COMMENTS OF THE ABA SECTION OF ANTITRUST LAW ON THE PROPOSED AMENDMENTS TO THE ANTITRUST RECOMMENDATIONS OF THE UNITED STATES SENTENCING GUIDELINES

The Section of Antitrust Law of the American Bar Association appreciates the opportunity to present its views to the United States Sentencing Commission on the important issues raised in the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing.[1] 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 and should not be construed as representing the policy of the American Bar Association.

The Section strongly and unconditionally supports the U.S. Department of Justice Antitrust Division's considerable efforts to deter, detect and prosecute cartel behavior. These efforts promote the integrity of our market economy and protect consumers. The Section favors substantial and effective penalties for those who engage in hard-core collusion among rivals affecting prices, allocation of markets or customers and similar conduct.[2] However, the proposed amendments constitute a dramatic increase in the antitrust penalties for individual offenders, including an effective doubling of antitrust sentences at the lowest sentencing levels, and may adversely affect antitrust prosecutorial goals. As a result, and in the spirit of recent Supreme Court caselaw, the Section strongly urges the Commission to consider not recommending any antitrust amendments to the Guidelines to Congress at this time and instead for the Commission to hold more substantive hearings on these complex and difficult issues.[3]

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1 70 Fed. Reg. 8868-8872 (Feb. 23, 2005).

2 *See* ABA Antitrust Section, Comments on HR1086: Increased Criminal Penalties, Leniency Detrebeling and the Tunny Act Amendment (January 2004).

3 The Commission has requested comments on its proposal to increase the base offense level for antitrust violations by 2 or 4 levels to Level 12 or Level 14 and also requested comments regarding the use of the volume of commerce table contained in USSG § 2R1.1(b)(2). With regard to the volume of commerce table, the Section seeks to provide herein some insight related to the use of the

When evaluating any part of the process for antitrust sentencing, attention should focus on the fundamental factors that Congress, courts and commentators all recognize govern sentencing determinations. Sentences should be sufficient, but not greater than necessary, to provide a punishment reflective of the seriousness of the offense, to deter criminal conduct, to protect the public, and to provide rehabilitation, where appropriate. The proposed amendment, which would substantially increase prison terms in all situations, without any analysis of the benefits or impact of such increased sentences, does not appear to be well-grounded or tailored to meet these fundamental objectives, particularly where the Guidelines substitute presumptions for facts. While penalties are an important element of effective deterrence, there is no consensus that increasing prison terms at all levels of offense will create greater deterrence. Moreover, the proposed amendments could have unintended adverse consequences, particularly on gaining the key cooperation of offenders and foreign authorities that has been necessary to prosecute hard-core, clandestine cartels.[4] This view is informed by our members' extensive experience in the practical aspects of criminal enforcement.

In view of the increased focus on sentencing and the impending scrutiny of the sentencing process in light of the recent Supreme Court decision in *United States v. Booker*,[5] the Commission and Congress should consider a comprehensive review of the changes to the Guidelines and such changes should be made only after deliberate process and with adequate support.[6] Equally importantly, given that the Guidelines are now only advisory and judges will

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table but cannot comment on potential proposals that have not yet been offered. The Section would consider any proposals that may be offered in the future.

4 The Section also notes that the comments to the Guidelines should state explicitly that the recommendations for sentencing in the antitrust area are intended to cover only this "heartland" of hard-core conduct. *See United States v. Koon*, 518 U.S. 81 (1996).

5 125 S. Ct. 738 (2005).

6 For example, in August 2004, the American Bar Association House of Delegates adopted a policy (Report 303) urging Congress to reverse certain recent narrow amendments to the Sentencing Guidelines including an amendment requiring entities to waive attorney-client and work product protections as a condition for cooperation with the government. The comments herein do not affect

have discretion regarding their application to any particular sentencing, the Commission bears an increased burden of explaining why the Guidelines recommend a particular sentence and the underlying bases for the recommendation. Otherwise, the Guidelines will not be able to achieve their purpose of informing judges of a reasonable sentence under the particular facts and circumstance of the defendant facing punishment.

