

**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW ON H.R. 1086:
INCREASED CRIMINAL PENALTIES, LENIENCY
DETREBLING AND THE TUNNEY ACT AMENDMENT**

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**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW ON H.R. 1086:
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DREBLEING AND THE TUNNEY ACT AMENDMENT**

The Section of Antitrust Law of the American Bar Association appreciates the opportunity to present its views on the important issues raised in the criminal penalties, drebleing and Tunney Act provisions of the antitrust legislation currently before Congress (H.R. 1086, previously considered as S. 1797). The views expressed in these comments are those of the Section of Antitrust Law and they 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 nor should they be construed as representing the policy of the American Bar Association.

The Section will provide comments on all three parts of the proposed legislation and strongly urges Congress to hold hearings or public briefings on these complex and difficult issues. First, the Section strongly supports the U.S. Department of Justice Antitrust Division's considerable efforts to detect and prosecute cartel behavior. Like all who are concerned about the integrity of our market economy, the Section favors substantial and effective penalties for corporations and individuals who engage in clandestine, hard core collusion affecting prices, allocation of markets or customers and similar conduct. Penalties are an important element of effective deterrence to this type of conduct. Although not recommending any specific maximum sentence, the Section supports an increase in the statutory maximum corporate fine to eliminate potential inequities in favor of criminal defendants who contest their cases, leaving defendants who cooperate in a far worse position. The Section cautions that there could be unintended adverse consequences from

the proposal to increase maximum prison terms. This view is informed by our members' extensive experience in the practical aspects of criminal enforcement.

Second, the Section strongly supports the de-trebling provision of the legislation as an effective and innovative tool to enhance detection of antitrust crimes through creation of an additional and powerful incentive for corporate self-reporting. This provision is likely to enhance the effectiveness of the Antitrust Division's leniency program even in the face of the serious proliferation of U.S. antitrust damage actions and the increasingly broad reach of antitrust damages to non-U.S. purchasers as a result of the *Empagran*¹ and *Kruman*² cases. The legislation could, therefore, provide a major incentive to companies to self report their improper behavior and serve as a source of great assistance to the Antitrust Division, whose scarce resources can then be devoted to additional cartel investigations. Because this is innovative legislation, its implementation should be carefully crafted to protect the leniency applicant by establishing transparent procedures and by safeguarding the interests of consumers and other parties that are injured by cartel activities. As the statutory plan already reflects, it should be re-evaluated after a five-year trial period.

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1. *Empagran v. F. Hoffman La-Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, ___ U.S. ___, 2003 WL 22734815, 72 USLW 3356 (Dec. 15, 2003). This case will likely be heard by the U.S. Supreme Court in Spring 2004 regarding the issue of whether non-U.S. purchasers of vitamins who purchase their product outside of the U.S. can sue for treble damages in the U.S. courts. This case will likely resolve this issue. If affirmed, the case could increase damage liability in the typical cartel case many times over, depending on the volume of sales outside the United States.
 2. *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 USLW 3169 (Aug. 8, 2003).

Third, the Section opposes the provision that amends the Tunney Act. This provision is, in the Section's view, unnecessary and will greatly complicate the certainty of Antitrust Division settlements and impair the speed with which transactions will be completed.

I. Increases In Antitrust Fines And Prison Sentences Raise Complex Questions Of Policy And Practice And Should Be Enacted Only After Hearings Or Public Briefings

The proposal to increase maximum Sherman Act criminal fines and prison sentences raises many complex and difficult issues. As a threshold matter, Congress should make a clear statement regarding the types of offenses that may be prosecuted criminally under the Sherman Act. Congress should also look at the current impact of actual sentences in antitrust cases as a form of deterrence, as a means of enhancing enforcement and as a result of adherence to the provisions of the U.S. Sentencing Guidelines. The Section has devoted much of its time in recent years to the study of antitrust remedies.³ Based on this experience, the Section strongly urges Congress to hold hearings or public briefings on these issues to evaluate, in a serious, thorough manner, the impact and the inter-relationship of these issues.⁴ The Section is prepared to assist the Congress in analyzing these important issues.

3. For a concise review of the development of criminal antitrust enforcement see Roxane C. Busey and Patrick J. Kelleher, A Short History Of Civil And Criminal Antitrust Remedies And Penalties, 2002 Section of Antitrust Law Spring Meeting. In April 2003, the Section held a two-day Remedies Forum where many experts in the field provided papers and testimony regarding antitrust remedies issues, including criminal penalties and the impact of civil damage actions on antitrust deterrence. The materials from the Forum are available on the Section of Antitrust Law's website at www.abanet.org/antitrust/remedies.

4. These are difficult and complex issues. For a brief discussion of the challenges of determining optimal antitrust penalties see Andrew I. Gavil, William E. Kovacic and Jonathan B. Baker, Antitrust

A. The Legislative History Of The Proposed Legislation Should Make Clear That Increased Fines And Imprisonment Should Be Reserved For Hard Core, Clandestine Activities That Harm Competition And Consumers

The proposed legislation would increase the criminal penalties for violation of Sections 1, 2 and 3 of the Sherman Act. Sections 1 and 3 prohibit unreasonable restraints of trade, while Section 2 prohibits monopolization or attempts to monopolize. The criminal penalties provisions of the Sherman Act do not differentiate among the various types of anticompetitive conduct that could violate the Act. The means of determining whether conduct is considered *per se* illegal or subject to the rule of reason are judicially created categories, not identified statutorily. The Antitrust Division has, for many years, been judicious in limiting criminal enforcement to hard core, clandestine conduct such as price fixing, bid rigging and customer, territorial or market share allocation schemes.⁵ This judgment is the result of prosecutorial discretion, not the dictates of the statute. Indeed, the current Assistant Attorney General for the Antitrust Division has stated clearly and unequivocally that the type of conduct that will be prosecuted criminally “is hard core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity,

Law in Perspective: Cases, Concepts and Problems in Competition Policy 1040-46 (West Group 2002).

5. Congress should consider the wisdom and practical effect of increasing criminal penalties for monopolization offenses under Section 2. It has been many years since a monopolization case was prosecuted criminally, and a monopolization case involving hard core, clandestine conduct is highly unlikely.

concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior.”⁶

The Division’s discretion is also informed by the case law, which has echoed the same point. The United States Supreme Court has acknowledged that the Sherman Act “does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits . . .”⁷ and has provided rigorous requirements to establish criminal intent. While it is highly unlikely that the Congress will, 113 years after the passage of the Sherman Act, parse the statute into separate criminal and civil parts based on the type and degree of anticompetitive conduct, it is critical that the legislative history of this legislation establish Congress’ clear intent that any increased fines and incarceration should apply only for the hard core, *per se*, clandestine conduct such as price fixing, bid rigging and customer, territorial or market share allocation. That clear intent of Congress will provide direct guidance to the courts and will, together with court decisions such as the *Gypsum* case, prevent misuse of this effective enforcement tool.

B. The Rationale For Increased Criminal Fines

The Section supports an increase in antitrust criminal fines, although it takes no position as to the level to which the statutory maximum fine should be increased. The

6. Assistant Attorney General R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals (August 12, 2003) (available at <http://www.usdoj.gov/atr/public/speeches/201241.htm>).

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

Section believes that an increase in fines is warranted as a means of establishing greater deterrence and to provide some proportionality of sentences so that those cooperating are not disadvantaged because they did not contest the sentencing proceedings. Although the Division has had great success in obtaining fines significantly larger than the current statutory maximum, there may be situations in which the Division would have difficulty establishing the basis for alternative maximum sentences.

