



# DEPARTMENT OF JUSTICE

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## **Antitrust Sentencing In The Post-*Booker* Era:**

### **Risks Remain High For Non-Cooperating Defendants**

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# Antitrust Sentencing In The Post-*Booker* Era:

## Risks Remain High For Non-Cooperating Defendants

### **I. Introduction**

In the last year, major developments occurred in the law governing federal sentencing in general, and antitrust sentencing in particular. First, on June 22, 2004, the President signed into law The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provided for long overdue increases in the maximum sentences under the Sherman Act. Two days later, in *United States v. Blakely*,<sup>1</sup> the Supreme Court issued a decision calling into question the future of the United States Sentencing Guidelines, which had been the foundation of federal sentencing for almost two decades. In January 2005, in *United States v. Booker*,<sup>2</sup> the continued use of the Guidelines was upheld, although in an advisory rather than mandatory fashion. The full impact of the *Booker* decision on federal sentencing and what legislative actions are taken in reaction to *Booker* are yet to be seen, but, as I will discuss today, the risks remain high for non-cooperating defendants in criminal antitrust investigations. Before discussing the implications of *Booker* on Division practice, I will briefly discuss the history of the Guidelines and the genealogy of *Booker*.

### **II. Sentencing under the United States Sentencing Guidelines**

From 1987 until January 2005, judges in the United States imposed sentences in federal cases based on the United States Sentencing Guidelines.<sup>3</sup> The Guidelines established mandatory fine and jail ranges within which judges had to impose sentence, subject to statutory minimum<sup>4</sup> and maximum penalties.<sup>5</sup> The Guidelines factors that determined the ranges were found by the

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<sup>1</sup> 124 S. Ct. 2531 (2004).

<sup>2</sup> 125 S. Ct. 738 (2005).

<sup>3</sup> See United States Sentencing Commission, Guidelines Manual (hereinafter USSG). The USSG is available at <http://www.ussc.gov/GUIDELIN.HTM>.

<sup>4</sup> Antitrust offenses, like the majority of federal offenses, do not have a statutory minimum penalty.

<sup>5</sup> The Guidelines do contain certain mechanisms for judges to sentence below the Guidelines range. The departure provisions that are most pertinent to antitrust sentencing are downward departures based on the defendant's substantial assistance in the Division's investigations or prosecutions or fine reductions based on the defendant's inability to pay a Guidelines fine. See

sentencing judge post-trial or after a guilty plea had been entered. Prior to the enactment of the Sentencing Guidelines in 1987, sentences in federal cases were left largely to the discretion of the sentencing judge, subject to statutory minimum and maximum sentences. Thus, the Guidelines were developed in order to promote sentencing consistency for similar classes of defendants. For both individual and corporate antitrust defendants, the Guidelines standardized sentencing based largely on the defendant's volume of affected commerce,<sup>6</sup> role in the offense,<sup>7</sup> any obstruction of justice committed by the defendant,<sup>8</sup> cooperation by the defendant in the Division's investigations and prosecutions,<sup>9</sup> and the defendant's acceptance of responsibility.<sup>10</sup> For corporate antitrust defendants, the size of the organization, the involvement of high-level personnel in the offense, and prior criminal history<sup>11</sup> have also played a role in the calculation of the defendant's Guidelines range.<sup>12</sup>

### **III. *United States v. Booker* and its Genealogy**

This mandatory Guidelines system changed in 2005 after the decision of the U.S. Supreme Court in *United States v. Booker*.<sup>13</sup> In *Booker*, the Supreme Court held that when a sentencing judge determines facts not found by the jury or admitted by the defendant in imposing an enhanced sentence under the U.S. Sentencing Guidelines, the defendant's constitutional Sixth Amendment right to a jury trial is violated, but the Court also held that there is no Sixth Amendment violation if the Guidelines are used in an advisory rather than mandatory

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USSG §§5K1.1, 8C4.1, 5E1.2(e), 8C3.3.

