

**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW
IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION'S
REQUEST FOR PUBLIC COMMENT ON CRIMINAL REMEDIES - -
THE ALTERNATIVE FINE STATUTE - 18 USC § 3571 (d)**

JUNE 2006

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 May 24, 2006 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.

I. Executive Summary

These comments respond to questions posed by the Commission regarding the continued efficacy of the alternative fine statute, 18 USC § 3571 (d), in antitrust criminal prosecutions in light of recent Supreme Court holdings that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Commission's request for public comment seeks views on whether the Sherman Act's maximum corporate fine should be increased if the alternative fine statute were made inapplicable to antitrust criminal prosecutions and, if so, to what amount. Finally, the Commission raises for debate a number of very timely issues regarding the factors that may lead a corporation to agree to pay a fine in excess of the Sherman Act maximum fine even though, in order to support such a fine pursuant

¹ 71 Fed. Reg. 30,863 - 30,864 (May 31, 2006).

to the alternative fine statute, the government now would have to prove the supporting gain or loss to a jury beyond a reasonable doubt.

Despite the difficulties that will attend jury determination of the gain or loss under the alternative fine statute, there does not seem to be any compelling reason to single out antitrust crimes as exempt from the operation of this general fining statute applicable to all federal crimes. Federal criminal juries are often called upon to decide complex disputed issues based upon expert testimony. Furthermore, because the maximum fine under the alternative fine statute is based upon the total harm inflicted or gain obtained by all defendants, proving sufficient gain or loss to support an appropriate (Guidelines) fine, which is based upon the harm inflicted or gain obtained by the defendant being sentenced, may not be as daunting a task as it may appear at first glance. In addition, in those situations where the gain/loss issue is too complex for submission to a jury, the court may decline to impose a sentence under the alternative fine statute.

With the recent increase in the Sherman Act maximum fine to \$100 million, there will be far fewer cases where the alternative fine provision will come into play. Yet, it is in those rare cases where the alternative fine statute would come into play, *i.e.*, the largest, most widespread, and most harmful cartels prosecuted by the government, that the courts ought to have the ability to impose a penalty above the statutory maximum.

However, the interplay of the operation of the Guidelines and § 3571(d) highlights one issue that the Section believes warrants further study, *i.e.*, the Guidelines' 20% default harm assumption. The Section believes that the Commission should recommend 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. 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 of lesser magnitude, and would achieve a greater degree of fairness and proportionality in sentencing organizational defendants in criminal antitrust cases.

Finally, the Section believes there are numerous factors that impact a corporation's decision to enter a plea agreement with the government that calls for a fine above the Sherman Act maximum fine. Many of these factors are influenced only tangentially, if at all, by the difficulty - or lack of difficulty - the government may face in supporting a fine under the alternative fine statute. These factors will continue to act as powerful motivators for corporations to agree to fines above the Sherman Act statutory maximum.

II. Introduction

The Section is on record as 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 as 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 and effectiveness, in criminal antitrust prosecutions, of the alternative

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 Tunney Act Amendment (January 2004) (available at <http://www.abanet.org/antitrust/comments/2004/reports.html>); Comments Of The ABA Section Of Antitrust Law In Response To The Antitrust Modernization Commission's Request For Public Comment On Criminal Remedies (November 14, 2005) (available at <http://www.abanet.org/antitrust/comments/2005/11-05/criminal-remedies.html>).

fine statute (18 USC § 3571(d)), in light of the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). Consideration of these issues is particularly timely in light of the recent dramatic increase in criminal penalties for antitrust offenses⁴ and the recent Supreme Court decisions which may call into question the continued constitutional validity of the alternative fine statute and which, at a minimum, suggest that in order to obtain a fine pursuant to the alternative fine statute the government will have to prove to a jury “beyond reasonable doubt” the gain or loss caused by the violation. 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 the largest antitrust criminal violations prosecuted by the government, *i.e.*, those that may trigger application of the alternative fine statute where the government would seek to obtain a fine in excess of the \$100 million Sherman Act maximum. The Commission has asked, in effect, whether in those cases the current corporate sentencing process achieves the generally accepted goals of sentencing.⁵

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

⁵ Of course, the same analysis set out herein would apply to individual fines as well. However, because the Division rarely seeks fines in excess of the Sherman Act maximum against individuals, this discussion of the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) will focus only on its effect on corporate fines. We are aware of only two cases in which the Division sought to obtain a fine against an individual in excess of the statutory maximum. In *U.S. v. Andreas*, 96-CR-762 (N.D. Ill. June 2, 1999), the court refused to hold a § 3571(d) hearing and imposed the statutory maximum fine. In *U.S. v. Koehler*, the court imposed an agreed-upon fine of \$10 million.

