines – and the Division's enforcement policy – should be based on this sound economic foundation. Every dollar extracted by way of a criminal fine from an accused company beyond that which would assure *its* present confession and cooperation and – importantly – its future antitrust compliance, is counter-productive to the Division's goals (and needs). If, as the Division warned in *Empagran*, the overall payment is too "punitive," then companies will be less likely to come in.

Excessive fines also harm consumer welfare. The economic reality is that corporate fines are cost-items that – eventually – get reflected in future prices (or restricted capital expenditures

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11 *See* Brief for the United States and the Federal Trade Commission as Amicus Curiae in Support of Petition for Rehearing En Banc, *Hoffmann-LaRoche v. Empagran,* 316 F.3d 338 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004), available at http://www.usdoj.gov/atr/cases/f200800/200866.htm

12 Mark A. Cohen & David T. Scheffman, THE ANTITRUST SENTENCING GUIDELINE: IS THE PUNISHMENT WORTH THE COSTS?, 27 AM. CRIM. L. REV. 331, 339-40 (1989).

for plant, equipment or innovation). The consumer – the intended beneficiary of the antitrust laws – always pays.[13]

And, excessive punishment can chill legitimate, pro-competitive competitor communications and collaborations – for trade associations and standard setting activities, joint research and new product development, cost-saving benchmarking and the like. This result – again – is to the unnecessary detriment of consumers.[14]

Every antitrust compliance presentation I have seen or delivered *begins* with the threat of ***jail*** for individual executives. It *then* speaks of "large' fines **<u>and</u>**, *lastly* dwells on the – certain – avalanche of ***treble-damages and joint and several liability*** for the sales of all the co-cartelers. This liability exposure is to classes of direct and indirect purchasers, in suits that will

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[13] *See* Bruce H. Kobayashi, ANTITRUST, AGENCY, AND AMNESTY: AN ECONOMIC ANALYSIS OF THE CRIMINAL ENFORCEMENT OF THE ANTITRUST LAWS AGAINST CORPORATIONS, 69 GEO. WASH. L. REV. 715, 736 (October/December 2001):

> Even if one condemns price-fixing as presumptively undesirable, one would still not want to impose arbitrary, large fines on the shareholders of a corporation whose agent engages in such activity. Unless the incentives provided by corporate fines can be costlessly and effectively transmitted to a firm's agents, an arbitrarily large expected penalty in excess of the social harm from the crime will induce excessive investments in monitoring and prevention by corporations. These excessive expenditures will also increase production costs for all firms (even those that did not engage in the criminal activity ex-post), ultimately resulting in a secondary effect-higher marginal costs of production and higher prices to consumers. ***Ironically, high prices to consumers and the resulting welfare losses are exactly the effects that the criminal antitrust laws are intended to prevent.***

[14] *See* Cohen & Scheffman, *supra* n.11, at 352-54 (citation omitted):

> The first concern is that ***efficient conduct will be discouraged*** due to the fear that it will be attacked as price-fixing or bidrigging. The second concern is that the framers of the [Sentencing] Guideline and the Justice Department seem to have taken no notice of the fact that corporations already spend a great deal of resources to ensure that their employees do not engage in illegal acts, and that, in some instances, ***conservative compliance programs inhibit lawful, efficient conduct***. … [C]ompliance can lead to the alteration of otherwise efficient business practices which can reduce the overall efficiency of the corporation … [by] requiring several layers of management to approve any price discounts, never pricing below fully allocated costs, prohibiting employee membership in trade associations, frequent rotation of sales personnel, and a policy of uniform pricing for all customers, regardless of differences in geographic competition.

immediately be brought by an aggressive, well-financed, horde of plaintiffs' antitrust class action lawyers.

There is also the probability of separate lawsuits by large customer "***opt-outs***." The opt-outs have the ability to – and do – make threats that, absent immediate restitution, the "partnering relationship" the defendant-company has sought to cultivate with these customers (now determined to be victims of price-fixing), will be poisoned. After all this, there are also the almost certain securities fraud cases (and often plummeting stock prices) that follow after the announcement of a criminal plea.[15]

These mega-U.S. civil liability and reputational consequences are further aggravated – if it is an international cartel – by the probability of EU and foreign government fines. Moreover, as the EU Antitrust Commission has recently been advocating (and as has been increasingly occurring under existing EU member state laws), there is the growing prospect for civil liability for foreign sales in foreign courts.