1. The Antitrust Division Has Demonstrated The Ability To Use The Alternative Criminal Fines Act To Obtain Fines That Exceed The Sherman Act's Maximum Fine Levels

Since 1996, the Antitrust Division has regularly obtained corporate fines well in excess of the statutory maximum fine. Indeed, since 1996, the Antitrust Division has obtained fines in excess of the statutory maximum \$10 million in 35 cases, with its highest fine being \$500 million.⁸ The Division was able to achieve these results by use of the alternative maximum fine provision of 18 U.S.C. § 3571(d), which provides that the government can set as an alternative to the statutory maximum fine an amount that is twice the gain or twice the loss from the conduct. The principal reason for the Antitrust Division's success in this arena is that corporate defendants usually enter into a negotiated plea agreement rather than challenge the Division at trial and, if necessary, at a contested sentencing hearing. By entering into a plea agreement with the Division in international

8. See Appendix 1.

cartel cases, corporations often gain much from the bargain even while agreeing to a fine much higher than the Sherman Act statutory maximum.⁹

The risks to the Antitrust Division in proceeding under 18 U.S.C. § 3571(d) are, first, the Division may not be able to prove actual gain or loss to the court's satisfaction, especially when evidence is not readily available or the violation cannot be easily quantified. This is a serious problem that could result in the fines in some of its major cases being capped at the statutory maximum – currently \$10 million. Second, since Congress gave the court the discretion to refuse to conduct a sentencing hearing under § 3571(d) if it finds the process “would unduly complicate or prolong the sentencing process,” the Division could be unable to put on the evidence of actual gain or loss at sentencing. While this has not yet occurred in a corporate antitrust sentencing, and has occurred only once in the prosecution of ADM's senior executives when other factors caused the Court to “default” to the statutory maximum fine, such a situation could be inequitable and disproportionate if it were to occur. If the court refuses a hearing because of time considerations, the speculative nature of the proof, the absence of data to prove gain or loss

9. In these plea agreements, the Division has provided many incentives to the cooperating corporations, including non-prosecution agreements involving other product areas, non-prosecution of some or all corporate executives, resolution of the U.S. travel status of non-U.S. citizens, prosecuting the offense as a single Sherman Act count rather than more serious fraud charges, and, perhaps, conviction on a more limited conspiracy than would have been the case if the Division were required to indict. Plea agreements are obviously intended to provide both the government and the defendants with benefits that they might not otherwise obtain in litigation.

or any other reason the court may raise, the maximum fine for a corporation would be capped at \$10 million under the current law.¹⁰

While, absent the legislation, the Division would continue to obtain fines over \$10 million in most plea bargaining situations, the Division faces a situation where the uncooperative defendant that contests the alternative sentencing procedure could actually obtain a far lower sentence than the cooperating defendant who agrees to a “twice the gain, twice the loss” sentence. That disparate treatment of defendants, if it occurs, would raise substantial fairness concerns. From that perspective, increasing the fine level statutorily would increase the fairness and transparency of corporate sentencing and limit opportunities for situations in which the defendant contesting the sentence will obtain better treatment than the defendant accepting responsibility and cooperating with the Division. If nothing else, the proposed legislation may be construed as a “safety net” so that fine levels in challenged cases are not considerably lighter than fine levels in plea situations.

While the Division’s success in obtaining fines well in excess of the statutory maximum, together with the other spiraling costs of antitrust civil actions, appears to provide effective deterrence, as a matter of public policy there should not be an exception or

10. The defendant also faces many risks in contesting a sentence at a 18 U.S.C. § 3571(d) hearing. The Antitrust Division will usually be able to prove its case, since the standard of proof at a sentencing hearing is the civil case standard of a preponderance of the evidence. The Division may be able to prove an enormous impact of the conspiracy on customers or consumers — and the sentencing price may be very severe for the defendant. The Division will require the parties to provide data to establish gain or loss, and will call corporate employees and customers to testify about the gain or loss resulting from the conduct. The defendants do not want the Division to put on proof of higher prices and to expose publicly the internal deliberations of their pricing policies. Most significantly, the Division’s evidence in a contested sentencing proceeding will be presented in open court, providing a road map for actual or potential treble damage plaintiffs.

a loophole that provides opportunities for major violators to avoid serious and proportionate punishment. While the Section supports raising the level of criminal fines above the current statutory maximum of \$10 million, the Section strongly urges hearings or public briefings to determine what level of fines should be established as the maximum statutory level. These hearings or public briefings can explore the impact of the proposed ten fold increase, its impact on small cases or short conspiracies or the impact of higher fines on corporate cooperation and self reporting.

2. In Determining How The Level Of Criminal Fines Affect Deterrence, Congress Should Consider The Total Exposure Of A Criminal Antitrust Defendant In Assessing The Amount To Increase Criminal Fines

In determining a statutory maximum fine level, Congress should consider that from a deterrence perspective, antitrust criminal prosecutions, especially in recent international cartel cases, have involved a price tag much higher than the criminal fine paid. Both the size of international conspiracies and the level of fines that the Antitrust Division has obtained have triggered a resurgence of antitrust class action cases, the increased frequency of opt-out treble damage cases and numerous state indirect purchaser cases.¹¹ In the recent vitamins litigation, for example, over thirty-five federal actions have been filed and

11. According to the Administrative Office of the United States Courts, antitrust case filings have as a general matter been on the increase in the last five years, although they remain at far lower levels than was common as recently as the 1970s. Class actions spiked in 2000, very probably in response to high profile government prosecutions, such as the lysine and vitamins cartels, and the Microsoft monopolization case. It appears, however, that the surge in class action activity may be subsiding, perhaps due to a moderating trend in high profile antitrust prosecutions.

	1998	1999	2000	2001	2002
# Antitrust Cases Filed	580	645	858	723	826
# Antitrust Class Actions	60	100	213	122	126
Class Actions as % of All Antitrust Cases	10%	16%	25%	17%	15%

consolidated by the Judicial Panel on Multidistrict Litigation, while over fifty state court direct and indirect purchaser actions have been filed all over the United States.¹²

Similarly, the global nature of antitrust enforcement, which was essentially non-existent prior to the huge cartel cases of the past ten years, has made additional enforcement actions by foreign governments, particularly Canada and the European Union, regular events.¹³ The combined costs of all of these proceedings against a corporation and its officials have grown substantially. Consideration of this amount is a more reliable measure of deterrence than a focus on criminal penalties alone.

Given the fact that the Antitrust Division has been investigating and prosecuting these much larger international cases only since the mid-1990s, the full impact of these fines and related punishments cannot yet be fully determined. Since October 15, 1996, with the precedent-setting \$100 million corporate fine against ADM, the Division has been utilizing § 3571(d) to calculate alternative maximum fines well above the Sherman Act maximum.

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12. The federal actions were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation before Chief Judge Hogan in the U.S. District Court for the District of Columbia (MDL-1285). Indirect purchaser actions were filed and handled at a state court level in many states, including Alabama, California, Kansas, Wisconsin, Illinois, and Minnesota, among others.
 13. Major U.S. prosecutions in the lysine, citric acid, vitamins, graphite electrodes and various chemical industries were followed by investigations by the antitrust enforcement authorities of Canada, the European Union, Japan, Australia and Brazil. Cartel investigations have become more international in scope, and as the economy has become more global, the concerns about possible prosecution facing an organization, whether based in the U.S. or elsewhere, extend beyond the United States. The European Commission, Directorate General for Competition often conducts investigations concurrently with the United States Department of Justice, as does the Canadian Competition Bureau, which has powers to bring criminal actions as well. Australia and Japan have been increasingly active in enforcement actions. The United Kingdom recently amended its competition laws to provide for criminal penalties against corporate officers and directors of up to five years imprisonment. See generally, R. Hewitt Pate, *supra* note 6 at 7-8.