III. Should 18 U.S.C. § 3571(d) Be Amended So That It Is Not Applicable In Sherman Act Prosecutions? If So, Should The Sherman Act Maximum Corporate Fine Be Increased And, If So, To What Amount?

On January 12, 2005, the Supreme Court in *U.S. v. Booker* invalidated, on Sixth Amendment right to jury trial grounds, the mandatory operation of the U.S. Sentencing Guidelines. 543 U.S. 220 (2005). The *Booker* holding has its roots in the Court's 2000 decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).⁶ In fact, it may be that the Court's ruling and analysis in *Apprendi* is more directly relevant to the continued efficacy of the alternative fine statute than the Court's decision in *Booker*. In *Apprendi*, the Court reviewed New Jersey's hate crimes statute which increased the maximum term of imprisonment authorized for certain offenses from 10 to 20 years based on facts found by the sentencing judge by the lesser "preponderance of the evidence" standard. Apprendi was charged under New Jersey law with second-degree possession of a firearm for an unlawful purpose, which carries a prison term of 5 to 10 years. After Apprendi pleaded guilty, the court found by a preponderance of the evidence that the shooting was racially motivated, and sentenced Apprendi to 12 years in prison.

In reversing the lower courts, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt." 530 U.S. at 490.⁷

⁶ Actually, it can be traced back to a footnote in a 1999 Supreme Court decision. *See, Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

⁷ Initially, the potential impact of the Court's decision in *Apprendi* on U.S. Sentencing Guidelines procedures was not clear. The Guidelines list a number of sentencing enhancement factors for each federal crime or type of crime. The existence and extent of these factors is determined by the sentencing judge on a preponderance standard and have the effect of increasing the sentencing range faced by a defendant, but do not increase the maximum penalty set forth in the statute defining the offense. In *Blakely v. Washington*, 542 U.S. ____ , 124 S. Ct. 2531 (2004), the Supreme Court made clear that its reasoning in *Apprendi* had a profound effect on mandatory sentencing guidelines schemes. In *Blakely* the defendant was sentenced after pleading guilty to an offense which carried a maximum penalty of 10 years in prison (120 months). However, Washington's mandatory sentencing guidelines called for a "standard range" of 49 to 53-months and the sentencing judge was required to impose a sentence within the

It is this holding that initially called into question the constitutional validity of the alternative fine statute as it was being administered by the federal courts.

Apprendi, *Blakely*, and *Booker* have firmly established the principle that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt” and that the statutory maximum “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” The most significant impact of this principle for corporate antitrust defendants is the effect it has on corporate fines imposed pursuant to the alternative fine statute. 18 U.S.C. § 3571(d). That statute, which applies to all federal crimes which result in pecuniary gain or loss, 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 forth the penalties. Pursuant to the statute, a defendant can be fined a maximum of twice the gross pecuniary gain or twice the pecuniary loss resulting from an offense.⁸ The Division has had remarkable success

standard range unless he found “substantial and compelling reasons justifying an exceptional sentence.” The judge imposed an “exceptional sentence” of 90 months, 37 months beyond the standard range maximum, but still less than the 120-month maximum sentence, based upon the court’s finding - on a preponderance of the evidence standard - that the defendant had acted with “deliberate cruelty,” a statutorily enumerated ground for departure. Absent this finding, the judge could not have imposed a sentence above the standard range maximum of 53 months. The Supreme Court invalidated the sentence because facts found by the judge by a preponderance of the evidence had the effect of increasing the sentence he faced. The Court said that the “[s]tatutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Therefore, the maximum constitutionally permissible sentence was 53 months, the sentence supported by the facts admitted by *Blakely* in his guilty plea. In *Booker* the Court applied its holdings in *Apprendi* and *Blakely* to the U.S. Sentencing Guidelines and struck them down as a mandatory sentencing scheme to the extent their operation increased the sentencing range the court could impose based on facts found by the sentencing judge.