Indeed, the Division recognized the hugeness of this ***punitive*** regime of civil liability when it sought – and obtained – in the 2004 Antitrust Criminal Penalty Enhancement and Reform Act, not only an increase in the Sherman Act statutory maximum fine to $100 million, but also elimination of treble damages and joint and several liability for the *first-in* amnesty

[15] As Cohen & Scheffman explain, *supra* n.11, at 350-51: "In addition to the civil and criminal penalties imposed on antitrust violators, there are ***marketplace penalties*** that may also be important deterrents to antitrust violations.… There are likely to be … ***reputational*** costs for a corporation … some customers may decide they do not wish to deal with a convicted felon, either on principal or for fear that they will be taken advantage of in future business dealings by this known "bad actor." There is some ***evidence that the market value of a firm drops*** significantly following the public announcement of an antitrust violation. Finally, firms doing business with … governments are often suspended or ***debarred*** from future government business."

applicant. The Division did so because it wanted to – further – encourage confession and cooperation, as essential to its ability to uncover and stop continuing price-fixing.[16]

As the Division told the Supreme Court in *Empagran*, any decision to expand civil liability to include foreign purchasers "would undermine the effectiveness of the government's amnesty program. Even those conspirators who come forward and receive amnesty … still face exposure to private treble damage actions … ***Potential amnesty applicants therefore weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty program***…. [T]he amnesty program, by creating a high risk of defection and exposure, deters cartel behavior more effectively than an increase in private litigation after the cartel has been exposed."[17]

As the Division bottomlined it: "[D]eterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits [*read* "more punitive corporate fines"], but by encouraging conspirators to seek amnesty and thus expose cartels in the first place."

(b) The Division's Sentencing Guidelines Methodology for Calculating Corporate Fines Is – Unnecessarily and Unfairly – Punitive.

The Division does not appear to apply the economic principle of "optimal deterrence," *i.e.* setting fine demands at the level of the "full social costs" of the offense. In negotiating fines, the Division makes no econometric or other assessment of the actual impact the alleged price-

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16 As discussed in Section 4 *infra*, I urge that the de-trebling and release of joint and several liability should also be extended to at least a "***second-in***" confessor, *provided* that: the Division certifies that its confession was timely; the company provided real cooperation in the form of substantial assistance for further prosecution of other companies and the individuals responsible; it committed to making appropriate restitution to consumers actually harmed; and the company implemented appropriate corporate governance and antitrust compliance training programs.

17 *See* Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Petitioners in *Hoffmann-LaRoche Ltd. v. Empagran*, 542 U.S. 155 (2004) available at http://www.usdoj.gov/atr/cases/f202300/202397.htm.

fixing had on anyone. It simply – and mechanically – applies the mathematical formula set forth in the Federal Sentencing Guidelines for Antitrust Violations. Those Guidelines can produce gigantic fine numbers – especially in any industry selling large volumes of product. Those fines often bear *no* relation to the social cost of the offense. And they fail to account for the punishment the civil liability regime will impose on the company beyond the amount of the criminal fine.

The Division's *modus operandi* is to calculate a fine based on the complicated formula set out in §2R1.1 of the Sentencing Guidelines. Under this formula, a "base fine" is established, *first*, by measuring the "volume of commerce" ("the VOC"), *i.e.*, all of the goods or services subject to the conspiracy that were sold by the corporation during the alleged life of the cartel (as determined by the Division). That VOC is multiplied by 20 percent. The 20 percent figure serves as a proxy for twice a ***presumed*** 10 percent overcharge on all the VOC.

After the base fine is set, the Division determines a minimum and maximum "multiplier." The multipliers are set by reference to a "culpability score," factoring in – principally – the size of the organization as determined by the nature and degree of the involvement or "willful ignorance" of senior management. To a lesser extent, the scorecard reflects the company's past antitrust history and whether the company had in place an "effective" antitrust compliance program (a factor typically not met by virtue of the price-fixing itself).

The multipliers can range between 0.75 and 4.0, but the minimum multiplier is typically more than 1.00 and easily 1.6 for any reasonably sized corporation (*i.e.* more than 5,000 persons). The (typically minimum) "multiplier" times the "base fine" yields the Division's "fine" demand.