More than two years later, the Division obtained a record fine of \$500 million in the vitamin cases. Large corporate fines were imposed against companies in the citric acid, lysine, marine construction, marine transportation, fine arts auctions, USAID construction contracts, chemicals, sorbates, graphite electrodes and vitamins industries, among others. (See Exhibit 1). Each involved international antitrust conspiracies that literally affected the entire world.

The most dramatic, and potentially far-reaching, development of the past three years from a corporate deterrence perspective has been the interpretation by two U.S. Courts of Appeals that, in the context of a global antitrust conspiracy affecting the U.S. market, the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, allows foreign purchasers of products from foreign suppliers to sue under the U.S. antitrust laws for treble damages. This issue is likely to be argued before the U.S. Supreme Court in the Spring;¹⁴ affirmance of this result could change the deterrence equation dramatically by potentially increasing damage liability substantially.

The deterrence issue has no easy answer but simply exemplifies the importance of the need for hearings or public briefings on these issues. Based on the hearings our Section held at our Remedies Forum in the Spring of 2003, the Section recognizes that some will argue that the statutory maximum fine, not fines in individual cases, affect deterrence. Others will argue that the total cost of the cartel investigation and prosecution is the basis for deterrence, not the criminal penalty. Some also believe that combined criminal and civil

penalties provide too much deterrence that will chill the businessperson in his decision making while others hold that such deterrence is too little or the necessary consequence of the company's wrongdoing. Whether increased criminal penalties will provide an appropriate level of deterrence based on the total cost of cartel investigations and litigation to the companies should be the subject of hearings and public briefings to reach the proper deterrence balance.

3. If Congress Increases Criminal Fines It Should Direct The United States Sentencing Commission To Assess Whether Current Presumptions In Determining Criminal Fine Levels Are Empirically Sound And Good Public Policy

If it enacts the proposed corporate fine increase, Congress should reassess the Sentencing Guidelines presumption that twenty percent of the volume of commerce is an appropriate proxy for the gain or loss in a conspiracy. This presumption is unique in the U.S. Sentencing Guidelines for antitrust crimes and produces disproportionate effects under existing sentencing that result in either higher or lower sentences than would be appropriate if the gain or loss were actually calculated.

Corporate sentencing in an antitrust case is controlled by Section 2(R)1.1 of the Sentencing Guidelines, which directs the court to “use 20 percent of the volume of affected commerce” to calculate the base fine.¹⁵ The rationale for the inclusion of this presumption is stated in the Sentencing Guidelines:

14. *Empagran v. F. Hoffmann-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, ___ U.S. ___, 2003 WL 22734815, 72 USLW 3356 (Dec. 15, 2003).

15. USSG 2(R)1(d)(i).

It is estimated that the average gain from price fixing is 10 percent of the selling price. The loss from price fixing exceeds the gain, because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price fixing exceeds the gain, subsection (d)(i) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under Section 8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the Court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range. (USSG §2R1.1 cmt. n.3).

In practice, this twenty percent loss presumption has controlled the resolution of criminal sentences imposed on corporations. The Section has found no other Sentencing Guideline that utilizes this type of proxy. This presumption is unique in the Sentencing Guidelines, and virtually unprecedented in criminal sentencing proceedings.

Having reviewed the Sentencing Commission's analysis of this issue, this presumption was unsupported by any empirical economic evidence. It now has been employed since 1991. Since 1996, the Antitrust Division, and many defendants in antitrust cases, have determined the actual gain or loss resulting from the conduct that is necessary for them to calculate the alternative maximum fine under 18 U.S.C. § 3571(d).¹⁶ This development, which has had a great impact on the size of criminal fines, is in substantial conflict with the twenty percent presumption in the Sentencing Guidelines. As part of any change of the statutory maximum fine, Congress should instruct the Sentencing Commission

16. As noted above, the Division can seek a fine above the statutory maximum pursuant to the alternative fines provision of 18 U.S.C. § 3571(d). This section authorizes a fine based on twice the gain derived from or loss caused by the illegal activity. Thus, the Division has to prove actual loss in order to invoke this provision. In practice, however, the Sentencing Guidelines presumption is used by the Division as a benchmark for this calculation for a negotiated resolution.

to review this controversial formula in light of the significant experience of the Division in cartel cases. Such a review could result in much higher fines in egregious cases of significant overcharges and much lower fines in appropriate cases, as opposed to the current “one size fits all” presumption.

This issue is particularly relevant to the question of whether the maximum fine should be increased to \$100 million. Under the current sentencing regime, the Division would be able to advocate a fine of as much as \$100 million based on nothing more than this unsupported presumption. Despite the harm that actually occurs, the current sentencing presumption enables the Division, in many cases, to extract a very high penalty without establishing any factual basis for the finding,¹⁷ as well as foregoing higher penalties where the presumption seriously underestimates the overcharge or loss.

Looking at the Sentencing Guidelines employed in other criminal offenses, including numerous types of business misconduct, there are no other situations known to the Section where the United States is entitled to presume the loss generated by the illegal conduct. Certainly, the calculation of the loss generated in a large securities fraud case, or a substantial environmental crime, is as difficult to calculate as in an antitrust case. Yet, there is no comparable sentencing presumption imposed for those offenses.

The Antitrust Division has defended this presumption by arguing that there are unique problems of proof that prohibit the establishment of the loss in an antitrust

17. An increase of the statutory maximum would greatly expand the Division’s ability to invoke the presumption irrespective of the loss that could be proved or the harm that had been done.

sentencing proceeding. The Division deals with these issues on a frequent basis, and Congress and the Sentencing Commission should carefully consider the Division's rationale and any empirical evidence it can produce to support its position.¹⁸ It should be considered, however, against the backdrop that the Division has regularly determined gain or loss to increase the maximum fine recommendation, pursuant to 18 U.S.C. § 3571(d).¹⁹ In addition, the calculation of loss or gain is made and supported by competent evidence in the case of every civil plaintiff.²⁰ This issue should be studied carefully to achieve fairness in sentencing among a number of criminal offenses.

Finally, there may be instances when the Division would not be able to prove a substantial loss, such as when the conspiracy was not as successful or evidence from sales documents were not available. If the Division is unable to prove a loss where little or none existed, then justice will be served by a smaller fine that reflects a penalty for the illegal conduct but a recognition of the relatively insignificant actual harm inflicted by the illegal

18. See studies cited in Greg Werden, "The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook," Antitrust Division Economic Analysis in Group 2003 Discussion Paper 03-02. Dr. Werden is an Antitrust Division economist.

19. The Department of Justice has substantial advantages in a sentencing proceeding. Unlike proof of guilt, the government's burden in a sentencing 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 proceeding is significantly less than that which must be confronted by the civil claimants.

20. The standard of proof 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).

conduct. 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.²¹

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.