I. INCREASES IN RECOMMENDED ANTITRUST PRISON SENTENCES RAISE COMPLEX QUESTIONS OF POLICY AND PRACTICE AND SHOULD BE ADOPTED ONLY AFTER HEARINGS OR PUBLIC BRIEFINGS

The proposal to increase recommended Sherman Act prison sentences raises many complex and difficult issues. The Section has devoted much study in recent years to antitrust remedies.[7] Based on this experience, the Section strongly urges the Commission to hold hearings on these issues to evaluate, in a serious, thorough manner, the impact and the inter-relationship of the relevant issues.[8] The Section strongly favors rigorous enforcement and

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this and other existing ABA policies and recommendations. *See also* Resolution of the House of Delegates, ABA adopted February 14, 2005 regarding Sentencing Guidelines (Report 301) recommending careful study and data collection of sentencing post-*Booker*. Moreover, the legislative history referenced by the Commission regarding an expectation that the Sentencing Guidelines for antitrust crimes would be amended after the Antitrust Criminal Penalties Enforcement and Reform Act of 2004, Pub. L. 108-237, pre-dated the Supreme Court decision in *Booker* and cannot be construed as an endorsement of the proposed amendments.

[7] 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.

[8] *See* ABA Antitrust Section, Comments on HR1086: Increased Criminal Penalties, Leniency Detrebeling and the Tunny Act Amendment (January 2004) (recommending hearings on the issues considered herein). For a brief discussion of the challenges of determining optimal antitrust penalties, see Andrew I. Gavil, William E. Kovacic and Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 1040-46 (West Group 2002).

effective penalties for the cartel offenses 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 and penalties are tailored to meet the societal goals of sentencing. Through a deliberative process that will elucidate and ground the data and mechanics of the recommendations with regard to antitrust sentencing, the Commission can provide the meaningful and appropriate tools needed by judges to impose reasonable sentences that meet the goals established by Congress.

II. THE COMMENTS TO THE ANTITRUST SENTENCING GUIDELINES SHOULD MAKE EXPLICIT THAT THE RECOMMENDED PENALTIES APPLY ONLY TO HARD-CORE ACTIVITIES THAT HARM COMPETITION AND CONSUMERS

The commentary and very structure of the Antitrust Sentencing Guidelines clearly relate only to hard-core price fixing, bid rigging, and allocation schemes. Yet, on the face of the Sherman Act, any violations of Sections 1, 2 and 3 may trigger criminal penalties. Sections 1 and 3 prohibit a broad range of unreasonable restraints of trade, while Section 2 prohibits monopolization, attempts to monopolize, or conspiracies 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.[9] The facial breadth of criminal antitrust laws has been noted in the caselaw. 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. . . . "[10]. Even the means of determining whether a restraint of trade is

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[9] In addition, the Robinson-Patman Act, 15 U.S.C. § 13(a), is another antitrust statute that provides for criminal sanctions.

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

considered *per se* illegal or subject to the rule of reason are judicially created, not identified statutorily.

For generations, the Antitrust Division has 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.[11] But this judgment is the product of prosecutorial discretion, not the dictates of statute.

The Section applauds the Division's self-imposed discretion and fully anticipates its continuation, but prudence requires that the Guidelines should make explicit the Commission's clear intent that the Guidelines' recommendations regarding antitrust violations apply only to the hard-core, *per se*, clandestine conduct such as price fixing, bid rigging and customer, territorial or market share allocation.

III. THE GUIDELINES SHOULD REFLECT CONSIDERATION OF THE FACTORS THAT SHOULD GOVERN SENTENCING DETERMINATIONS

The Commission's proposal would substantially increase the period of incarceration for any antitrust violation. An increase in the base offense level from 10 to 14 would approximately double the minimum period of incarceration for any antitrust offender. That is a drastic increase that should be supported by analysis of its benefits and potential consequences. Yet, the Commission's proposal does not reflect consideration of the factors enumerated in 18 U.S.C. § 3553(a), nor do those factors appear to support that proposal. Unless those factors are

[11] 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. These cases we criminally prosecute at the Division are not ambiguous. They involve . . . clear knowledge on the part of the perpetrators of the wrongful nature of their behavior." Assistant Attorney General R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals (August 12, 2003) (available at http://www.usdog.gov/atr/public/speeches/201241.htm). It has been many years since a

specifically considered, the Commission's proposal cannot comply with a fundamental premise of the recent Supreme Court decisions.[12] Without such consideration at a minimum, the proposal does not address numerous issues that are relevant to the determination of a "reasonable" sentence. Providing true guidance for the sentencing process now more than ever requires transparency from the Commission and specific and detailed support for the Commission's proposal.