Thus, the Division can – and regularly does – start its fine negotiations based on taking 20% of the volume of commerce times a 1.6 multiplier. That amounts to a presumed 32% penalty on sales. For $1 billion in sales, that is a fine of $320 million, regardless of actual impact or historical and actual profit margins.

Given the overhang of treble damage liability, is such a fine necessary for deterrence? Does it not deter confession and cooperation?

My experience is that the Division's approach *does* deter the very confession and cooperation that the Division recognizes is essential to the success of its criminal antitrust enforcement program. This is particularly the case in recent times where the Division's primary tool for – theoretically – ameliorating the harshness of the multiplier effect in the Guidelines is a "downward departure," pursuant to §5K1.1, for "substantial assistance."

The Division's lack of transparency as to any standards for what the discount off the "base" Guidelines fine will be – 30%, 50%, 65%, or what? – has produced uncertainty and unpredictability. The lack of public explanations is compounded by the Division's conflicting statements in private negotiations. In any event, any effective value of a – larger percentage – "downward departure" can readily be erased by the Division taking a harsh position on the size of organization, thereby increasing the multiplier from 1.2 to 1.4 or 1.6.[18]

Significantly, in 2004, the Division obtained an increase in the Sherman Act maximum fine for price-fixing to $100 million, a facially large amount that the Division presumably selected to send a strong message of deterrence. While the Sentencing Guideline fine amounts

[18] As discussed *infra* in Section 2(d), the Division has used the vague concept of "***willful ignorance***" in §8C2.5 of the Sentencing Guidelines to expand the scope of "high level personnel" "involvement" in the price-fixing, and thereby the "size of organization," resulting in a higher multiplier – and higher – corporate fine. The Division has done this even where it has decided ***not*** to "carve-out" for individual prosecution the very individuals that it claims were "willfully ignorant."

are capped by the relevant statutory maximums, the Division does not consider itself bound by any maximum because of the existence of § 3571.

As noted, the Alternative Sentencing Statute allows any fine to be set on the basis of twice the amount of the gain or loss from the offense. However, while the Division relies on § 3571 to escape the cap, it still uses the 10% impact *presumption* of and multiplier in the Guidelines, notwithstanding § 3571's requirement of proof of *actual* gain or loss.[19]

(c) The Sentencing Guidelines Should be Modified to Make the 10% Impact Presumption Rebuttable, or the Percentage Should Be Reduced and the Automatic "Doubling" Eliminated.

The Division does not need to – nor should it – have the Guidelines' "cake" of a presumption of a large impact and be able "to eat" from the Guidelines' cap expansion under §3571, without complying with the proof requirements of the Alternative Sentencing Statute. Accordingly, the Sentencing Guidelines should be amended to make the 10% impact presumption rebuttable. Given *Booker*, the Division would have to prove, beyond a reasonable doubt, the actual impact to a jury – unless the company agrees to have a judicial determination.[20]

One arguably adverse consequence for defendants of having the criminal fine reflect the actual impact is that it would give the plaintiffs' antitrust bar the benefit of a *prima facie* determination of damages as well as liability. But my experience is that the plaintiffs' bar already starts with the assumption of an admission of at least a 10% impact, based upon the plea-bargained, Sentencing Guidelines-based fine.

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[19] As explained in Section 3, *infra*, **§ 3571(d) should be repealed**. Hardly anyone but the Division uses it. Given the credible reality of civil liability, a $100 million fine should be sufficient deterrence. It also would better encourage confession and cooperation, especially if coupled with the other reforms advocated of increased individual prosecution and jail sentences and de-trebling of civil liability for timely confessors.

[20] Under *Booker*, the Sentencing Guidelines are only "**advisory**," in any event. But the experience to date indicates that the judiciary is strongly inclined to follow the Guidelines.

An alternative approach would be to lower the amount of the presumed impact to 3 or 5%. That may be (equally) arbitrary but probably more realistic, "fair" and desirable from an enforcement policy perspective. It would preserve certainty, predictability and economy of judicial resources. These are the – sole – justifications for the current 10% presumption, *i.e.*, "to avoid the time and expense that would be required for the court to determine the actual gain or loss." *See* U.S.S.G. § 2R1.1, comment n.3.