⁸ 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.

obtaining corporate fines pursuant to the alternative fine statute. In fact, since 1997, the Division has obtained 47 corporate fines in excess of the Sherman Act \$10 million maximum.⁹

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 unlike under 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* 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.

To date, no court has interpreted *Apprendi*'s holding in the context of the alternative fine statute, but it is widely accepted that *Apprendi*'s holding, as amplified by *Blakely* and *Booker*, at a minimum, requires the government to prove the gain or loss in a criminal antitrust case to a jury beyond reasonable doubt in order to support a fine above the Sherman Act maximum. In fact, at this point no one doubts that under § 3571(d), as applied in antitrust cases, the facts that

⁹ All of these fines have been imposed pursuant to plea agreements with agreed-upon sentences. To date, no contested antitrust sentencing proceeding has occurred under the alternative fine statute. 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. 96-CR-762 (N.D. Ill. June 2, 1999).

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.

If *Apprendi* does have that effect on 18 U.S.C. § 3571(d), then the burden on the government to obtain fines above the statutory maximum is substantially higher than was thought pre-

Apprendi.¹⁰

The determination of antitrust damages is not a precise science and often depends upon the assessment of complex economic analysis and testimony. Obtaining and marshalling the evidence necessary to present, or to defend against, an antitrust gain or loss theory to a jury

¹⁰ Some argue that *Booker* has called into question – if not sounded the death knell for – the continued constitutional validity of § 3571(d). The argument is that § 3571(d) clearly contemplates judge-made findings of fact for the purpose of increasing the maximum fine a court can impose and that such a scheme is unconstitutional after *Booker*. In *Booker*, the Court noted that the Congressional intent was that Guidelines enhancement factors be judge determined, but held that such a scheme was in conflict with a defendant’s Sixth Amendment right to a jury trial. The Justice Department argues that § 3571(d) remains viable, based on the reasoning of the Ninth 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 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. But in *Booker* the Court “saved” the Guidelines, not by ruling that going forward the enhancement factors would need to be submitted to the jury for determination beyond reasonable doubt, but by ruling that the judge-determined Guidelines range would be advisory instead of mandatory. The determination of gain or loss arguably is far more complex and far less suited for jury determination than most Guidelines enhancement factors. Surely, Congress could not have intended that the determination of overcharges, based on complex economic and econometric analyses, be undertaken by a jury pursuant to a beyond reasonable doubt standard. Of course, 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.” Perhaps § 3571(d) could be saved by the limitation that the alternative fine calculation be undertaken “unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.” Maybe 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. In any event, a successful *Booker* challenge would in fact put an end to the Antitrust Division’s ability to obtain corporate fines in excess of the Sherman Act maximum fine of \$100 million, unless the Court was willing to read § 3571(d) as authorizing the submission of the gain/loss issue to the jury for determination on a beyond reasonable doubt standard, something it was unwilling to do in the case of Guideline enhancement factors. See James L. McGinnis, “Antitrust Attorneys Grapple With Impact Of *Booker*,” *The National Law Journal* (July 18, 2005).

would impose a number of practical problems for the government, the defense, the court, and the jury. The government will have to obtain (and subjects would have to provide) evidence of gain or loss during the course of the grand jury investigation in ways that were not the ordinary practice pre-*Apprendi*. Defendants will be faced with the new challenge of having to defend against not only the antitrust charge but also the damage issues in the context of criminal proceedings. Courts will be faced with deciding whether the issues of guilt and gain/loss should be tried together or whether there is authority to bifurcate the issues if that is the preferred method.¹¹ Whether the issues are bifurcated or not, courts and litigants will have to develop standards and instructions pursuant to which this new issue will be presented to juries. If the guilt and penalty phases are not separated, juries will have to be instructed on how to separate the evidence relevant to the two in their deliberations. That is, juries will have to first determine if the evidence (other than the gain or loss evidence) establishes the defendant's guilt beyond reasonable doubt and, if so, only then consider the economic evidence to determine the amount of the gain or loss. Furthermore, it is not clear exactly what juries will be called upon to decide. Will it be sufficient for them to determine, beyond reasonable doubt, that the gain/loss from the offense is "at least" or "no less than" some amount or falls within some range; or will they have to determine the precise dollar amount of the gain or loss resulting from the offense?