<sup>6</sup> See USSG §§2R1.1(b)(2), 2R1.1(c)(1), 2R1.1(d)(1), 8C2.4(a), 8C2.4(b). The volume of commerce for Guidelines purposes is the defendant's or defendant's employer's volume of commerce in the product or service subject to the conspiracy for the entire duration of the conspiracy.

<sup>7</sup> See USSG §§3B1.1, 3B1.2, 8C2.8(a)(2) and comment. (n.1).

<sup>8</sup> See USSG §§3C1.1, 8C2.5(e).

<sup>9</sup> See USSG §§5K1.1, 8C4.1.

<sup>10</sup> See USSG §§3E1.1, 8C2.5(g).

<sup>11</sup> While criminal history is also a factor in determining an individual's Guidelines range, it is extremely rare to have an individual antitrust defendant with a criminal history. On the other hand, there have been recidivist corporate antitrust defendants from time to time.

<sup>12</sup> See USSG §8C2.5.

<sup>13</sup> 125 S. Ct. 738 (2005).

manner.<sup>14</sup> The Court thus held that judges still must consider and take into account the Guidelines in determining and imposing sentence, along with other sentencing factors in 18 U.S.C. § 3553(a), but imposition of a sentence within the Guidelines range is no longer mandatory.<sup>15</sup> *Booker* also established that appellate courts will review sentences imposed under the new advisory Guidelines system for unreasonableness.<sup>16</sup> Before focusing on the implications of *Booker* on Division practice, it is useful to look back at the caselaw that led to *Booker* and see how we arrived at the point we are at today.

### A. *Apprendi*

The trilogy of cases that concluded with the *Booker* decision began with *United States v. Apprendi*<sup>17</sup> in June 2000. *Apprendi* involved the propriety of a judicial determination of a sentencing enhancement based on a hate crime statute. The defendant, who had fired several shots into the home of an African-American family, pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. The second-degree offense carried a maximum penalty of ten years' imprisonment under New Jersey law, while the third-degree offense carried a maximum penalty of five years' imprisonment. The judge, at the sentencing hearing, found by a preponderance of the evidence that in committing the crime, the defendant "was motivated by racial bias" and applied an enhancement under a New Jersey hate crime statute to sentence the defendant to 12 years' imprisonment on one of the second-degree counts, two years above the maximum for the offense.<sup>18</sup> *Apprendi* appealed, arguing that his constitutional right to a jury trial was violated because a jury had not determined, beyond a reasonable doubt, whether he had a racial motive. The Supreme Court agreed, holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be [proved] to a jury . . . beyond a reasonable doubt."<sup>19</sup>

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<sup>14</sup> *Id.* at 756-57.

<sup>15</sup> *Id.* The additional section 3553(a) factors include the nature and circumstances of the offense; the need for the sentence to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment; deterrence; protection of the public from further crimes by the defendant; rehabilitation; avoidance of unwarranted sentence disparity; and the need to provide restitution to victims of the offense.

<sup>16</sup> *Booker*, 125 S. Ct. at 765-67.

<sup>17</sup> 530 U.S. 466 (2000).

<sup>18</sup> *Id.* at 471. The judge imposed shorter concurrent sentences on the other two counts.

<sup>19</sup> *Id.* at 490.

## **B. *Blakely***

*Apprendi* was followed by *United States v. Blakely*<sup>20</sup> in June 2004. In *Blakely*, the defendant kidnapped his estranged wife, bound her with duct tape, forced her at knifepoint into a wooden box in the back of his pickup, and threatened their 13-year-old son that he would shoot the wife if the boy did not follow them.<sup>21</sup> *Blakely* ultimately pled to second-degree kidnapping involving domestic violence and use of a firearm, a class B felony. Washington State law provided that the maximum sentence for a class B felony was 10 years, but Washington State sentencing guidelines provided for only a 53-month maximum jail sentence based on the facts admitted in the defendant's plea. The State guidelines, however, also provided for enhancements based upon aggravating factors, such as a finding in domestic-violence cases that a defendant acts with deliberate cruelty. The judge found at sentencing that the defendant had acted with deliberate cruelty and imposed an enhanced sentence of 90 months, 37 months beyond the unenhanced maximum.<sup>22</sup> *Blakely* appealed, claiming that the judge-found enhancement infringed his constitutional right to a jury determination of all facts legally essential to his sentence.<sup>23</sup>