C. The Impact Of Increased Prison Sentences – Some Practical Consequences That Should Be Considered

1. An Increase in Maximum Prison Sentences Should Carefully Balance The Possibility of Increased Deterrence Against The Unintended Consequence of Less Cooperation

While a significant increase in the maximum prison sentence would have an impact on Antitrust Division prosecutions, the Section is concerned about its practical impact. The Section urges Congress to balance the impact of increased prison sentences against the unintended consequences that higher prison sentences may have on the detection and successful prosecution of cartel cases. One of the major reasons to enact the proposed legislation is to increase deterrence of antitrust violations. Deterrence is hard to quantify or analyze, but it includes two factors: punishment and the likelihood of detection. As

21. USSG 2R1.1(b)(1) and USSG 2R1.1(d)(3) (discussion of increased penalties for bid rigging for individuals and corporations, respectively).

reflected in the comprehensive study of antitrust remedies in the testimony at the Section's Remedies Forum,²² many argue that, from a punishment perspective, an increase in maximum prison sentences will significantly increase deterrence. Others, looking at the likelihood of detection and conviction, are concerned that if the increase in sentences leads to greater difficulty in obtaining pleas and cooperation in antitrust prosecutions it could create a perception in the business community that the risk of serving a prison sentence has actually diminished, thereby decreasing deterrence. The proper balance needs to be reached and the Section submits that such a balance should not be determined without more serious review of the practical consequences through hearings or public briefings. Based on its comprehensive study of remedies issues and based on the record generated by the Section's Remedies Forum in April 2003, the Section believes that Congress should address these difficult issues only after in-depth review in hearings and public briefings.

In analyzing this issue, Congress should consider the policy comment of the United States Sentencing Commission regarding antitrust offenses: "The Commission believes that the most effective method to deter individuals from committing this crime is through the imposition of short sentences coupled with large fines."²³ Many antitrust enforcement officials, however, argue that the amount of the criminal fine or civil damages is a far less potent deterrent than prison sentences for corporate executives, foreign and domestic.²⁴

²² Section of Antitrust Law, Remedies Forum, *supra* at note 3.

²³ USSG 2R1.1 cmt. n.7.

²⁴ Assistant Attorney General R. Hewitt Pate, Anti-Cartel Enforcement: The Core Antitrust Mission (May 16, 2003) (available at <http://www.usdoj.gov/atr/public/speeches/201199.htm>).

Congress should carefully examine these competing views in assessing whether increases in sentences will increase deterrence.²⁵

Whenever questions of punishment and deterrence are raised, it becomes necessary to strike a balance of very complex concepts. When the incentives and rewards of competition versus collusion are put in this framework, the issues become even more complex and difficult. Because both deterrence and the impact of higher fines on enforcement are difficult, if not impossible, to quantify, Congress should seek the view of those most experienced in this area. Will higher prison sentences cause corporate executives to think twice about entering into a cartel in the first place? If the corporate executive is investigated, will higher prison sentences make it more likely that the executive would cooperate, fearing a much higher sentence, or would the executive decide that there is no good alternative and the executive should take the chance and force the Antitrust Division to

25. Deterrence in white collar/corporate crime has been the subject of a number of scholarly articles, but there is little agreement on the impact of severe monetary penalties in deterring illegal conduct. The articles do not provide any consensus regarding adequate deterrence in the criminal antitrust environment. *See, e.g.*, John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981) (discussing many of the complex factors to be considered in evaluating the effectiveness of corporate fines and punishment generally); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 Am. Crim. L. Rev. 409 (1980) (advocating fines over imprisonment as punishment of white collar crime); *see also* Gary Becker, *Crime and Punishment*, 76 J. Pol. Econ. 169 (1968). As noted by one commentator, however, measuring antitrust deterrence can be very difficult. *See* Stephen Calkins, *An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 Ariz. L. Rev. 413 (1997), and Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties*, 60 Law and Contemporary Problems 127 (1997). There are no known empirical studies on the adequacy of the present mix of criminal and civil antitrust sanctions from the standpoint of deterrence. One study, Joseph C. Gallo, Kenneth G. Dau-Schmidt, Joseph L. Craycraft & Charles J. Parker, *Criminal Penalties Under the Sherman Act: A Study in Law and Economics*, 16 Res. L. & Econ. 25 (1994), is based on data from time periods when substantially lower statutory fines were in effect and when prison sentences were much less likely to be imposed. Today, with the array of civil actions that follow substantial criminal antitrust fines, the analysis of deterrence factors should be far more complex.

its proof? If the Division is unsuccessful in either developing cases or winning prosecutions because of less cooperation, does that undermine the deterrent effect of very high maximum prison sentences? It is for these reasons that the decision on increases in these penalties needs careful and thoughtful consideration and should be subjected to rigorous empirical and theoretical analysis through hearings or public briefings. The Section's Remedies Forum in April 2003 is strong evidence that there is no easy or simple solution to this question.²⁶

a. The Proposed Legislation Is Likely To Increase Minimum Sentences Dramatically

The proposed legislation would increase the maximum period of incarceration for an antitrust crime more than threefold – from three to ten years. While this is a dramatic increase, Congress should understand the practical application of this proposed increase and its potential effect on important aspects of the Division's enforcement program. The Section strongly agrees that serious punishment is necessary and appropriate in these cases. The Section cautions, however, that Congress should look at the practical impact higher sentences will have on witness cooperation or potential cooperation that is uniquely important to effective prosecution of antitrust conspiracies. Next to the leniency program itself, cooperation from executives willing to plead guilty in exchange for much reduced sentences is the chief source of evidence by which the Division builds its cases. In these cases where the principal element is proving an agreement among competitors, it is exceedingly difficult to establish a case based on one witness' or one company's testimony,

26. Section of Antitrust Law, Remedies Forum, *supra* at note 3.

so the success of a contested case often depends on negotiated settlement with individuals from a number of defendants.

Application of an increase in the statutory maximum period of incarceration would likely require action by the Sentencing Commission before a practical impact would be felt in a criminal proceeding. There is some guidance from the Sentencing Commission's response to Sarbanes-Oxley,²⁷ where the Act directed the Sentencing Commission to reconsider the penalties imposed for obstruction of justice offenses. The Commission amended USSG 2J1.2 to increase the base offense level for obstruction of justice offenses by two levels.²⁸

Based on that experience, and assuming a minimal two-level adjustment was made for the Guideline addressing antitrust offenses, there would be a significant increase in the periods of incarceration imposed in virtually all antitrust cases. The effect would be most evident with sentences imposed through a negotiated plea agreement, which is how the Antitrust Division obtains much of its cooperation. The Division has often negotiated an agreed-upon sentence at offense levels from Level 13 to Level 15. Level 13 requires the imposition of a sentence between 12 and 18 months, while a Level 14 is between 15 and 21 months, and Level 15, between 18 and 24 months.