Regardless of the exact question put to juries, it is clear that they will be grappling with issues about which even experts in the field often disagree. Juries could be called upon to "choose," using a "beyond reasonable doubt" standard, between two competing experts'

¹¹ This discussion assumes that courts will view indictments alleging gain or loss not as alleging a "new" crime, *i.e.*, a cartel affecting \$X of commerce as to which the jury will return a general verdict of guilty or not guilty, but rather as alleging a Sherman Act cartel violation as to which the jury will return its general verdict but with additional allegations of the amount of commerce affected which the jury must determine separately from its guilt determination. The validity of this assumption is not certain and that is one more difficult issue the courts, the government, and defendants will have to resolve going forward.

testimony and opinions. But juries are often called upon to determine complex issues subject to expert opinion in other federal criminal prosecutions - issues including the fraudulent or non-fraudulent nature of complex corporate accounting procedures, for example. As difficult as the issues may be and as difficult as it may be to prove antitrust gain or loss beyond a reasonable doubt, it is highly unlikely that it could be said, as a matter of law, that it can never be done.

Despite these and many other difficulties that will attend the placing in the hands of a jury the determination of the gain or loss under the alternative fine statute, there does not seem to be any compelling reason to single out antitrust crimes as exempt from the operation of this general fining statute applicable to all federal crimes. As noted, federal juries often are called upon to decide complex disputed issues. Furthermore, in those cases where the court views the gain or loss issue as too complex, the statute itself provides an exception. A court need not impose a fine under the alternative fine statute in cases where the determination of gain or loss would “unduly complicate or prolong the . . . process.” Arguably, pursuant to this provision, a court could refuse to allow the government to present evidence of gain or loss to the jury and impose sentence against the defendants, if convicted, limited by the statutory maximum - \$100 million - in instances where the court is satisfied that the complexity of the issues in the particular case outweigh any benefit of being able to impose a fine in excess of that amount.

In addition, with the recent increase in the Sherman Act maximum corporate fine to \$100 million, there will be far fewer cases where the alternative fine provision will come into play than has been the case in the past. While the Division has used the alternative fine statute to obtain fines in excess of the \$10 million maximum in 47 cases, only 8 of those fines have been in excess of \$100 million - the current maximum. Furthermore, it is in those rare cases where the alternative fine statute would come into play that the courts ought to have the ability to impose a

penalty above the statutory maximum. If the alternative fine statute were amended to make it inapplicable to antitrust offenses, then the participants in the largest, most widespread, and most harmful cartels prosecuted by the government would face a relatively smaller - and perhaps less effective - penalty than corporate participants in smaller local or regional conspiracies.¹² It already is a bit of a perverse irony that it is only in the larger, more harmful cartel cases that the courts may have to submit complex economic issues to the jury in order to be able to impose an appropriate fine against convicted defendants. But not to have that option would simply compound the problem.

Furthermore, proving sufficient gain or loss - even beyond reasonable doubt - to support an appropriate (Guidelines) fine against any particular defendant may not be as daunting a task as it may appear at first glance. It is important to understand that in any particular case, the Division continues to rely upon the Sentencing Guidelines in the first instance to determine the appropriate fine range. The determination of the Guidelines range is based primarily upon the volume of commerce engaged in by the defendant in the goods or services affected by the violation. Generally, as noted above, that will yield a fine under the Sherman Act maximum. However, the Division has said that in those cases in which the government will seek a fine above the Sherman Act statutory maximum pursuant to 18 U.S.C. § 3571(d) (*i.e.*, when the Guidelines fine range is above the Sherman Act maximum) the indictment will allege, and the