The Sentencing Commission's Notice suggests that the primary reason for the proposed increase in the base offense level is to make it proportionate to other fraud-type offenses. In enacting the Antitrust Criminal Penalty Enhancement and Reform Act of 2004,[13] Congress significantly raised the ceiling on the sentences available for antitrust violations, increasing the maximum penalty for violations from three to ten years. It did so, however, without holding hearings or otherwise collecting empirical data that could guide the Commission or courts on the best range of sentences for such offenses.

The Supreme Court's recent sentencing decisions have focused renewed and substantial attention on the sentencing process. One of the fundamental aspects of the decision in *United States v. Booker*[14] is concern for the "reasonableness" of the sentence in light of the factors enumerated in § 3553(a). The Supreme Court expressly directed the sentencing court's attention to those factors. The Court stated, "[the Federal Sentencing Act] requires a sentencing court to consider Guideline ranges,… but it permits the court to tailor the sentence in light of other

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monopolization case was prosecuted criminally, and a monopolization case involving hard-core, clandestine conduct is highly unlikely.

12 *United States v. Booker*, 125 S. Ct. 738 (2005).

13 Pub. L. 108-237.

14 125 S. Ct. 738 (2005).

statutory concerns as well, see § 3553(a)."[15] The Supreme Court also focused on the importance of these factors in reviewing a sentence on appeal. The Court stated, "Those factors [§ 3553(a)] in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." Unquestionably, the Supreme Court has focused on the importance of the factors listed in § 3553(a) to contribute to reasonable sentencing decisions.

In the wake of *Booker*, and reflective of the renewed attention on these factors, some judicial decisions, such as *United States v. Ranum,*[16] have been critical of the Commission's perceived failure to consider these factors in its proposals. Others, such as *United States v. Wilson,*[17] have stated that 28 U.S.C. § 994(b)(1) requires the Commission to consider and apply the § 3553(a) factors. As discussed above, in the Section's view, the advisory status of the Guidelines under *Booker* amplifies the need for the Sentencing Commission to offer empirical support for its recommendations so that courts will have sufficient understanding of the premises of the Guidelines to exercise their sound sentencing discretion. In this context, and in light of the absence of Congressional hearings elaborating on these issues during the enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the Section submits the Commission should demonstrate that its proposal complies with these critical sentencing factors.

Section 3553(a) reflects Congress' direction on the factors to be addressed in imposing a reasonable sentence. The section states, in pertinent part:

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15 *Id*. at 757. *See also* USSG § 5A, intro. comment.

16 353 F. Supp. 2d 984 (E.D. Wis. 2005). In *Ranum*, the court reduced the sentence to a year and a day based on several factors that were specifically identified by the Guidelines as being inappropriate sentencing factors.

17 No. 2:03-CR-00882, 2005 WL 273168 (D. Utah Feb. 2, 2005).

> The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of the subsection. The court, in determining the particular sentence to be imposed, shall consider--
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> 1. the nature and circumstances of the offense and the history and characteristics of the defendant;
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> 2. the need for the sentence imposed--
>
>   a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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>   b. to afford adequate deterrence to criminal conduct;
>
>   c. to protect the public from further crimes of the defendant; and
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>   d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
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> 3. the kinds of sentences available;
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> 4. the kinds of sentence and the sentencing range established for…

(Emphasis added). Certainly, these factors express the Congressional assessment of the issues to be considered, and they describe the factors most relevant to federal sentencing goals and objectives.[18]

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[18] The *ABA Standards for Criminal Justice: Sentencing* (3d ed. 1994), which set forth ABA policy regarding proper sentencing standards, contain a similar list of factors in identifying the legitimate purposes of punishment:

> Standard 18-2.1 Multiple purposes; consequential and retributive approaches
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> (a) The legislature should consider at least five different societal purposes in designing a sentencing system:
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> (i) To foster respect for the law and to deter criminal conduct.
> (ii) To incapacitate offenders.
> (iii) To punish offenders.
> (iv) To provide restitution or reparation to victims of crime.
> (v) To rehabilitate offenders.

The ABA *Standards* also provide for punishment that is no more severe than necessary.

Unfortunately, the Commission's proposal does not reflect consideration of any of these factors. The fundamental basis of § 3553(a) is that a sentence must be "sufficient, but not greater than necessary" to comply with the stated purposes. The Commission's proposal, however, does not provide either objective data or reasoned argument to support the proposal that an increase in the base offense level to 14 is necessary or justified. The proposal does not provide any basis to conclude that this increase is not greater than necessary, nor is there any indication that the issue was even considered.