The Supreme Court, in an expansive reading of *Apprendi*, agreed with *Blakely* and held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely [based on] the facts reflected in the jury verdict or admitted by the defendant.*”<sup>24</sup> Thus, enhancements under the Washington State guidelines had to be proven to a jury or admitted by the defendant.

## **C. *Booker***

The *Blakely* decision, of course, immediately raised the question of whether the Supreme Court would apply the holding of *Blakely* to the United States Sentencing Guidelines. This question was answered in *United States v. Booker*<sup>25</sup> in January 2005.

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<sup>20</sup> 124 S. Ct. 2531 (2004).

<sup>21</sup> *Id.* at 2534.

<sup>22</sup> *Id.* at 2535.

<sup>23</sup> *Id.* at 2536.

<sup>24</sup> *Id.* at 2537.

<sup>25</sup> 125 S. Ct. 738 (2005).

*Booker* was actually a consolidated matter involving two separate cases, *United States v. Booker*<sup>26</sup> and *United States v. Fanfan*.<sup>27</sup> In *Booker*, the jury found the defendant guilty of possession with intent to distribute at least 50 grams of crack cocaine, based on evidence that he possessed 92.5 grams of cocaine. This verdict carried a statutory maximum sentence of life and a federal Sentencing Guidelines range of 17 years, six months to 21 years, 10 months in jail. The judge found at the sentencing hearing that Booker had possessed 566 additional grams of crack and that he had obstructed justice, findings which increased the Guidelines range to 30 years to life. The judge imposed a 30-year sentence, which Booker appealed. The Seventh Circuit Court of Appeals applied the *Blakely* holding to invalidate the sentence.<sup>28</sup>

Fanfan was convicted by a jury of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine, which, without any additional findings, carried a maximum sentence of 78 months under the U.S. Sentencing Guidelines. At sentencing, the judge found additional drug quantities and that an aggravating role in the offense adjustment applied, which would have required a sentence of 188-235 months under the Guidelines. The sentencing judge, however, found that under *Blakely* he could not apply the enhancements and imposed sentence based solely on the facts reflected in the guilty verdict, which the Government appealed.<sup>29</sup>

The Supreme Court in an unusual two-opinion decision, held in the first opinion that the Sixth Amendment right to a jury trial “is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact . . . that was not found by the jury or admitted by the defendant.”<sup>30</sup> The Court held in the second opinion that the remedy for that violation was not a requirement that juries determine Guidelines factors but that the Sentencing Guidelines should be applied in an advisory rather than a mandatory manner.<sup>31</sup> Thus, courts are now required to consider Guidelines ranges, along with other sentencing factors contained in 18 U.S.C. § 3553(a), in determining and imposing sentence.<sup>32</sup>

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<sup>26</sup> 375 F.3d 508 (7<sup>th</sup> Cir. 2004).

<sup>27</sup> 2004 WL 1723114 (D. Me. 2004).

<sup>28</sup> 375 F.3d at 514-15.

<sup>29</sup> 2004 WL 1723114, at \*3-5.

<sup>30</sup> *Booker*, 125 S. Ct. at 756.

<sup>31</sup> *Id.* at 756-57; *see also* 125 S. Ct. at 750 (“If the Guidelines . . . could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.”).

<sup>32</sup> *Id.* at 757.