¹² The Commission also asks whether and to what amount should the Sherman Act maximum fine be increased if the alternative fine statute were made inapplicable to antitrust offenses. The Section strongly believes that the alternative fine statute should not be so amended. One of the benefits of the alternative fine statute is that it is limited only by the quantum (or two times the quantum) of provable gain or loss. Therefore, it is theoretically capable of establishing an appropriate fine for any antitrust offense regardless of the size of the harm inflicted. Furthermore, while increasing the Sherman Act maximum corporate fine would be appropriate for review if the alternative fine statute were repealed as to antitrust offenses, obtaining a consensus on the appropriate maximum in those circumstances is highly problematic. Furthermore, it likely is impracticable to ask Congress to consider increasing the Sherman Act maximum corporate fine just two years after Congress increased that figure ten-fold.

government will seek to prove, the gain or loss attributable to the entire cartel, not just the defendant, in order to establish the maximum alternative fine applicable to the violation.¹³ Section 3571(d) provides that "[i]f *any person* derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the *gross gain* or twice the *gross loss*." Thus, it is the Division's position (supported by sentencing cases in other types of crimes) that § 3571(d) provides for a maximum fine of twice the gross gain derived from the crime or twice the gross loss of the victims of the crime, *i.e.* twice the gain derived by, or twice the loss caused by, the cartel rather than the defendant. So, the Division's burden to prove sufficient gain or loss to support a Guidelines fine may not be as great as one might initially suspect. As noted, the Guidelines corporate fine is based upon the individual defendant company's sales of the product affected by the conspiracy during the course of the scheme. Yet, the potential maximum fine under the alternative fine statute is calculated on the basis of the gain derived by all conspirators or the harm suffered by all victims. That being the case, the percentage overcharge on the entire commerce affected by the conspiracy in order to support a Guidelines fine based on any one conspirator's sales may be surprisingly low in most cases.

Perhaps partially as a result of the recognition that "proving damages" in a § 3571(d) context may not pose the difficulty for the government as first appears, the Division has continued to obtain fines in excess of \$10 million with remarkable regularity. Since *Apprendi* was decided, 23 corporations have paid fines in excess of the statutory maximum. Nine of those fines were obtained since *Blakely*, and seven of the 23 fines in excess of \$10 million were

¹³ 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 7, available at www.usdoj.gov/atr/public/speeches/208354.html.

obtained after *Booker*, including the second highest fine ever obtained by the Division, \$300 million.

However, the interplay of the operation of the Guidelines and § 3571(d) highlights one issue that the Section believes warrants further study, *i.e.*, the Guidelines' 20% default harm assumption. 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. 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 greater 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 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

¹⁴ U.S.S.G. § 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.

The Guidelines 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 either direction – in any given case. Apparently the Sentencing Commission adopted this special methodology because of its perception of the difficulty in calculating the actual gain or loss in an antitrust case, where determination of overcharges often 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 at 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

¹⁶ U.S.S.G. § 2R1.1 comment (n.3). Of course, 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.G. § 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.G. § 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>).

today, if it ever was.¹⁸ If subsequent events have shown that the determination of gain or loss in 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.

The Section already has provided the Commission a detailed statement of 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 the Guidelines' "default harm" assumptions are not adequately supported by empirical evidence and should be subjected to a rigorous review by the Sentencing Commission.¹⁹ 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 significant developments since it was adopted in 1991 and against the backdrop that the Division has regularly determined gain or loss to increase the

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 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 *See*, ABA Antitrust Section, Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment (January 2004) (available at <http://www.abanet.org/antitrust/comments/2004/reports.html>); and Comments Of The ABA Section Of Antitrust Law In Response To The Antitrust Modernization Commission's Request For Public Comment On Criminal Remedies (November 14, 2005) (available at <http://www.abanet.org/antitrust/comments/2005/11-05/criminal-remedies.html>).

maximum fine recommendation pursuant to 18 U.S.C. § 3571(d).²⁰ Such a review also should examine any empirical evidence supporting the adoption of 20% of affected commerce as the proxy for harm. The Section believes that such empirical review will 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 organizational defendants in antitrust cases.²¹ In effect, in cases involving substantial overcharge, the government is assessing very low fines and in cases involving smaller overcharges, the government is assessing disproportionate fines.