While the Section strongly supports sentences and fines in criminal antitrust cases sufficient to punish such conduct and protect consumers and the economy from its effects, there are numerous additional factors that should be considered by the Commission in connection with the proposal. Specifically, the Section is concerned that the present proposal fails to give adequate consideration to (a) whether the structure of increased penalties will increase deterrence; (b) whether the increase in penalties is necessary for societal protection or rehabilitation of offenders; (c) whether there is evidence that courts have been limited in imposing appropriate sentences by the current Guidelines; (d) whether the increase in penalties may inadvertently hinder antitrust prosecutions; (e) whether the increase in penalties may diminish foreign cooperation in such investigations. These issues, when viewed in the light of § 3553(a), suggest that the proposal should be reconsidered and more fully justified after the Commission gathers appropriate empirical data and holds hearings on these issues.

> Standard 18-2.4 Severity Of Sentences Generally
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> The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

A. The Assumption that the Proposed Increases in Jail Terms Will Lead to Greater Deterrence Lacks Empirical Support

A primary consideration in assessing the merits of any change to the Sentencing Guidelines for antitrust offenses is whether the change will lead to greater deterrence of criminal conduct. The Commission in the past has taken the position that long jail terms are not the most effective means of deterring criminal violations of the antitrust laws: "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."[19] In analyzing this issue, the Commission should first consider whether circumstances have changed sufficiently that the Commission no longer accepts its statement as policy. If the Commission no longer accepts this view, it should disclose the basis for such a significant shift in viewpoint, and set forth the empirical basis for that conclusion in sufficient detail to allow scrutiny and challenge in the rulemaking process.

Deterrence is difficult to quantify or analyze,[20] but any analysis must include two factors: whether the severity of the punishment is likely to be perceived as outweighing the rewards of

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[19] USSG § 2R1.1 comment (n.8).

[20] 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.*, Mark Cohen and David Scheffman, "The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?", 27 Am. Crim. L. Rev. 331, 1989; 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

the conduct, and whether the severity of the punishment in some manner reduces the likelihood of detection. Based on its comprehensive study of remedy issues and based on the record generated by the Section of Antitrust Law's Remedies Forum in April 2003, the Section believes that the Sentencing Commission should address these difficult issues only after in-depth review in hearings and public discussion.

The Section recognizes that many antitrust enforcement officials 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.[21] Whenever questions of punishment and deterrence are raised, however, 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 sentences on enforcement are difficult, if not impossible, to quantify, the Commission should seek the views of those most experienced in this area, both prosecutors and defense counsel. 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 the best alternative is to force the Antitrust Division to 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

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& 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.

[21] *See, e.g.*, 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).

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 heard strong evidence that there is no easy or simple solution to this question.[22]

B. The Assumption that the Proposed Increases in Jail Terms Are Necessary for Rehabilitation and/or Social Protection Lacks Empirical Support

In August of 2004, the American Bar Association's House of Delegates adopted a resolution urging:

> the federal government to ensure that sentencing systems provide appropriate punishment without over reliance on incarceration as a criminal sanction, based on the following principles:
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> (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
>
> (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts. [23]

The proposed revisions to the Sentencing Guidelines for antitrust violations do not explain how they take these concerns adequately into account. In the Section's view, the primary benefit of jail sentences for antitrust offenders is deterrence. There is no evidence that recidivism exists at all among antitrust offenders. Indeed, the members of the drafting committee for these comments could not identify a single instance in which an individual offender had been convicted of a second, later violation of the antitrust laws – and certainly, if

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[22] Section of Antitrust Law, Remedies Forum, *supra* at note 6.

[23] Report 121A to 2004 Annual Meeting of the American Bar Association House of Delegates (Aug. 2004) (available at http://www.abanet.org/leadership/delegates.html through link to Daily Journal for 2004 Annual Meeting).

there were one or two such situations, that would be a very small number in the 115 year history of the Sherman Act.

Likewise, antitrust offenders are rarely a risk to their community if punished by the short periods of incarceration recommended by the Sentencing Commission in its earlier commentary. The conviction of an antitrust offender in the United States almost always results in removal of the offender from the position he or she used to violate the antitrust laws. There is no evidence that extended prison sentences correlate to protection against further anticompetitive conduct or are necessary to prevent a continuing or new criminal enterprise. Thus, the proposed increase in the base level for antitrust sentences is not based upon any real threat of recidivism or harm to the community.