There is *no* sound economic or empirical basis for a 10% impact presumption. Indeed, the fairness and appropriateness of the 10% presumption has been consistently questioned, particularly as it relates to large-volume, low-margin homogeneous products of the type most typically – and logically – the subject of attempts at price-fixing.[21]

In any event, for the reasons explained above relating to the overhang of civil liability and the real deterrent effect of persistent individual prosecutions and actual jail sentences, any presumed (or judicially determined) impact does not need to be "doubled," as provided for in the Guidelines. Five (5) times the actual damages ("doubling" under the Guidelines plus "treble" civil damages) is excessively punitive and unnecessary for deterrence.[22]

In short, *more* confession, cooperation and compliance can be obtained for *less*.

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[21] *See* Cohen & Scheffman, *supra* n.11, at 332-33: '"Although there is a considerable body of economic and legal literature on organizational sanctions for antitrust violations, we have found that there is ***little credible statistical evidence*** that would justify the [Sentencing] Commission's assumptions which underlie the Antitrust Guideline."; Kobayashi, *supra* n.12, at 722: "It is clear … that the size of the criminal fines relative to loss was increased for antitrust violations under the U.S. Sentencing Commission Guidelines. Moreover, these significant changes occurred ***without any analysis*** of the adequacy of historical fine levels or any systematic analysis of the average gain or loss from price-fixing.". *See also* Tefft W. Smith, James H. Mutchnik, and Scott M. Abeles, *Finding the Right Price*, Legal Times, December 12, 2003.

[22] Indeed, given that – in many states – both direct and indirect purchasers can receive treble damages from the ***same sales***, recovery beyond the actual impact may be many times ***higher***.

(d) The Currently Vague "Culpability Scorecard"-Based Multiplier Should Be Eliminated or More Specific Guidelines Provided.

For the same reasons, there is no need to compound the *over*-deterrence by a multiplier. This is especially true given the fact that, under § 8C2.5 of the Sentencing Guidelines, one of the most potent factors affecting the "culpability score" for establishing the amount of the multiplier, is the size of the "organization" involved in the price-fixing (10, 50, 200, 1,000 or 5,000 or more people).

The "organization" can be the entire company or, for example, just a sales or marketing group. The key determinant is "whether an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense." The Guidelines state that "willful ignorance" occurs when "the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred." § 8A1.2, comment 3(j). That definition is – apparently – so vague that the Division has asserted that it is satisfied by simple negligence or at most gross negligence or recklessness.[23]

At a minimum, more specific Guidelines need to be provided to better align the Antitrust Sentencing Guidelines with the well-established body of criminal law in other contexts.[24]

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23 Notably, however, and further to the issue of transparency as discussed *infra* in Section 5, the Division has taken inconsistent positions as to when it will apply such a strict, non-intent-based standard in determining what culpability score to calculate and, therefore, what multiplier to apply.

24 *See, e.g. United States v. Henderson*, 721 F.2d 276, 278 (9th Cir. 1983) (approving pattern jury instruction that jury could find "willful ignorance" if "[the] defendant ***deliberately*** closed his eyes to the obvious to avoid learning the true boundary lines and was aware of the high probability that the lines he chose were inaccurate"); *United States v. Shannon*, 137 F.3d 1112, 1117-18 (9th Cir. 1998) ("*willfully ignorant*" and "deliberate ignorance" require that "facts must have put her on notice of the probability of the occurrence of criminal activity, that the defendant failed to investigate, thus deliberately choosing to not verify or discover the criminal activity").

The "willful ignorance" and "deliberate ignorance" cases and pattern jury instruction follow the so-called *Jewell* instruction from the seminal, pre-Guidelines decision in the *United States v. Jewell*, 532 F.2d 697, 702 (9th Cir. 1976). *Jewell* defined "knowingly" to include "the state of mind of one who does not possess positive

But the larger question is: should price-fixing be subject to "progressive punishment" based upon arbitrary breaks in the size of organizations?

In any event, the "willful ignorance"/multiplier issue underscores the needlessness of "piling on" the amount of the corporate fine. To the extent that the application of the multiplier results in a higher dollar corporate fine – but less cooperation and fewer individual prosecutions – the Division's enforcement objectives are *not* well served.

The bottom line is that the focus at the Division should shift from seeking the large corporate fine to achieving individual deterrence and better corporate governance. The jail sentence should be the headline; the corporate fine should be the by-line. All parties – the government, the corporation, and employees – would then be incented to engage only in actions that benefit consumers.