If there were a two-level increase in the base offense level, as occurred under the Sarbanes-Oxley obstruction of justice statute, the sentences would be at Levels 15 through

27. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. §7201 *et. seq.*)

17. This would result in a substantial increase in the period of incarceration that would have to be accepted by a defendant to negotiate a resolution. A Level 15 would result in a penalty of 18 to 24 months, a Level 16 at 21 to 27 months, and a Level 17 at 24 to 30 months. In a typical case, it would result in a fifty-percent increase at the bottom of the sentencing range at the lowest level – a substantial increase with little negotiating room for a lower sentence. While the Antitrust Division can influence sentences for cooperating witnesses through downward departures under USSG 5K1.1, the new higher sentences would always be the beginning point of sentencing calculation, and departures would have to be much larger to bring sentences down to a level many cooperating witnesses would accept. Such a result may or may not have practical consequences in affecting the willingness of defendants to negotiate plea agreements rather than put the Division to its proof at trial. Without hearings or public briefings the Congress will not have sufficient information to make a balanced judgment.

b. **Congress Should Consider Whether Increases In Minimum Sentences May Have An Unintended Adverse Impact On Successful Antitrust Enforcement**

Given this circumstance, Congress should consider the effect of higher sentences on deterrence and on the Antitrust Division’s enforcement program. Because proof of an antitrust offense requires proof of a conspiracy, it presents unique prosecutorial challenges. Frequently, alternative explanations for pricing discussions or other market conduct are raised as a defense in antitrust prosecutions. Likewise, defendants in these prosecutions

28. Report to the Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002, United States Sentencing Commission, January 2003.

frequently will seek to convince a jury that competitor communications had no impact on price. Accordingly, antitrust prosecutions nearly always depend upon gaining the cooperation of more than one of the direct participants in the conspiracy as witnesses through plea or leniency arrangements. The Section submits that whether a significant increase in the base incarceration period could chill the willingness of individuals to negotiate plea agreements to help build the Division's cases for trial is the crucial question Congress needs to confront. This concern is particularly true in cases involving the prosecution of international cartels, in which key witnesses will frequently balance the benefit of accepting a limited prison term to regain the ability to travel in the United States with the fact that absent cooperation they are unlikely to be extradited and face prosecution in the United States. If cooperation is deterred, the Division would not only be deprived of the cooperation instrumental in helping to prove the conspiracy under investigation and to initiate investigations of other markets, but also would be required to expend substantial additional prosecutorial resources to prepare for and try cases that otherwise would have been resolved by agreement. Congress should consider whether the unintended effect of a substantial increase in the incarceration period could be a significant reduction in the Division's enforcement program or a significant increase in the size of the Antitrust Division's staff. In considering this issue, Congress should consider the perspective of both the career prosecutors familiar with the strategies in succeeding in such cases and of members of the defense bar who know the considerations targets of such investigations – domestic and foreign – apply in determining whether to enter into such a plea arrangement.

The Section submits that this is a difficult and delicate balance that should be considered carefully either through hearings or public briefings.

c. Congress Should Consider Whether Dramatic Increases In Minimum Sentences May Have An Adverse Impact On Cooperation From Foreign Governments

In an era of international cooperation in fighting cartels, Congress must consider the U.S. role in the world competition community. Given past circumstances, there may be substantial concern by some foreign jurisdictions that the enforcement of antitrust law in the United States is too severe – and especially unfair to foreign corporations and nationals. In particular, many foreign jurisdictions may be concerned by the combination of severe and escalating criminal penalties and innumerable and duplicate civil actions for multiple damages, especially if the *Empagran* case is upheld by the Supreme Court. The Section understands on good authority that several jurisdictions intend to file amicus briefs in the *Empagran* appeal making exactly this point.

Congress should analyze the possibility that an increase in Sherman Act maximum prison sentences would cause other governments to reconsider or limit the cooperation that has been forthcoming in anti-cartel investigations. It is inevitable that some jurisdictions would react adversely to higher penalties, especially when those penalties implicate their nationals. If a foreign jurisdiction is unhappy because of the level of U.S. penalties, that could affect cooperation efforts in the United States and in other jurisdictions. If this were to occur, the Division's very successful program to detect and prosecute international cartel

activity could be compromised, affecting the detection and prosecution of cases.²⁹

Accordingly, the likely trade-offs stemming from more severe sentences could limit the amount of cooperation in many cases – non-U.S. executives would simply “stay home” and not travel to the United States or its extradition partners – and create conflicts with the Antitrust Division’s international allies in anti-cartel prosecutions. This is a delicate question that requires careful analysis through hearings or public briefings to determine if such increases would be consistent with the Antitrust Division’s important goals in the larger, global enforcement community.

II. The De-Trebling Of Damages For Leniency Recipients Is An Innovative Experiment That May Improve Enforcement

The successful prosecution of cartels depends in the first instance upon detection. Much cartel detection, including most of the headline-making cases such as those in the vitamin, graphite electrode and art auction commission industries, has been the result of companies coming forward and participating in the leniency program. While the leniency program has been very successful, each company that is determining whether to report an offense must be mindful of its overall corporate obligations, including those to its shareholders. That means carefully considering the potentially costly treble damage civil

29. Prior to the mid-1990s, the Antitrust Division had great difficulty securing the cooperation of the non-U.S. executives in its cartel investigations. Indeed, the Division’s loss in *U.S. v. General Electric Company*, the famous “diamonds” case, was at least in part the result of not obtaining cooperation from non-U.S. executives. After the ADM case, the Antitrust Division began to obtain cooperation first by making no-prison deals and later by short incarceration deals (three to four months), along with securing immigration status for non-U.S. executives. These developments increased the incentives of the non-U.S. executives to cooperate fully in a situation where the executive could continue his international business career after he had cooperated with the Antitrust Division and served his sentence. However, the difference between serving three months in a U.S. prison camp and a far longer sentence in the U.S. penal system is substantial, and the latter may be an offer many international executives would likely reject.

liability that flows from cooperation with the Antitrust Division in a cartel matter. With treble damage liability growing on a global scale, such liabilities may significantly chill cooperation and self-reporting, particularly with regard to competitor agreements that may well not otherwise be discovered or are more limited or shorter in duration.

The natural effect of substantially increasing damages exposure is to create a disincentive for even the most responsible companies to cooperate with the Antitrust Division.³⁰ The detrebling provisions of the legislation, however, are a creative concept that the Section strongly supports. While the proposed legislation suffers from procedural problems that may preclude it from providing the intended incentives for corporate cooperation, the Section believes these problems can be easily rectified.

In considering this legislation, Congress should understand the potential magnitude of damages in a cartel case and the great benefit and incentive the legislation offers. As explained above, in addition to a corporate criminal fine, the cartel defendant is subject to civil damages that impose joint and several treble damage liability with no right of contribution on each defendant – no matter how limited its role was in the conspiracy. Direct purchaser cases are either class actions or opt-out actions.³¹ Class actions typically end with class settlements, negotiated by class counsel and approved by the court.

30. One recent study suggests that extremely high damage liability could discourage companies from seeking leniency. Phillip C. Zane, *The Price Fixer's Dilemma: Applying Game Theory To The Decision of Whether to Plead Guilty to Antitrust Crimes*, 48 Antitrust Bull. 1 (2003).

31. Defendants in cartel cases inevitably also face indirect purchaser treble damage actions in state courts throughout the country. This is as a result of state laws repealing the *Illinois Brick* preclusion of such cases. These cases typically cannot be removed and (unlike federal actions) cannot be consolidated into a single nationwide proceeding. Coordination among the state courts depends entirely on happenstance or informal cooperation between counsel and judges.

Defendants' settlement with a class plaintiff does not end the matter since they also must litigate with direct purchasers that "opt out" of the direct purchaser class settlement. Those opting out tend to be large, sophisticated firms with experienced counsel seeking large treble damage recoveries. Also, as discussed above, federal court treble damage claims for damages suffered by foreign direct purchasers as a result of foreign cartel activity have been initiated in many cases, and the issue is now pending before the U.S. Supreme Court.³²

The result is huge financial exposure, which is difficult to quantify even with the help of experienced counsel and economists. Hunkering down and taking cases to trial is usually not an attractive or affordable option. While a defendant who receives leniency has entered no guilty plea, the company will still be tried civilly with defendants that have pled guilty, will have to produce its incriminating documents, and will be subject to joint and several liability. Small or even moderate size defendants easily can face joint and several liability that can exceed their sales of the relevant product during the alleged conspiracy period.