C. There Is No Evidence That Courts Have Been Limited By Guidelines Ranges or That the Increases Are Needed To Increase Prison Terms

The Commission's proposal is particularly troubling because the sentences imposed by courts in antitrust cases over the last few years do not appear to be unduly limited by the current offense level. There is no objective data, for example, to support the conclusion that courts believed the current level is too low.[24] Based on the collective experience of the Section of Antitrust Law's leadership, all sentences for antitrust violations of Section 1 of the Sherman Act[25] have been less than two years where the statutory maximum was three years. Thus, even

[24] Unless there are data to demonstrate that courts were unduly restricted by the previous offense level, the Commission's focus should be directed elsewhere. Rather than increase the term of imprisonment for all violations, perhaps a more reasonable approach would be to add an offense level for violations that affect an extremely large amount of commerce in a situation where the government can prove by objective evidence that the conspiracy was especially successful in obtaining supracompetitive profits. Such a proposal would comply with the direction of Congress in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

[25] This is for antitrust violations without additional counts for fraud, false statement or obstruction of justice. The prosecutor has the option of charging violations with additional crimes in appropriate circumstances.

as the average term of an antitrust sentence has risen, it would seem that courts concluded the current sentencing range was "sufficient." An increase would not be justified, and would exceed that which is "necessary."

D. Potential Unintended Adverse Impact on Successful Antitrust Enforcement

The Commission should look at the practical impact higher sentences will have on potential cooperation that is uniquely important to effective prosecution of antitrust conspiracies. Next to the Antitrust Division's Leniency Program, which offers complete amnesty to the corporation and its cooperating employees, 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, so the success of a contested case often depends on negotiated settlement with individuals from a number of defendants.

Based on that experience, and assuming a four level adjustment to 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 the four level increase were used, the comparable sentence would be at levels 17 through 19. 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 17 at 24 to 30, a Level 18 at 27 to 33 months, and a Level 19 at 30 to 37 months. In a typical case, raising the

base offense level would approximately double the bottom of the sentencing range at the lowest level – a huge increase with little negotiating room for a lower sentence.[26] 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 calculations, and departures would have to be much larger to bring sentences down to a level many cooperating witnesses would accept – something many judges are reluctant to consider. Such a result will have practical consequences in affecting the willingness of defendants to negotiate plea agreements rather than put the Division to its proof at trial. While no one can predict the magnitude of its impact, such sentences will tend to make cooperation less likely.

Given this circumstance, the Commission 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 frequently will seek to convince a jury that competitor communications had no impact on price. Accordingly, successful antitrust prosecutions nearly always depend upon gaining the cooperation of several 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 a crucial question the Commission needs to confront. This concern is particularly true in cases involving the prosecution of

[26] At a Level 12, the increase would still be about 50%, a substantial increase.

international cartels, where 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 and try cases that otherwise would have been resolved by agreement.

The Commission 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. Alternatively, to gain cooperation of essential witnesses, prosecutors may be forced to grant use immunity to individuals of the type who now agree to plead guilty in exchange for relatively short prison sentences. If broader use of immunity were to become the norm, the practice may adversely affect deterrence. In evaluating these issues, the Commission should consider the perspective of both the career prosecutors familiar with the strategies for succeeding in such cases and of members of the defense bar who know the considerations that targets of such investigations – domestic and foreign – apply in determining whether to enter into a plea arrangement. The Section submits that this is a difficult and delicate balance that should be considered carefully either through hearings or other public discussions.

E. Increases In Sentences May Have An Adverse Impact On Cooperation From Foreign Governments

In an era of international cooperation in fighting cartels, the Antitrust Division has benefited substantially from the cooperation of others in the world competition community.

It took many years for the international community to accept enforcement of cartel cases and to begin cooperation with the United States in that effort. Although most nations now subscribe to the enforcement agenda, this alliance is still precarious principally because of the criminal enforcement – and incarceration – that the United States advances.[27] Given past circumstances, there may be substantial concern by some foreign jurisdictions that the enforcement of antitrust laws 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 civil actions for multiple damages.