#### **IV. Implications of *Booker* on Division Practice**

Outlined below are the basic ramifications of *Booker* on Division charging, negotiating, and sentencing practice. Post-*Booker*, much of our practice will remain the same. Our prosecutors will continue to seek Guidelines sentences because they have promoted consistency, fairness, and transparency in sentencing. Thus, we will continue to oppose Guidelines adjustments and departures not supported by the facts or law, and we will appeal sentences that are below the Guidelines range and fail to reflect the purposes of sentencing.<sup>33</sup>

Just as the Guidelines promoted consistency in the almost two decades of Guidelines experience pre-*Booker*, they can continue to do so in the post-*Booker* world. As noted by the Second Circuit in the recent *Crosby* decision, the Guidelines have not been discarded.<sup>34</sup> District courts still must consult and take into account the Guidelines, along with the other 3553(a) factors. Those additional factors include the need to provide just punishment and the need to avoid unwarranted sentence disparity, goals that underlie the Guidelines system. As the District of Utah found in *United States v. Wilson*, “heavy reliance on the Guidelines is the only way to avoid unwarranted sentencing disparity.”<sup>35</sup> *Wilson* noted that “it is important [for] courts [to continue to] do ‘business as usual’ in one respect,” and that is in ensuring “equal justice under the law.”<sup>36</sup> A defendant’s sentence should not be based on the personal preferences or biases of the judge who is imposing sentence. Hence, we will continue to utilize the Guidelines in negotiating plea agreements and to argue for the application of the Guidelines at sentencing.

##### **A. Charging Practice**

After *Blakely*, the Division began to include in indictments sentencing factors, i.e. allegations supporting Guidelines calculations, and we were prepared to prove those allegations to a jury beyond a reasonable doubt. This meant that in cases already under indictment at the time of the *Blakely* decision, we had to supersede the indictments to add the sentencing factors allegations. Because *Booker* held that judges could continue to make Guidelines calculations in an advisory manner and that a jury determination of Guidelines factors would not be compatible with the Sentencing Reform Act which created the Guidelines system, we no longer have to

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<sup>33</sup> See JAMES B. COMEY, U.S. DEP’T OF JUSTICE, DEPARTMENT POLICIES AND PROCEDURES CONCERNING SENTENCING (Jan. 28, 2005), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/dag\\_jan\\_28\\_comey\\_memo\\_on\\_booker.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf).

<sup>34</sup> *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

<sup>35</sup> 355 F. Supp. 2d 1269, 1271 (D. Utah 2005).

<sup>36</sup> *Id.* at 1286.

allege Guidelines sentencing factors in an indictment nor prove them to a jury beyond a reasonable doubt.<sup>37</sup>

The only change to our charging practice will occur in cases in which we are seeking a fine above the Sherman Act statutory maximum, pursuant to 18 U.S.C. § 3571(d). In that case, we will allege the amount of gain or loss in indictments. If necessary to obtain an appropriate fine, the Division will allege the gain or loss attributable to the entire cartel, not just the defendant. Section 3571(d) provides that “[i]f *any person* derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the *gross gain* or twice the *gross loss*.”<sup>38</sup> Thus, 3571(d) provides for a fine of twice the gross gain derived from the crime or twice the gross loss of the victims of the crime, i.e. twice the gain derived by, or twice the loss caused by, the cartel rather than the defendant.

Some commentators have questioned the constitutionality and remaining validity of 18 U.S.C. § 3571(d) post-*Booker*, suggesting that gain or loss calculations pursuant to the statute cannot be delegated to a jury. While there is no caselaw on the validity of jury determinations of gain or loss under section 3571, similar arguments involving comparable sentencing statutes have been rejected by courts. In *United States v. Buckland*,<sup>39</sup> the Ninth Circuit rejected an argument that 21 U.S.C. § 841, which provides for various maximum sentences for offenses relating to differing quantities of controlled substances, was rendered unconstitutional by *Apprendi* because of claimed Congressional intent that judges determine the drug quantities by the preponderance of the evidence standard. Prior to *Apprendi*, circuit courts had held that drug quantity under section 841 was a sentencing factor that did not have to be found by a jury beyond a reasonable doubt.<sup>40</sup> The Ninth Circuit noted Supreme Court precedent that “‘every reasonable construction must be resorted to, in order to save a statute from unconstitutionality’”<sup>41</sup> and that “‘where an alternative interpretation of [a] statute is ‘fairly possible,’ [courts] are obligated to construe the statute to avoid [serious constitutional] problems.’”<sup>42</sup>

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<sup>37</sup> *Booker*, 125 S.Ct. at 756-764.