As a result of this situation, the Section submits three factors should influence congressional action in this area. First, the corporate risk created by civil liability is enormous. Potential civil liabilities (with or even without the criminal fine) can be and in many cases have been "bet the company" in scope. Second, the current system has such potential for crushing liability that it may chill cooperation with the Division through the leniency program and otherwise to the detriment of consumers and the public generally. And third, allowing detrebling as a reward for self reporting and substantial cooperation

32. *Empagran, supra*, at note 1.

through the leniency program may serve the public interest without compromising restitution to victims. Formal hearings or public briefings on these factors could substantially inform Congress to clarify and improve the effectiveness of this provision.

The detrebling provision is a creative step towards enhancing the incentive of firms to come forward to cooperate with the Department of Justice with regard to criminal antitrust activity. The legislation would eliminate (a) trebling and (b) joint and several liability for sales others than the firms' own in both federal and state actions. This is a very significant reduction in potential liability that would directly affect (i) direct purchaser class actions; (ii) opt out direct purchaser cases; (iii) foreign direct purchaser claims; and (iv) state indirect purchaser actions. It is also consistent with the leniency applicant's obligation to pay restitution, since the legislation preserves liability for actual damages suffered by consumers as a result of the cooperating firm's sales.

It is important to consider the practicalities of the leniency process. A cooperating defendant is very likely to settle a civil case early, with or without this legislation. Being tried with other defendants who have pled guilty and having its incriminating statements and documents in evidence realistically complicates any effort to mount an effective defense. As a result, leniency applicants today usually try to achieve an early settlement, trading early cooperation with the plaintiffs for a lower payment.

Under the proposed legislation, the leniency applicant would be required to cooperate with plaintiffs in order to achieve detrebling. Plaintiffs no longer would need to trade a lower settlement value for cooperation early in the case since the defendant must cooperate

to achieve detrebling. Thus, one effect of the legislation may be that settlements will follow the statutorily prescribed cooperation, but will be negotiated off of single, not treble damages. This creates a significant benefit to the leniency applicant, and that may make it easier to decide in favor of cooperation.

The aspect of the legislation that needs to be seriously reviewed in hearings or public briefings is the proposed procedure for establishing a defendant's cooperation. The legislation provides little guidance on the determination or timing of the detrebling decision. As drafted, it would place the private plaintiffs in a position to advise the court of the extent of the defendant's cooperation. In these cases, private plaintiffs could demand levels of cooperation far beyond what the Antitrust Division required for leniency. In evaluating the cooperation of the leniency applicant, plaintiffs obviously have an economic incentive to reject defendant's cooperation as insufficient. Thus, an attractive economic outcome for a plaintiff will be to take whatever benefit it can from the defendant's actual cooperation but, at the end, advise the court that it fell short of full cooperation and the defendant should not be accorded the benefit of detrebling and removing joint and several liability. Despite the good faith of plaintiffs' counsel in making this assessment, the legislation would put plaintiffs' counsel in a terrible conflict between supporting the leniency applicant's request for detrebling and maximizing the economic benefit to their clients.

This problem is simply not addressed by the proposed legislation. It presents no objective standards for measuring cooperation. Under the proposed legislation, a company considering the leniency program will have no reasonable means of determining its eligibility for detrebling in advance of proffering the cooperation to plaintiffs. The absence

of clear standards that the leniency applicant may rely on when making the decision to cooperate may seriously undermine the impact of this legislation.

As a result, the Section encourages Congress to hold hearings or public briefings to fashion a more defined set of procedural standards. One approach would be for the Antitrust Division to certify that the applicant adequately cooperated in the criminal investigation and that, as in the Division's leniency program itself, that would provide conditional detrebling to the applicant. A description of the extent of the cooperation could be provided in the form of a list of witnesses made available to the Antitrust Division and the documents produced to the Division. The applicant's obligation in the civil proceeding would be to do the same for a plaintiff that it did for the Division. This will provide an incentive to the company to cooperate with plaintiffs knowing that it conditionally had obtained detrebling treatment.

From the plaintiffs' perspective, this would also be an objective measure and should provide sufficient assurance of cooperation since, after all, the Antitrust Division is preparing a case to meet a higher burden of proof than the plaintiffs have to carry. In effect, cooperation that is good enough for the Antitrust Division to prove a case beyond a reasonable doubt ought to be sufficient for the plaintiffs to prove a case by a preponderance of the evidence. At worst, the Antitrust Division's view should be sought and followed by the court, with a rebuttable presumption that the Division, the guardian of the public interest, got it right. Plaintiffs would have the right to present evidence of how the cooperation was insufficient, but that standard should be a high one. The need for a set of

standards and an impartial and objective source of a recommendation to the court is an essential step to insuring the fairness and ultimate success of this legislation.

Finally, the five-year sunset provision is an effective way to determine if this rather creative provision is workable and successful. Five years will be a fair test, after which the provision can be made permanent or withdrawn.

III. Amendments To The Tunney Act May Harm The Ability Of The Enforcement Agencies To Achieve Settlements And Be Detrimental To The Public Interest

Subtitle B of H.R. 1086 would amend Section 5 of the Clayton Act, 15 U.S.C. § 16(b)-(h), more commonly known as the Tunney Act. H.R. 1086 would change the Act in essentially two ways: (1) by granting the Antitrust Division the option to publish comments and responses regarding consent decrees under review by means other than the Federal Register, subject to approval by the district court; and (2) by mandating more searching judicial review of proposed consent decrees, including a new provision that requires the court to make a determination that the decree is supported by “substantial evidence and reasoned analysis.” The first change may improve the efficiency of the Act in a few cases by allowing the Antitrust Division to reduce the costs and delays of publishing all comments in the Federal Register. The Section will limit its analysis to the second set of changes, which could well harm the Antitrust Division’s civil antitrust enforcement program, as well as impede efficiency-enhancing and pro-competitive business activities of private parties.

Before considering these changes, the proposals should be studied carefully, and in particular Congress should examine in detail how the Act has worked in practice and whether that practice suggests any problems that need to be corrected. The Section is not

aware of any problems with the current functioning of the Act that would require legislative amendment. Congress has held no hearings on the effectiveness and efficiency of the existing Tunney Act. Nor have the need for the specific changes proposed in H.R. 1086 and their full ramifications been carefully assessed. This change in the Tunney Act could be detrimental to the enforcement and pro-competitive aims of the antitrust laws and should not be enacted, at least not without hearings or public briefings to explore the likely consequences of such action.

The Tunney Act, more formally known as the Antitrust Procedures and Penalties Act of 1974, plays a small, but important, role in the framework of federal antitrust enforcement. An essential feature of the antitrust laws is that they are enforced on a case-by-case basis by applying evolving general principles to specific facts, rather than by the enactment and administration of detailed rules and regulations. That is, antitrust enforcement is a matter of investigation and individual adjudication, not generalized agency regulation. For the Antitrust Division this means conducting civil investigations and, when necessary, challenging potentially illegal conduct in federal district court. As the Department of Justice does in other areas of civil law enforcement, the Antitrust Division frequently exercises its discretion to resolve antitrust cases by agreeing with the targets on binding consent decrees issued by the court. (The Federal Trade Commission does the same thing for matters under its jurisdiction, under a different regulatory regime.) Consent decrees serve the important function of allowing the Antitrust Division to operate much more quickly and at much less expense than if it tried all cases to judgment, freeing up resources to handle other cases. For the private parties involved, consent decrees similarly reduce expenses and delays and avoid

the risks and uncertainties of trial. These benefits accrue in the full range of civil antitrust enforcement, but particularly for transactions subject to preconsummation review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a. Frequently only a small and relatively easily remedied part of a transaction raises antitrust concerns, and the consent decree process allows the parties to remedy that part while avoiding the uncertainties and delay of protracted litigation. Such litigation can derail the entire transaction, or, at a minimum, further delay the transaction by six to nine months, jeopardizing the synergies and other benefits of the transaction and affecting the employment of numerous people and the competitive health of the product market. Consent decrees thus play a vital role in the Antitrust Division's efforts to correct anticompetitive aspects of transactions while allowing the public to benefit from pro-competitive aspects to the maximum extent possible.