The Commission should analyze the possibility that an increase in Sherman Act prison sentences at the lower offense levels would cause other governments to reconsider or limit the cooperation that has been forthcoming in anti-cartel investigations. It is likely 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.[28] Accordingly, the likely trade-offs stemming from more severe sentences could limit

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[27] While various other countries prosecute anti-cartel laws criminally, most notably Canada, the vast majority of foreign jurisdictions either do not have legislation permitting criminal enforcement or have not prosecuted criminally.

[28] 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 *United States v. General Electric Co.*, 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

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 at the lower offense levels would be consistent with the Antitrust Division's important goals in the larger, global enforcement community.

As discussed above, particularly given the Sentencing Guidelines' advisory status after *Booker*, it would be appropriate for revisions to the Guidelines to give judges some means of balancing the cost to society in imposing sentences longer than the current norm against the benefits from those longer sentences.[29] The Section believes that effective antitrust enforcement requires great reliance on the cooperation of foreign authorities and executives pleading guilty to violations of the law and that deterrence is the principal objective of individual sentences. These factors also should be considered in determining whether a substantial increase in the base offense level for all offenders is warranted absent evidence of increased deterrent effect or other benefits to society.

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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 and a far longer sentence in the U.S. penal system is substantial, and the latter may be an offer many international executives would reject.

[29] Social costs other than those related to enforcement objectives should also be weighed. As the American Bar Association's Justice Kennedy Commission pointed out: "The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union. And the U.S. incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan."[29] The cost of incarceration at a Bureau of Prisons facility, as calculated by the U.S. Probation Office, are $63.51 daily and $23,183.69 annually. In contrast, the costs for supervision by U.S. Probation Officers of someone not incarcerated (home detention, probation) are $ 9.61 daily and $3,506.53 annually. Moreover, there are additional societal costs in the long-term incarceration of antitrust offenders. Such individuals are frequently well-educated with valuable management skills.

IV. A PRESUMPTION OF BID-RIGGING TO INCREASE THE SENTENCE IS INAPPROPRIATE

The proposed amendments include striking subdivision (1) of USSG § 2R1.1, which currently provides for a one level increase to the applicable offense level, if the conduct involved participation in an agreement to submit noncompetitive bids. The Commentary regarding the proposed amendments indicates that because "Commission data" reflects that a significant majority of the cases sentenced under § 2R1.1 are "bid-rigging" cases, what was previously considered aggravating behavior would now be incorporated into the base offense level. The Section opposes this approach.[30]

A significant number of cases sentenced under § 2R1.1 are for violations that do ***not*** involve bid rigging, including most of the major antitrust cases. Indeed, nearly all of the cases where Sherman Act violations have resulted in fines of $10 million or more have been for offenses other than bid rigging – primarily for price fixing and market allocation. Given the significant number of non-bid-rigging cases prosecuted and sentenced under this provision, it is inappropriate to presume that the factual circumstance of an agreement to submit noncompetitive bids exists in every case. Indeed, as proposed, the increase in the offense level would create a hidden presumption that would be without any basis in many cases.

Furthermore, in more detail below, the use of presumptions in sentencing contravenes the spirit of recent Supreme Court case law. This is true not only with regard to sentencing issues generally, but also with regard to many important issues of antitrust law. "Legal presumptions

[30] This Comment does not address the issue of whether the Guidelines should continue to provide punishment for bid rigging at a higher offense level than that used for other forms of antitrust violations. However, the concept of continuing to provide more severe punishment for bid-rigging offenses may deserve further study by the Commission.

that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."[31]

V. USE OF THE PRESUMPTION OF LOSS BY REFERENCE TO 20% OF AFFECTED COMMERCE FOR ORGANIZATIONS CONTRAVENES RECENT SUPREME COURT CASE LAW

The Section is concerned that the Sentencing Commission, in considering changes in antitrust sentences as the result of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, has not considered whether the United States Supreme Court decision in *Unites States v. Booker*,[32] requires amendment or removal of the current method of calculating the base fine for an organization that commits an antitrust violation or the use of the volume of commerce table for enhancements for individuals.[33]

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. Under the Guidelines, determining the fine to be imposed against an organization in an antitrust case begins with a calculation of the "base fine," which almost always will be computed pursuant to the volume of commerce provisions of USSG § 2R1.1. For most federal crimes, the base fine is the greatest of the gain or loss resulting from the offense or an amount from a fine table corresponding to specific characteristics of the offense. However, for antitrust offenses, the Guidelines simplify the process by establishing a proxy for the

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[31] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-67 (1992).