Furthermore, in those cases where the government has to prove harm to a jury beyond reasonable doubt to establish the potential maximum fine, *i.e.*, where the government is seeking a fine pursuant to the alternative fine statute, it seems inappropriate – if not unconstitutional²² – to

²⁰ In its Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment (January 2004), the Section urged Congress to instruct the Sentencing Commission to 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.

²¹ 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.

²² 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>).

base the calculation of the actual fine on a “presumed harm” of 20% of the defendant’s affected volume of commerce.

IV. Why Do Corporations Continue To Agree To Pay Fines In Excess Of The Statutory Maximum? Is The Threat Of The Prosecution Of A Greater Number Of Corporate Employees Or Of Harsher Penalties Against Corporate Executives A Factor In A Corporation’s Decision To Agree To Higher Than Statutory Maximum Fine?

As already noted, all of the corporate antitrust fines imposed pursuant to the alternative fine statute have been imposed pursuant to plea agreements calling for the imposition of an agreed upon fine. While to date, no court has applied *Apprendi*’s holding to the operation of the alternative fine statute, it is widely accepted that, after *Apprendi*, the application of § 3571(d) requires that the gain/loss determination be submitted to a jury for determination on a beyond reasonable doubt standard, substantially increasing the burden on the government’s ability to obtain fines above \$10 million (now \$100 million). Yet, as noted earlier, many of the agreed-upon § 3571(d) fines obtained by the Division were agreed to and imposed after *Apprendi* was decided.

These statistics raise the obvious question - if *Apprendi* now requires the government to prove gain or loss to a jury beyond reasonable doubt in order to obtain a fine in excess of the Sherman Act statutory maximum, why are so many companies agreeing to pay fines based upon the alternative fine statute? There are a number of factors that a corporation must consider in weighing whether to agree to the imposition of a fine pursuant to the alternative fine statute other than the possibility that, if contested, the government would have to prove the gain or loss to a jury beyond reasonable doubt and might fail in doing so.²³ In addition, all of the incentives to

²³ Of course, all of the considerations discussed in this section, and others, are relevant to a corporation's consideration of whether to enter a plea agreement and cooperate with the government regardless of whether the company is facing a potential fine in excess of the Sherman Act statutory

cooperate early remain unchanged (if not enhanced) and to forego those opportunities for the possibility that the government will not be able to establish (beyond reasonable doubt to a jury) a sufficient illegal overcharge to support a § 3571(d) sentence rather than agreeing to a fine that the government is willing to agree to at the beginning or early in an investigation is the kind of high stakes gamble that most antitrust defendants have been unwilling to take.

The Division presumably will continue to make favorable plea deals with those companies that are prepared to cooperate early and will not divert its attention to litigate gain or loss with those targets of the investigation which wish to test the government's proof in that regard until the end of the investigation.²⁴ So, in order to put the Division to its proof, the corporate defendant must decide that it is in its interest to wait until the end of the Division's investigation to resolve its criminal liability. What opportunities will it give up while waiting? There are many. First, the company will give up the certainty of an early resolution pursuant to a binding C-type plea agreement²⁵ and will face sentencing at the end of the investigation when the government's evidence against it is strongest. Second, the company will give up the advantage of having the government file a motion asking the court to depart from the Guidelines range because of its early cooperation. Third, the company will give up the opportunity to take

maximum pursuant to 18 U.S.C. § 3571(d). Therefore, amending the alternative fine statute to make it inapplicable to antitrust offenses would not remove these influences on a corporation's decision; it would simply reduce the potential fine faced by corporate participants in the largest, most harmful - usually international - cartels prosecuted by the Antitrust Division.

²⁴ 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 10 (available at www.usdoj.gov/atr/public/speeches/208354.htm).

²⁵ Most Division cases against corporations are resolved by plea agreements entered pursuant to Fed.R.Crim.P. 11(c)(1)(C), which provides for an agreed-upon sentence that the sentencing judge must either accept the plea agreement and impose the agreed-upon fine or reject the plea agreement and allow the defendant to withdraw its guilty plea.

advantage of the Division's amnesty plus policy, which could result in the lowering of the fine even beyond that justified by its cooperation in the pending investigation and could result in its prosecution for other antitrust offenses for which it could have received amnesty. The company also would lose the opportunity to detreble its private civil damage liability, under the 2004 legislation, in connection with the "amnesty-plus" products. Furthermore, the stronger the government's case, *i.e.*, the later in the investigation, the greater the number of executives potentially "carved out" of the non-prosecution provision of the company's plea agreement, should the company ultimately enter an agreement with the Division.²⁶ And the willingness of the Division to make favorable deals with those "carved out" executives decreases, the later into the investigation they come in.