The Tunney Act provides a mechanism for public notice and comment on such consent decrees and for review by the court. Among other procedures, the Act requires the Division to prepare a competitive impact statement describing the case and the proposed decree, evaluating alternative remedies actually considered, and discussing remedies available to private injured parties and procedures available for modifying the proposal.³³ This statement must be filed along with the proposed consent decree and must be published in the Federal Register at least sixty days before the decree becomes final.³⁴ The Division must receive and consider written comments on the proposal from the public and must

33. *See* 15 U.S.C. § 16(b).

34. *Id.*

publish the comments and the Division’s response to them in the Federal Register after the sixty-day period.³⁵ The court considering a consent decree must determine that it is “in the public interest” before entering the decree, and the statute identifies certain factors the court “may consider” as part of that determination, and allows the court to take certain actions to help it make that determination.³⁶

These provisions were intended to achieve a careful balance of judicial oversight and prosecutorial flexibility. In passing the Tunney Act, Congress intended to prevent courts from functioning as “rubber stamps” that approved proposed decrees without any inquiry at all.³⁷ It wanted courts to “make an independent determination as to whether or not entry of a proposed consent decree [is] in the public interest.”³⁸ But Congress also recognized that consent decrees are a “legitimate and integral part of antitrust enforcement” and “of crucial importance as an enforcement tool, since they permit the allocation of resources elsewhere.”³⁹ The committees reporting on the bill stated squarely that they “wish[ed] to retain the consent judgment as a substantial antitrust enforcement tool.”⁴⁰ Therefore, as Senator Tunney put it during the floor debate on the bill, “The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating

35. 15 U.S.C. § 16(d).

36. *See* 15 U.S.C. § 16(e)-(f).

37. *See, e.g.*, H.R. Rep. No. 93-1463 at 8, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6,539.

38. S. Rep. No. 93-298, at 5 (1973)..

39. *Id.* at 3, 5.

40. S. Rep. at 7; H.R. Rep. at 8 (referring to decrees as a “viable settlement option”).

the benefits of prompt and less costly settlement through the consent decree process.”⁴¹ He also emphasized that the factors enumerated in subsection (f) for the court to consider are “purely discretionary. . . . only guideposts, not designed to put strictures upon the court’s freedom, but rather to encourage even greater illumination of the facts”⁴² Both House and Senate reports noted the expectation that courts “will adduce the necessary information through the least complicated and least time-consuming means possible.”⁴³

Courts applying the Act have largely maintained this careful balance. They have recognized that the role specified for them in subsection (e) is somewhat limited. “The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General.” *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (citing *United States v. National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978)), *cert. denied*, 454 U.S. 1083 (1981)).⁴⁴ Thus, a court determines only whether the proposed decree is “within the reaches of the public interest,” and may not reject a decree because it believes a better one might have been negotiated.⁴⁵

41. 119 Cong. Rec. 24,598 (daily ed. July 18, 1973) (statement of bill sponsor Sen. Tunney).

42. *Id.* at 24,599.

43. S. Rep. at 6; H.R. Rep. at 8.

44. Indeed, as Chief Justice Rehnquist has noted, reviewing this balance of interests would threaten to encroach on powers constitutionally vested in the Executive Branch and embroil courts in political questions of public policy and non-judicial discretion. *See Maryland v. United States*, 460 U.S. 1001, 1105-06 (1983) (Rehnquist, J., dissenting) (dissenting from approval of proposed decree contingent on specific modifications).

45. *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1457-58 (D.C. Cir. 1995); *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990); *Bechtel Corp.*, 648 F.2d at 666; *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975).

There is a substantial record on which to evaluate the success of the Tunney Act as it was enacted. Courts have not shirked their responsibility to review consent decree proposals, and many have held hearings.⁴⁶ In some cases, proposed decrees have been withdrawn after substantial opposition.⁴⁷

The proposed amendment, therefore, would disturb the careful balance achieved in the current form of the Act. It would also substantially change subsection (e), which currently describes the “public interest” factors the court “may consider.” The current subsection (e), particularly coupled with subsection (f), underscores the discretionary authority courts now have in making their judgments about a proposed settlement, including the authority to make a decision without requiring substantial documentation and briefing from the Antitrust Division where the reasonableness of a settlement is evident. Subsection (f) outlines procedures the court “may” use in fulfilling its review obligations, such as taking testimony or appointing a special master, though it does not require any of these acts.

The proposed amendment may reduce the flexibility currently available under the Tunney Act. The current Act permits more extensive review and intervention in conduct challenges, while permitting an expedited review in the area of merger reviews. In most

46. See, e.g., *Microsoft Corp.*, 56 F.3d 1448; *United States v. Westinghouse Elec. Corp.*, 1988-1 Trade Cas. (CCH) ¶ 68,012 (D.D.C. 1988); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,430 (N.D. Cal. 1979), *aff'd*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. ARA Servs.*, 1979-2 Trade Cas. (CCH) ¶ 62,861 (E.D. Mo. 1979); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977).

47. See, e.g., *United States v. Allied Waste Indus., Inc.*, 2000-1 Trade Cas. (CCH) ¶ 72,923 (D.D.C. 2000); *United States v. Thomson Corp.*, 949 F. Supp. 907 (D.D.C. 1996); *United States v. United Techs. Corp.*, 1980-81 Trade Cas. (CCH) ¶ 63,792 (N.D.N.Y. 1981); *United States v. National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978).

instances the core of a proposed merger is pro-competitive, and it is in the interests of consumers and the parties to move expeditiously to consummate the transaction, as modified, to address the potential competitive harm. In conduct challenges, the relief typically entails the imposition of a restriction or modification of behavior. Thus, the defendants are not harmed by the delay and the potential for differing views regarding the appropriate remedy. In the transaction context, certainty and speed are critical so that the parties can negotiate a settlement and proceed with the closing as soon as possible. Thus, in most merger cases, the parties close a transaction before a settlement is approved by the court; to date, courts have agreed that the Antitrust Division's settlements have met the public interest.

The legislation adds an entirely new procedure that can be read to limit the court's current discretion in how it considers the public interest ramifications of a settlement, and may increase the uncertainty as to whether a particular settlement will be approved, thereby potentially requiring the Antitrust Division to expend additional resources to develop a record that could delay the closure of a transaction. In addition, the legislation may require the court to hold a hearing even where the court does not believe one is warranted: "The court shall not enter any consent judgment proposed by the United States under this section unless it finds that there is a reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest."⁴⁸

48. H.R. 1086, 108th Cong., § 221 (2003).

Without explanatory material from the drafters of this proposed provision or without hearings or public briefings, it is not clear what is intended by this language and why there is any compelling reason to add this section, given the impact it could have on the timing and burdens of finalizing consent decrees. The most potentially troubling aspect of the proposed amendments is the use of the term “substantial evidence,” which has meaning in the lore of administrative law and judicial review of agency actions. The Administrative Procedure Act prescribes six criteria courts must apply on review, depending on the type of action being reviewed. One of tests is the “substantial evidence” test, which is applicable only when there has been a formal hearing on the record. As the United States Supreme Court has held, “review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971). Less formal agency actions, such as nonpublic investigations, are generally reviewed under the much more deferential “arbitrary and capricious” or “abuse of discretion” standard.

