

Supplemental Criminal Remedies Discussion Outline

Note: Italicized text is based on the Commission's questions for public comment. Indications of support for particular recommendations are based on AMC Staff's recording of discussions during and the transcripts of the deliberation meeting on May 8, 2006. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated in initial deliberations.

I. *Should 18 U.S.C. § 3571(d) be amended so that it is not applicable in Sherman Act prosecutions? If Section 3571(d) were made inapplicable to Sherman Act prosecutions, should the maximum fine under the Sherman Act be increased? If so, what should be the revised fine amount?*

[1] Recommend no change to the applicability of Section 3571(d) to Sherman Act offenses or the current Sherman Act fines.

[2] Recommend that Section 3571(d) be made inapplicable to Sherman Act offenses.

[3] Recommend that Section 3571(d) be made inapplicable to Sherman Act offenses, and recommend that the maximum corporate fine under the Sherman Act be increased to \$500 million.

[4] Recommend that Section 3571(d) be made inapplicable to Sherman Act offenses, and recommend that the maximum Sherman Act fine be set to equal 10 percent of the defendant's worldwide gross sales.

II. *Should "twice the gross gain or twice the gross loss" as provided in Section 3571(d) be calculated based on the gain or loss from all co-conspirator sales or on only the defendant's sales?*

[5] Recommend no change to the statute; the interpretive question should be left to the courts.

[3 Commissioners favored: BB, SL, DV; Not voting: DC, SC]

[6] Recommend amending Section 3571(d) to provide that it applies to loss caused by an entire antitrust conspiracy.

[4 Commissioners favored: MD, DG, JS, JY; Not voting: DC, SC]

[7] Recommend amending Section 3571(d) to provide that it applies to loss caused by the particular antitrust defendant.

[3 Commissioners favored: JJ, DK, JW; Not voting: DC, SC]

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

[8] Recommend no change to the statute or *Sentencing Guidelines*; the interpretive question should be left to the courts.

[7 Commissioners favored: BB, DG, JJ, SL, DC, JW, JY; Not voting: DC, SC]

[9] Recommend amending the Guidelines to require use of actual gain or loss, if proven under Section 3571(d), for calculation of the *Guidelines* fine range.

[3 Commissioners favored: MD, DK, JS; Not voting: DC, SC]