<sup>38</sup> 18 U.S.C. § 3571(d) (emphasis added); *see also* H.R. Rep. 100-390, at 6 (discussing change from prior version of law, which explicitly referred to the defendant’s pecuniary gain).

<sup>39</sup> 289 F.3d 558 (9<sup>th</sup> Cir. 2002).

<sup>40</sup> *Id.* at 564 (citations omitted).

<sup>41</sup> *Id.* at 564, *citing Hooper v. California*, 155 U.S. 648, 657 (1895); *Miller v. French*, 530 U.S. 327, 336 (2000).

<sup>42</sup> *Buckland*, 289 F.3d at 564, *citing INS v. St. Cyr*, 533 U.S. 289 (2001).

As is the case with 18 U.S.C. § 3571(d), 21 U.S.C. § 841 does not state who makes the quantity findings nor what the burden of proof is. Thus, the Ninth Circuit agreed with the Seventh<sup>43</sup> and Tenth<sup>44</sup> Circuits in holding that the text of the statute was dispositive on the issue of whether juries could determine drug quantity because section 841 is silent on these issues and hence, there was no conflict with *Apprendi*.<sup>45</sup> The Ninth Circuit found that “*Apprendi* compel[led it] to submit to a jury questions of fact that may increase a defendant’s exposure to penalties, regardless of whether that fact is labeled an element or a sentencing factor.”<sup>46</sup>

*Buckland* also noted Congressional intent to “ramp up” the punishment for drug offenders based on the type and quantity of drugs involved in the offense.<sup>47</sup> Likewise, in the alternative fine statute, Congress intended to increase maximum fines so they would constitute “a significant punishment[] for the offense involved”<sup>48</sup> and to prevent offenders from profiting from their crime.<sup>49</sup> Obviously, in many of today’s antitrust cases, especially the international cartel cases, a fine limited to \$10 million for offenses committed before June 22, 2004 or even fines limited at \$100 million<sup>50</sup> for offenses committed on or after June 22, 2004 would not be significant punishment, would allow cartelists to reap enormous profits from their cartel activity, and hence would fly in the face of Congressional intent.

## **B. Plea Negotiations**

With respect to plea agreement language, our plea agreements will contain slight modifications in light of *Booker*. Most notably, our model language will stipulate that the recommended sentence is reasonable, that there are no aggravating or mitigating circumstances justifying a 5K2.0 departure, and that no departures or adjustments will be sought that are not identified in the plea agreement. We will also have acknowledgments that the Guidelines are advisory and that the Court will make the Guidelines determinations by a preponderance of the evidence standard. We will also have waivers of sentencing appeals if the sentence is consistent

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<sup>43</sup> *United States v. Brough*, 243 F.3d 1078, 1079 (7<sup>th</sup> Cir. 2001).

<sup>44</sup> *United States v. Chernobyl*, 255 F.3d 1215, 1219 (10<sup>th</sup> Cir. 2001).

<sup>45</sup> *Buckland*, 289 F.3d at 565.

<sup>46</sup> *Id.* at 566, citing *Chernobyl*, 255 F.3d at 1219; *Brough*, 243 F.3d at 1080.

<sup>47</sup> *Buckland*, 289 F.3d at 568.

<sup>48</sup> H.R. Rep. 98-906, at 16.

<sup>49</sup> *Id.* at 17.

<sup>50</sup> For example, volumes of commerce for at least one individual company topped \$700 million in the graphite electrode conspiracy, \$1 billion in the DRAM conspiracy, and \$3.2 billion in the vitamins conspiracy.

with or below the recommended sentence, which is already common in Division plea agreements. In plea agreements involving recommended fines above the Sherman Act maximum, we will have language addressing the gain or loss. We may include Guidelines stipulations in some cases, as we have frequently done in the past. Obviously, USSG §§5K1.1 and 8C4.1 substantial assistance departures remain a valid and important part of our practice, and we will continue to request downward departures where the defendant has provided substantial assistance.