(e) The Sentencing Guidelines Should Allow for "Conditional Leniency" in Appropriate Circumstances.

The Department of Justice (the Division's parent) has stated a – sensible – goal of using its prosecutions of business organizations to "be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime."[25] That DOJ goal (as well as the Division's objective of encouraging parties to come forward and confess) would be well-served by a willingness on the part of the Division – in appropriate circumstances of timely confession and full cooperation – to agree to deferred prosecution agreements, granting

knowledge only because he ***consciously avoided*** it. The court also noted that "'[a] court can properly find willful blindness only where it can almost be said that the defendant ***actually knew***.'" *Id*. at 704. As the Court stressed in *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985), to prove "deliberate ignorance," "*[i]t is **not enough** that the defendant was mistaken, recklessly disregarded the truth or negligently failed to inquire*.'"

25 Larry Thompson, United States Attorney General, *Principles of Federal Prosecution of Business Organizations*, Jan. 20, 2003, available at http://www.usdoj.gov/dag/cftf/index.html.

conditional (but substantial) corporate fine leniency (or even amnesty) to at least second-in confessors.[26]

The Division's current Leniency Program *disproportionately* rewards the first cartel member in the door, giving a "free pass" to the first-in, while forcing the other cartel members to write "big" Sentencing Guideline-calculated fine checks. The second-in company is often just days, if not hours, behind the amnesty applicant in contacting the Division. Thus, in reality, the real difference between the "saint" and the "sinner" is seldom black and white. But the Division – currently – has an "all or nothing" policy.

As such, its deterrent effect is one-dimensional. It increases the likelihood of detection by making cartels easier to discover and infiltrate, but it is not designed to ensure a lasting effect on corporate cultures, to prevent re-occurrence or provide corroborating evidence. Nor is there the requisite focus on justice. Remember, the government "is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … is not that it shall win a case, but that justice shall be done." *Berger v. United States.*, 295 U.S. 78, 88 (1935). Here, the only apparent enforcement objective being served by the current Division practice is punishment.

And this "all or nothing" approach is increasingly risky for the Division's long-term enforcement program. What happens to cartel enforcement if the first company comes in but everyone else hunkers down – and cooperates together – for the long fight because they perceive that even the winner of a "race" to be "second-in" is still a big loser? Why not join together and fight the fine amount, especially if the Division is seeking – as it typically does – $100 million-plus fines in excess of the statutory maximum?

[26] *See generally* James H. Mutchnik and Christopher T. Casamassima, *Beyond Leniency: Deferred Prosecutions For "Second-In" Companies*, American Bar Ass'n, Section of Antitrust Law, Criminal Practice and Procedure Comm., Annual Newsletter No. 34 (June 2005).

After all, the fine will be calculated by the Division using the complex and punitive formula in the Sentencing Guidelines; will it not? Isn't "twice the gain or loss" virtually unprovable under § 3571 as "unduly complicating the sentencing proceedings"? If the Division loses, then what happens to deterrence? Rehabilitation? What about the DOJ's stated policy goal of being a "force for positive change of corporate culture?"

In conditional leniency prosecution agreements, the Government typically files a criminal charge, but agrees to defer prosecution for a certain amount of time, so long as the defendant acknowledges wrongdoing and complies with the terms of a written agreement with the Government. If the defendant complies with the terms of the agreement – a fact which may be confirmed by an agreed-upon neutral party – the Government will dismiss (or reduce) the criminal charges at the end of the specified period. If the defendant does not comply with the agreement or engages in additional wrongdoing, the case will proceed and the Government can use the acknowledgment of wrongdoing, and any agreed upon factual predicates, against the defendant.

This type of conditional leniency effectively creates a *probationary* period for the defendant while it revamps its corporate governance system and cooperates in the continuing investigation. Usually, the agreement also provides for mandatory restitution to the direct victims of the misconduct and significant remedial corporate governance measures to prevent the activity from happening again. Common remedial measures are the implementation of specific antitrust compliance and training programs, the dismissal of culpable individuals and the establishment of audit procedures to monitor conduct for a reasonable period (*e.g.*, 3 years).

In appropriate circumstances (like where the company was the "leader" or initiator of the price-fixing), there should be a fine. But any fine should reflect the acceptance of responsibility, the substantial assistance benefits of cooperation, the commitment to make restitution, and other traditional "ability to pay" factors. It should *not* be punitive, as it now appears to be, under the Division's Sentencing Guidelines, plea bargaining approach. The focus should be on preventing recidivism through corporate governance improvements, compliance enhancements and compensation to the victims.