[32] 125 S. Ct. 738 (2005).

[33] It appears implicit in the design of the Guidelines that the upward adjustments for individuals from use of the volume of commerce tables contained in USSG § 2R1.1(b)(2)(b) are likely affected by the

economic impact of the conduct – twenty percent of the volume of commerce attributable to the defendant that was affected by the violation.

The government must prove the "affected volume of commerce" in order to establish the basis for the imposition of a criminal fine for an antitrust violation. However, in antitrust cases *only*, there is a specific Guidelines provision that establishes the base fine as twenty percent of the "affected volume of commerce." USSG § 2R1.1(d)(1). The Guidelines provide little commentary regarding the twenty percent figure other than the intention to simplify the calculations:

> 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)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under § 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 comment (n.3).

The Guidelines thus impose a conclusive presumption concerning the overcharge. There is no publicly available data or consensus to support that presumption. The presumption that all antitrust conspiracies result in the same level of harm is inequitable and disproportionate – in both directions.[34] It is ironic that the Sentencing Commission allowed this conclusive

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same presumptions as those explicitly noted with regard to the use of volumes of commerce for organizational sentencing discussed herein.

[34] Notably, this legislation expressly authorized the courts to decline to use the alternative fine provision if it would "unduly complicate or prolong the sentencing process." Thus, the use of the alternative maximum fine is discretionary with a court. In *United States v. Andreas*, the district court

presumption because of the difficulty in calculating the actual gain or loss in an antitrust case, while the Antitrust Division has been effectively calculating alternative maximum fines under 18 U.S.C. § 3571(d) since its sentencing calculation in *United States v. Archer Daniels Midland Co.* in 1996.[35]

In *Booker*,[36] the Supreme Court found that the Sentencing Guidelines violated the Sixth Amendment to the extent penalties were enhanced by findings of fact not made by the jury. In reaching this decision, the Court held: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."[37] Likewise, the Supreme Court's decision in *Shepard v. United States*,[38] reaffirming that "the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence," must be understood to limit the role of judicial fact-finding, and reinforces concerns with the presumption now in the Guidelines.

While the Supreme Court found that the constitutionality of the Sentencing Guidelines as a whole could be preserved by making them advisory rather than mandatory, serious questions exist on whether making the presumption that the base fine should be twenty percent of the affected volume of commerce in application is in any way advisory, particularly if it results in a

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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. *United States v. Andreas*, 96-CR-762 (N.D. Ill., June 2, 1999).

35 Crim.. No. 96-CR-00690 (N.D. Ill. Oct. 15, 1996).

36 125 S. Ct. 738 (2005).

37 *Id*. at 749 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

38 U.S. No. 03-9168, 73 U.S.L.W. 4186 (Mar. 7, 2005).

recommended fine in excess of the $100 million Sherman Act maximum. On its face, the twenty percent is not being applied simply to give the sentencing court guidance about the exercise of discretion in determining the right range of sentence, but rather as the basis for imposing a sentence, one that may exceed the statutory maximum under the Sherman Act. Even if described as advisory, this twenty percent presumption invites judges to increase an antitrust defendant's fine based upon a presumed loss, rather than based upon an actual finding by the jury. Moreover, such a presumption also contravenes the goal of uniformity based on severity of the real conduct.

The Section therefore urges the Commission to give careful consideration to whether the Sixth Amendment as interpreted by *Booker* requires amendment or withdrawal of the current Guidelines methodology and presumptions for determining the loss applicable to antitrust violations for the purposes of sentencing.

VI. CONCLUSION

As these comments suggest, the Section of Antitrust Law believes that the proposed amendments and suggested areas of potential amendments involve 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 be the subject of extensive hearings to determine the magnitude of increased penalties and their impact on the enforcement policies of the Antitrust Division and to expose transparently the process for arriving at reasonable and appropriate sentences. The Section strongly believes that the way to make these penalties for serious violations of the law most effective is to consider them not in a vacuum, but as part of the overall antitrust enforcement process where deterrence, detection and prosecution are maximized

and penalties are factually grounded and tailored to be sufficient but no greater than necessary to meet the societal goals of sentencing.

The Section urges the Commission to hold hearings 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 Commission's consideration of proposed antitrust amendments.

Respectfully submitted,

Section Of Antitrust Law
American Bar Association