Some have questioned whether, post-*Booker*, the prospect of having to allege and prove gain or loss to a jury will seriously hinder the Division's ability to negotiate corporate fines above the Sherman Act maximum.<sup>51</sup> The issue of alleging gain or loss, however, has been a potential issue in plea negotiations since *Apprendi* in June 2000, though *Blakely* and *Booker* clarified the sweep of *Apprendi*. However, the Division's track record since *Apprendi* shows that it has had no trouble consistently negotiating plea agreements calling for fines well above the Sherman Act maximum pursuant to section 3571(d). In fact, since June 2000, the Division has obtained 18 corporate fines above the Sherman Act statutory cap under 3571(d). And since *Booker* came out, we have filed two cases against corporations which have agreed to pay fines above the Sherman Act maximum under section 3571(d).

Despite the holdings of *Apprendi* and *Booker*, many incentives remain for corporations to enter early plea agreements with agreed-upon fines, even when those fines are above the Sherman Act statutory cap. Such agreements provide certainty for corporate defendants. Also, companies that plead early and offer valuable cooperation in the Division's investigation and prosecutions may have fewer executives carved out from the non-prosecution coverage in the company's plea agreement than later arriving defendants. In addition, their culpable executives may be able to obtain favorable plea dispositions or, in some cases, immunity in exchange for their timely cooperation. Also, a company that pleads early in an investigation, before the Division has uncovered the full scope of a conspiracy, has an opportunity to limit the scope of the offense charged against the company or the amount of commerce attributed to the company pursuant to U.S.S.G. §1B1.8. If a company holds out until the Division is further along in its investigation, it may lose the opportunity for a 1B1.8 limitation. Moreover, if a company has been involved in additional cartels, it may lose to other companies the opportunity to take

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<sup>51</sup> The alternative fine statute mainly comes into play with corporate defendants. The issue of alleging gain or loss does not come into play against individual defendants as often because it has been rare for the Division to seek fines against individuals above the Sherman Act maximum of \$350,000 for offenses committed before June 22, 2004 or \$1 million for offenses committed on or after June 22, 2004. With respect to the prosecution of individuals, the Division places much greater emphasis on imprisonment than obtaining large fines. Corporations only commit cartel offenses through their employees, and thus, individual offenders must be held accountable in ways that are not reimbursable directly or indirectly by their employers. Jail is the most effective deterrent and punishment for individuals. It is a cost that a defendant's employer cannot reimburse, and it imposes a social stigma on white-collar offenders.

advantage of the Amnesty Plus program, exposing the company to another hefty fine and more prosecuted executives.

If a company approaches the Division to begin plea negotiations but is intent on litigating gain or loss for the determination of the fine amount or if under *Booker* it requests to litigate the Guidelines twenty percent loss presumption,<sup>52</sup> the Division will not depart from its ongoing investigation to engage in such litigation. If a defendant wants to contest gain or loss, it will have to wait until the end of the investigation for its day in court. The Division will not engage in plea negotiations with a company that desires to litigate gain or loss. Not only will the company go to the end of the line, but so will its executives, unless they desire to approach the Division on their own and negotiate separately with the Division, which will obviously strengthen the Division's case against the company. Thus, many companies are likely to continue to forgo the litigation of gain or loss because of the many positive consequences resulting from early cooperation, such as fine reductions, non-prosecution coverage for some executives and favorable plea agreements for others, and possible limitations in the scope of the charged offense or attributable commerce.