Typical deferred prosecution agreements "carve out" culpable senior executives for criminal prosecution. As already discussed, deterrence through – certain and timely – individual prosecution and punishment through the imposition of jail terms, is the most effective and legitimate enforcement objective.

A conditional leniency approach would encourage earlier cooperation and acceptance of responsibility. That is the first step in changing a corporate culture. And, it minimizes the chilling effect of crippling fines that can harm future competitiveness and shareholders, without materially advancing any of the Division's antitrust enforcement interests.

Conditional leniency would also – quickly – provide a willing *corroborator* for any evidence supplied by the amnesty firm (which may not have the full evidence necessary to prosecute the remainder of the cartel). The Division could assure that the real victims of price-fixing would be compensated by the wrongdoers. It could assure that the "right" people are carved-out and prosecuted, by providing the second-in company with large incentives (potentially saving *tens* of millions of dollars) to assist in prosecuting the offending actors.

Recognition in the Sentencing Guidelines of the appropriateness of deferred prosecution agreements would give them meaningful legitimacy with the Division and the courts. Alternatively, the willingness to use conditional leniency agreements could just become a part of the Division's enforcement policy, as is the case with the other offices of the DOJ.

Whether this idea is adopted or not, firms that drag their feet should be hit with larger – and proportionally – greater fines. There should be clear consequences for stalling. And, as discussed *infra* in Section 5 on transparency, these enforcement practices should be known to be "certain," so firms (and their lawyers) considering whether to cooperate can accurately predict whether they ***will*** get a better deal by cooperating, rather than by waiting or fighting.

3. Congress Should Repeal or Amend the Alternative Fine Statute to Avoid *Over*-Deterrance.

(a) § 3571(d) Should Be Repealed.

Following the logic of the above discussions, § 3571(d) should be repealed. Hardly anyone but the Division uses it. The Division's focus on § 3571 is solely as a mechanism in plea negotiations to evade the – now $100 million – statutory cap in the Sherman Act.

The Division has not been successful in any court under § 3571(d). This is, in large part, because of § 3571's statutory proviso that the Alternative Fine Statute cannot even be applied where, as in an antitrust case, the Division would need to engage in a civil damage trial-like proceeding, because that would "unduly complicate the sentencing process."[27]

The Division has admitted its concerns about having actually to litigate under § 3571. As the Division's recent head, Hew Pate, explained: "[F]or the largest, most harmful antitrust conspiracies – typically those involving international cartels and foreign corporations – the Guidelines methodology adopted by the Sentencing Commission for calculating antitrust fines is

[27] The Division lost the only case anyone has found where it attempted to litigate under § 3571. *See United States v. O'Hara*, 1991 WL 286176 (D.Me. Sept. 13, 1991) (rejecting alternative fine for antitrust violation where calculating fine would unduly prolong or complicate the sentencing process); *cf. United States v. Andreas*, 1999 U.S. Dist. LEXIS 9655, *14 (N.D. Ill. June 2, 1999) (refusing 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).

mooted in favor of a fine calculation that tends to be *considerably more difficult* to administer, less certain, and potentially more lenient toward the offender."[28]

In any event, many commentators (myself included) have observed that §3571(d) is unconstitutional in light of the Supreme Court's decision in *United States v. Booker*.[29] In *Booker*, the Supreme Court struck the provision of the Sentencing Guidelines making them mandatory under the Sixth Amendment. 125 S.Ct. 738, 764. Applying its earlier decision in *Apprendi* to the Guidelines, the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756.

The legislative history of § 3571 clearly indicates that it was premised on a determination by a judge, in a truncated sentencing proceeding, *not* in a civil antitrust damages-like trial by a jury. That – by consistent experience – would be "complicated."

Moreover, the punitive, formulaic Sentencing Guidelines fines achievable by virtue of the Division's use of §3571(d) to avoid the Sherman Act statutory cap, are the very problem I recommend be addressed and reformed. Taking § 3571 out of the equation is just what is needed to get the Division focused on the right approaches to deter price-fixing, without threatening the same type of harm to the economy that price-fixing itself causes.[30]

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[28] R. Hewitt Pate, *Vigorous and Principled Antitrust Enforcement: Priorities and Goals Speech before the Antitrust Section of the A.B.A.*, Apr. 12, 2003.