By using the “substantial evidence” language the legislation may be read by courts to require that a consent decree be approved only after an agency investigation that resembles a formal hearing, with evidence recorded as to all aspects of the matter. Obviously, in what is always a nonpublic matter — the investigation of a transaction — a traditional rulemaking or adjudicatory hearing procedure cannot be used since much of the record remains confidential to ensure no adverse impact on competition, but Congress may be suggesting that more complete and detailed records be required of the Antitrust Division and the courts.

Additionally, though the language of the legislation does not expressly state it, the “substantial evidence” formulation may be read to place a burden of proof on the Division and the parties. In *Steadman v. SEC*,⁴⁹ for example, the Supreme Court held that the term “substantial evidence,” as used in the Administrative Procedure Act, denotes a quantity of proof, the traditional “preponderance-of-the-evidence” standard. Such a burden of proof requirement could be disruptive to the process and prolong the resolution of merger investigations. In any event, if Congress intends to propose such a requirement, it should be clearer in doing so and ensure such a proposal is fully vetted and analyzed.

The current merger investigation and settlement process is working effectively, consistent with the objectives of the Hart-Scott-Rodino Act when introduced.⁵⁰ As noted, in the cases listed above, it has allowed courts to review the terms of the merger settlement without creating elaborate procedures or litigation. It has the flexibility to allow the parties and the agency to move expeditiously and in confidence. Requiring a more detailed evidentiary record and more detailed disclosures to the court may not only slow down the

49. 450 U.S. 91 (1981)

50. This practice is consistent with the practice at the Federal Trade Commission, which is desirable given that both agencies are operating under the same substantive (Clayton Act Section 7) and procedural (Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”)) statutes. The HSR Act mandates that a reviewing agency has a prescribed time period to conduct its initial review, provides that each can issue Requests for Additional Information and Documentary Materials or terminate the waiting period, and mandates a prescribed second waiting period during which the reviewing agency must conclude its investigation. The use of consent decrees to address issues in merger review is as important to the Federal Trade Commission, which is not subject to the Tunney Act, as it is to the Antitrust Division. If the Antitrust Division’s consent decrees become subject to a more onerous judicial review, with the potential for causing delays in the consummation of mergers subject to its review, the parallelism that has existed since the enactment of the HSR Act could be severely and unnecessarily disrupted, to the detriment of the consumers. Moreover, subjecting Antitrust Division consent decrees to more onerous judicial review would also create a significant disparity between the U.S. pre-merger regime and the regimes of all other jurisdictions. We are not aware of any other

process — which could result in the abandonment of an efficiency-enhancing merger — it may inhibit open and constructive communications between the Antitrust Division staff and the parties to identify and resolve competitive concerns.

The Congress should consider the experience and views of the Antitrust Division in applying the Tunney Act. Hearings and public briefings could establish to the Congress' satisfaction that the present Tunney Act process is working effectively and serving the public interest.

IV. Conclusion

As these comments suggest, the Section of Antitrust Law believes that the proposed legislation involves the central issues of antitrust enforcement in the United States and their impact around the world. The proposals are timely and important and because of their importance should the subject of hearings or public briefings to determine the magnitude of increased penalties and their impact on the enforcement policies of the Antitrust Division. The Section strongly favors rigorous enforcement and effective penalties in the cartel area and believes that the way to make these penalties most effective is to consider them not in a vacuum, but as part of the overall antitrust enforcement process where detection and prosecution are maximized.

The detrebling proposal is an innovative idea that should have a very positive impact on antitrust enforcement. The Section strongly supports the detrebling proposal, but

jurisdiction subjecting consent agreements by relevant antitrust agencies to such a high degree of judicial scrutiny prior to implementation of the decree and consummation of the merger.

cautions that the procedure involved should be predictable and transparent to encourage its use. Finally, the Tunney Act proposal is unnecessary and could complicate a procedure where speed and certainty are critical factors.

The Section urges Congress to hold hearings or public briefings on the important issues raised by these comments and to obtain the views of the Antitrust Division and others interested in these issues whose experience can inform Congress' consideration of the proposed legislation.

ANTITRUST DIVISION				
Sherman Act Violations Yielding a Fine of \$10 Million or More				
Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500	International	Switzerland
BASF AG (1999)	Vitamins	\$225	International	Germany
SGL Carbon AG (1999)	Graphite Electrodes	\$135	International	Germany
Mitsubishi Corp. (2001)	Graphite Electrodes	\$134	International	Japan
UCAR International, Inc. (1998)	Graphite Electrodes	\$110	International	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	\$100	International	U.S.
Takeda Chemical Industries, Ltd. (1999)	Vitamins	\$72	International	Japan
Bilhar International Establishment (2002)	Construction	\$54	International	Liechtenstein
Daicel Chemical Industries, Ltd. (2000)	Sorbates	\$53	International	Japan
ABB Middle East & Africa Participations AG (2001)	Construction	\$53	International	Switzerland
Haarmann & Reimer Corp. (1997)	Citric Acid	\$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	\$49	International	Netherlands
Sotheby's Holdings Inc. (2001)	Fine Arts Auctions	\$45	International	U.S.
Odjell Seachem AS	Parcel Tanker Shipping	\$43	International	Norway
Eisai Co., Ltd. (1999)	Vitamins	\$40	International	Japan
Hoechst AG (1999)	Sorbates	\$36	International	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	\$32.5	International	Japan
Philipp Holzmann AG (2000)	Construction	\$30	International	Germany
Arteva Specialties (2003)	Polyester Staple	\$28.5	International	Luxembourg

ANTITRUST DIVISION
Sherman Act Violations Yielding a Fine of \$10 Million or More

Daiichi Pharmaceutical Co., Ltd. (1999)	Vitamins	\$25	International	Japan
Nippon Gohsei (1999)	Sorbates	\$21	International	Japan
Pfizer Inc. (1999)	Maltol/Sodium Erythorbate	\$20	International	U.S.
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	\$20	International	Japan
Dockwise N.V. (1998)	Marine Transportation	\$15	International	Belgium
Dyno Nobel (1995)	Explosives	\$15	Domestic	Norwegian Parent
F. Hoffmann-La Roche, Ltd. (1997)	Citric Acid	\$14	International	Switzerland
Merek KgaA (2000)	Vitamins	\$14	International	Germany
Degussa-Huls AG (2000)	Vitamins	\$13	International	Germany
Akzo Nobel Chemicals, BV (2001)	Monochloroacetic Acid	\$12	International	Netherlands
Hoechst AG	Monochloroacetic Acid	\$12	International	Germany
Ueno Fine Chemicals Industry, Ltd. (2001)	Sorbates	\$11	International	Japan
Eastman Chemical Co. (1998)	Sorbates	\$11	International	U.S.
Jungbunzlauer International AG (1997)	Citric Acid	\$11	International	Switzerland
Lonza AG (1998)	Vitamins	\$10.5	International	Switzerland
Morganite, Inc. (2003)	Carbon Products	\$10	International	British parent
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	\$10	International	Netherlands
ICI Explosives (1995)	Explosives	\$10	Domestic	British Parent
Mrs. Baird's Bakeries (1996)	Bread	\$10	Domestic	U.S.
Ajinomoto Co., Inc. (1996)	Lysine	\$10	International	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	\$10	International	Japan

As of 1/5/04