### **C. Sentencing Proceedings**

Turning to sentencing proceedings, the Guidelines should remain an important part of sentencing procedure. As noted above, the Division will continue to seek Guidelines sentences. We will ask judges to calculate a Guideline range prior to considering other factors, as the Second and Fourth Circuits have directed in *United States v. Crosby*<sup>53</sup> and *United States v. Hughes*.<sup>54</sup> We will oppose Guidelines adjustments and departures not supported by the facts and law. We will appeal any sentence departing from the range which fails to reflect the purposes of sentencing.

The Division has had nine sentencings since *Booker*. Just yesterday, a judge in the Northern District of California sentenced DuPont Dow Elastomers to pay an \$84 million fine pursuant to 18 U.S.C. § 3571(d) for its participation in the international synthetic rubber conspiracy. Another defendant in the synthetic rubber investigation, Zeon Chemicals, was also sentenced to pay a 3571 fine, this time \$10.5 million, on March 16.

With respect to individual defendants, two weeks ago, a judge in the Northern District of Texas sentenced the last holdout in the vitamins investigation, Daniel Rose, who was convicted after trial in December, to serve a Guidelines sentence of 30 months in prison. In doing so, the court accepted the Division's recommendations on enhancements for volume of commerce, bid rigging, and role in the offense, and it flatly rejected the defendant's arguments that the court should exercise its newfound discretion and depart down to a sentence of home confinement. In

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<sup>52</sup> USSG §2R1.1(d)(1).

<sup>53</sup> *United States v. Crosby*, 397 F.3d 103, 111-13 (2d Cir. 2005).

<sup>54</sup> *United States v. Hughes*, 2005 WL 628224, \*4 (4<sup>th</sup> Cir. Mar. 16, 2005).

January, a judge in the Eastern District of Wisconsin sentenced two defendants in our nationwide E-Rate investigation to six years' incarceration each. Also in January, another judge in the Eastern District of Wisconsin sentenced two executives, as well as their company, pursuant to the Guidelines in our Wisconsin highway bid-rigging investigation, imposing on the two individual defendants a one-year and one-day jail sentence and a ten-month split jail sentence.

#### **D. Legislative Options**

Obviously, future legislative action could produce further changes in sentencing practice and procedure. There has been much speculation regarding whether Congress will react to *Booker* and if so, what legislation would be appropriate. Justice Breyer, in his majority opinion, apparently contemplated that Congress would react, or some would say even challenged Congress to react when he stated “[t]he ball now lies in Congress’ court.”<sup>55</sup> At this point, the Department has not endorsed any particular legislative options, but Criminal Division Assistant Attorney General Chris Wray has identified, and testified before Congress regarding, four areas that Congress should seriously consider in any legislation.<sup>56</sup> Those areas are: 1) the Government’s discretion over cooperation agreements; 2) sentencing proceedings; 3) prohibited factors; and 4) the appellate review standard.

The Government’s discretion over cooperation agreements is so important to law enforcement that the Department will not support any proposal that does not adequately address this issue. Cooperation agreements are an essential tool to crack many types of crime, including cartels. The Government is in the best position to assess the value of a defendant’s cooperation. The Government has the facts pertinent to the investigation and can evaluate the defendant’s cooperation in the context of all those facts. The Government needs to retain the leverage of moving for a 5K to ensure full and complete cooperation. Otherwise, the defendant can attempt to tell only part of the story and try to convince a judge that since he provided “some” cooperation, he should get some credit for it. The integrity of the judicial process, however, demands that a defendant tell the full and complete truth.

With respect to sentencing hearings, the hearings should have consistent form and substance to ensure consistent sentences and that courts comply with their duty to consider the Guidelines. There is a danger that judges will use their discretion to ignore *Booker*’s requirements and to ignore the Guidelines. Judges in Oklahoma and Nebraska in *United States v. Barkley* and *United States v. Huerta-Rodriguez* have already ignored the *Booker* procedure of

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<sup>55</sup> *Booker*, 125 S. Ct. at 768.