[29] *See, e.g.,* Tefft W. Smith, James H. Mutchnik, and Scott M. Abeles, *Harder to Prosecute*, Legal Times, July 12, 2004.

[30] Even if § 3571(d) were replaced by a still ***higher Sherman Act maximum fine***, this would be an improvement. From a counseling and negotiating perspective, the benefits of certainty provided by an even higher, but capped, amount of liability would benefit the process.

(b) At a Minimum, § 3571(d) Should Be Amended in Important Respects.

The Alternative Fine Statute at least needs to be amended. *First,* the Division's position – that the "twice the gross gain or twice the gross loss" provision of § 3571(d) should be calculated based on the gain or loss from *all* the co-conspirators' sales – should be statutorily rejected. The Sentencing Guidelines limit the fine calculation to the defendant's *own* sales. There is no legitimate need to impose joint and several liability for criminal fines, when joint and several liability already exists for the civil damage exposure.

Second, consistent with *Booker,* the Antitrust Modernization Commission should recommend that language be included in the statute to make plain that any "gain or loss" must be proven to a jury, beyond a reasonable doubt, absent agreement to a judicial determination by the defendant.

Third, for the reasons already explained, there is no legitimate need for the statute to impose a fine based on "double" the loss or gain.

4. Congress Should Be Asked to Expand De-Trebling and Other Benefits to Timely Confessors and Cooperators.

For the reasons discussed above regarding the benefits of conditional leniency – including a possible complete pass on a corporate fine, the Commission should recommend to Congress that the Antitrust Criminal Penalty and Enforcement Act, 118 Stat. 661 (2004), be amended to extend the de-trebling and release of joint and several liability benefits to – at least – "***second-in***" confessors.

Any such grant should be conditioned on: the Division certifying that the "second-in" confession was timely; the company provided real cooperation in the form of substantial assistance for further prosecution of other companies and the individuals responsible; the company committed to making appropriate restitution to actually harmed consumers; and the company took meaningful, approved steps to implement corporate governance and training programs designed to minimize the likelihood of future antitrust violations.

5. The Division Should Be Instructed to Be More Transparent as to Its Enforcement Policies and Practices.

Transparency has been described by the Division as a "hallmark of an effective Amnesty Program," which should be provided "to the greatest degree possible throughout the enforcement program." The Division recognizes that "[p]rospective cooperating parties come forward in direct proportion to the *predictability* and *certainty* of their treatment following cooperation." The Division also acknowledges that – to get cooperation – it must "maximize transparency and predictability across enforcement policies." As the Division's current Criminal Enforcement Deputy, Scott Hammond recently stated: "[t]ransparency is essential. If [the] company cannot predict how it will be treated, it is far less likely to report."[31]

There is a disconnect between the Division's words and actions. Over the past 18 months, notwithstanding considerable criminal enforcement activity, the Division has been secretive as to what its actual policies are (and practices will be in) assuring the "proportionality" of benefits for second-in and later confessors and cooperators. Indeed, there have been a number of public promises of transparency, but no meaningful written or other explanations have been forthcoming as to what can reasonably be expected if a corporation cooperates.

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[31] Scott D. Hammond, Deputy Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, *Cornerstones of an Effective Leniency Program, Remarks Presented Before the ICN Workshop on Leniency Programs in Sydney, Australia*, at 9 (Nov. 22–23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

As Mr. Hammond further explained, "Self-reporting and cooperation from offenders have been ***essential*** to our ability to detect and prosecute cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide ***transparency*** throughout our anti-cartel enforcement program so that a company can predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not." *Id*.

There is no certainty or predictability as to: Will the second-in really get a better deal? What "substantial assistance" will actually be required? Who will be carved-out for – possible – individual prosecution and why? How will the Division try to prove "the gain or loss" if they have to litigate under § 3571(d)?

The Division's recent plea agreements and Sentencing Memoranda have been noticeably truncated and vague. If anything, there is the appearance of inconsistency and results-driven arbitrariness, with later fines appearing to reflect compromises to avoid § 3571(d) trials.