Furthermore, once those executives who might be covered in the non-prosecution provision of an early corporate deal – or who might be able to achieve a favorable early individual disposition even if carved out - recognize that the company has decided to forego an early disposition in order to try to limit its financial exposure down the road, they will have to decide if they are willing to risk the substantial jail sentences that they may face at the end of the investigation. Or, one or more of those executives may break ranks with the company and offer early cooperation on his or her own, which, of course, likely would further erode the company's position in arguing for a lower fine or in contesting the government's proof of damages. The company's recognition that its decision to decline to enter an early plea deal may cause its own executives to seek cooperation agreements with the government puts added pressure on the company to accept the government's offer.

²⁶ Of course, if there is no plea agreement, all of the company's executives remain subject to prosecution.

In addition, the Division's burden to prove sufficient gain or loss to support a Guidelines fine to a jury beyond reasonable doubt may not be as great as one might initially suspect. As already noted, a Guidelines corporate fine is based on the defendant company's volume of sales of the product affected by the conspiracy during the course of the scheme. However, the potential maximum fine under the alternative fine statute is twice the gain derived by all conspirators or twice the harm suffered by all victims that is relevant. Therefore, the percentage overcharge on the entire commerce affected by the conspiracy that the Division would have to prove to support a Guidelines fine for any one conspirator defendant may be surprisingly low in most cases. Furthermore, a determination in the criminal proceeding of the amount of the gain or loss (plaintiffs would argue a determination of the minimum amount of the gain or loss) could have a very negative impact on the company's ability to defend fully against the plaintiffs' damage claims in the follow-on civil cases.

There are a number of other pressures on corporate decision-makers to enter an agreement with the government. The continuation of a criminal investigation of a company and its executives can be a public relations nightmare and is a constant distraction to the company's management and its employees. It diverts their attention and energy from the performance of their ordinary corporate and business responsibilities, which can have a substantial negative impact on the company's performance. An early settlement with the government not only removes that distraction, but it can significantly improve the company's relationship with its customers and improve its competitive position by allowing the company to "admit its mistakes" and move on. These can be powerful incentives for corporate managements and boards to agree to settlements with the government, even at a fine level above the statutory maximum.

Going forward (conspiracies lasting beyond June 22, 2004) the alternative fine statute will come into play only in cases where the Division is seeking a fine in excess of \$100 million. Nevertheless, in those rare cases where the government intends to seek fines pursuant to the alternative fine statute, the incentives and pressures outlined above will remain powerful motivators for corporations to agree to fines above the Sherman Act statutory maximum.

V. CONCLUSION

The Section of Antitrust Law believes that there is no compelling reason to single out antitrust crimes as exempt from the operation of the alternative fine statute 18 U.S.C. § 3571(d). Furthermore, the Section believes that if antitrust crimes were to be exempted from the alternative fine statute, it would be necessary to increase the maximum corporate fine under the Sherman Act, but obtaining a consensus on the appropriate amount of the increase and asking Congress to consider increasing the Sherman Act maximum corporate fine just two years after it was increased ten-fold are both highly problematic.

The Section also believes that the Commission should recommend 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 of lesser magnitude, and would achieve a greater degree of fairness and reasonableness in sentencing organizational defendants in criminal antitrust cases.

Finally, the Section believes that despite the apparent increased burden on the government to obtain fines pursuant to the alternative fine statute resulting from the Supreme

Court's decision in *Apprendi*, factors other than the possibility that, if contested, the government would have to prove the gain or loss to a jury beyond reasonable doubt and might fail in doing so, will continue to act as powerful motivators for corporations to agree to fines above the Sherman Act statutory maximum.

Respectfully submitted,

Section Of Antitrust Law
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