<sup>56</sup> *Federal Sentencing After Booker: Hearing Before the House Comm. on the Judiciary Subcomm. on Crime, Terrorism and Homeland Security* (Feb. 10, 2005) (testimony of Christopher A. Wray, Assistant Attorney General Criminal Division, U.S. Justice Department), available at [http://www.usdoj.gov/criminal/press\\_room/testimony/2005\\_index.html#2](http://www.usdoj.gov/criminal/press_room/testimony/2005_index.html#2).

judges making Guidelines calculations by a preponderance of the evidence.<sup>57</sup> In those cases, the judges found prosecutors should prove all sentencing facts to a jury beyond a reasonable doubt—an approach explicitly rejected in *Booker*.

With respect to prohibited factors, under an advisory system, some courts may believe it is proper to consider factors that were prohibited under the mandatory Guidelines system. Such factors included a defendant's race, gender, national origin, religion, and socio-economic status. Already, some judges have cited socio-economic status as a reason for sentencing below the Guidelines range. The factors a court can consider should be consistent from judge to judge and district to district. Thus, AAG Wray urged Congress to prohibit consideration of factors that would be improper to consider or that would lead to sentencing disparity based on inappropriate characteristics of a defendant.

With respect to appellate review, the Department has concerns that the new reasonableness standard may not be sufficiently rigorous. Different courts may interpret reasonableness differently. Appellate review will now be an important means to obtain consistent sentencing, and thus there should be a rigorous and consistent appellate standard.

## **V. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004**

Last June, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 to bring the penalties for antitrust offenses more in line with other white collar offenses and to ensure that antitrust fines better reflect the massive volumes of commerce and concomitant harm caused by today's international cartels. The Act increased the maximum jail term under 15 U.S.C. § 1 from three to ten years, the maximum individual fine from \$350,000 to \$1 million, and the maximum corporate fine from \$10 million to \$100 million, effective June 22, 2004.<sup>58</sup> Section 2R1.1 of the Sentencing Guidelines, however, must be amended to accommodate the new ten-year jail maximum. Currently, the maximum recommended Guidelines' jail term under section 2R1.1 without any Chapter 3 adjustments for factors such as role in the offense or obstruction is 33 months. The Sentencing Commission recently published a proposal to change the base offense level from 10 to either 12 or 14 and to eliminate the one-level bid-rigging enhancement. The Commission requested comments by March 25 on whether the base offense level should be raised, and if so, to what extent.<sup>59</sup> The Commission also requested comment on whether the volume of commerce enhancements should be amended. Clearly, the offense levels must be increased in order to effectuate Congressional intent to increase the severity of sentencing for individuals who commit antitrust offenses, which involve

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<sup>57</sup> *United States v. Barkley*, Case No. 04-CR-119-H (N.D. Okla. Jan. 24, 2005); *United States v. Huerta-Rodriguez*, Case No. 8:04 CR365 (D. Neb. Feb. 1, 2005).

<sup>58</sup> Pub. L. No. 108-237, Title 2, § 215(a), 118 Stat. 661.

<sup>59</sup> United States Sentencing Commission, Notice of proposed amendments to sentencing guidelines, policy statements, and commentary, *available at* <http://www.ussc.gov/FEDREG/fedr0205.htm>.

massive volumes of commerce, and to bring antitrust sentencing more into line with sentences for other white collar offenses. The Department of Justice publicly requested that the Sentencing Commission amend section 2R1.1 in light of the increased jail maximum, and last Friday, the Department submitted comments supporting a base offense level of 13 and specific volume of commerce enhancements ranging from a one-point enhancement for commerce above \$1 million to a 15-level enhancement for commerce over \$1 billion.

## **VI. Conclusion**

While this is a time of great change in sentencing law, much will remain the same in Division practice. We will continue to seek fair, consistent, and transparent sentencing under the Guidelines. Great incentives still remain for defendants to negotiate early dispositions, including fines above the Sherman Act maximum, pursuant to 18 U.S.C. § 3571. Defendants that choose the risky strategy of waiting at the end of the line to litigate gain or loss will find that they lose the opportunity for the huge benefits to be obtained from cooperation departures, the optimal treatment of their culpable executives, and the protections of amnesty plus.