A case in point is the April 2005 Hynix plea. Hynix is a large computer memory products (or DRAM) manufacturer, with a "volume of commerce" for purposes of the Division's Sentencing Guidelines fine calculation of $839 million. Hynix did agree to pay a headline grabbing, $185 million fine (the then third largest) but it was interest free (something the Division has said it never does), with a low ($10 million) down payment and the remainder due over five (5) years.[32]

Hynix was the "third-in" cooperator, coming in almost two years after the initial amnesty applicant (Micron) and six months after the second-in cooperator (Infineon) pled guilty and agreed to pay a $160 million fine. Based on the identity of the Hynix executives carved-out for possible individual prosecution (none have been indicted to date), Hynix had "high level" involvement at a large organizational level, warranting a 1.6 multiplier. And based on the 10% impact presumption, doubled under the Sentencing Guidelines, and augmented by the 1.6 multiplier, and the $839 million volume of commerce, one would have expected a base fine of $265.5 million (*versus* the $185 million agreed to), with only limited potential for any

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[32] *See United States v. Hynix Semiconductor, Inc.*, No. CR 05-249 PJH (N.D. Cal.) Plea Agreement (Apr. 20, 2005).

"downward departure" for further "substantial assistance," given Hynix's delayed, third-in status.

The Division explained this – proportionally – low fine by stating that Hynix had an "inability to pay."[33] Based on the publicly available evidence, Hynix's "inability to pay" appears pretextual.[34] Notably, the Division has *not* publicly stated its reasoning for such a seemingly inexplicable result. Secrecy and silence does *not* produce certainly and predictability.[35]

The absence of certainty and predictability, as the Division has itself recognized, is *not* good enforcement policy. The lack of transparency can readily be remedied by explication. If the Division is not being – as it seems to me and many other criminal antitrust practitioners – arbitrary, unprincipled and unfair, the Division can demonstrate that by setting forth what it has been doing and why.

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33 U.S.S.G. § 8C3.3, entitled "Reduction of a Fine Based on Inability to Pay" and its subsection (a) states that a "court shall reduce the fine below that otherwise required … to the extent that imposition of such fine would **impair its ability to make restitution to victims**." The Guidelines allow – but do not require – a court to decrease a fine below the minimum fine, "if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is **not likely to become able to pay** the minimum fine [calculated under the Guidelines]. Provided, that the reduction under this subsection shall not be more than necessary to avoid **substantially** jeopardizing the continued viability of the organization." *Id.*

34 Hynix may have *seemed* – at first blush – a reasonable candidate for an "inability to pay" defense. Even in spite of its criminal behavior, Hynix had struggled with a crushing debt load for years, was controlled by creditors, and required a $ 4 billion bailout from the Korean government just to stay afloat in 2002.

But by the time of the plea, Hynix was reporting operating profit for the fourth quarter of 2004 of roughly $420 million and a capital surplus of approximately $500 million. Hynix's operating profit in the first quarter of 2005 was about $320 million. Analysts reported that Hynix was (and is) aggressively expanding its capital expenditures, and Hynix's own Web site reported that Hynix planned to spend $250 million in 2005 – as an initial investment – on a new factory in China. After Hynix's fine became public, Hynix publicly assured investors that *not* only did the $185 million fine ***not threaten its existence*** (or in Guideline's parlance "jeopardize the continued viability of the organization"), it would ***not even hurt its bottom line***.

35 For a more complete examination of the Division's Hynix plea agreement, *see* James H. Mutchnik and Christopher T. Casamassima, *United States v. Hynix Semiconductor, Inc.: Opening the Door to the Inability-to-Pay Defense?*, The Antitrust Source (September 2005), at 1, available at http://www.abanet.org/antitrust/source/09-05/Sep05-Mutchnik9=27.pdf. Those authors, together with me, represented one of the parties involved in the DRAM investigation.

If the Division's explanations make sense, predictability, certainty and credibility can be restored. And, counsel will be able to explain to clients that there really are benefits (assuming the Division agrees) to being the second-in, rather than third, fourth, etc., or whatever the case may be.

This will benefit the Division because, if defense counsel can trust that their clients will do better by cooperating early, then it is more likely that they will advise their clients to do so.

Conclusion

While these comments have raised questions about how the Division is applying the current criminal antitrust remedial statutes, I make these comments and suggestions for statutory and agency policy reforms with great respect for the important role the Division has played (and does – indeed, must – play) in combating price-fixing and preserving the open competition at the heart of our free enterprise system.

I thank you for the opportunity to present these views.