Department of Justice

STATEMENT OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION
HEARINGS
CONCERNING
ALTERNATIVES TO INCARCERATION

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Mr. Chairman and Members of the Commission:

I am pleased to have the opportunity to appear before you to present the Antitrust Division's views on alternatives to incarceration and sentencing in criminal antitrust cases. These subjects are of the greatest importance to the Division. As I will elaborate in my statement, despite the seriousness of antitrust crimes, which are comparable to out-and-out frauds on consumers, sentences currently imposed for criminal antitrust violations generally are inadequate to achieve their primary purpose of deterring offenses. Current sentences also suffer from the kind of "unwarranted sentencing disparities" that prompted the creation of this Commission. It is important that the guidelines to be promulgated by the Commission provide a more powerful and more consistent deterrent than is currently available.

The Sherman Act is the principal antitrust statute. It is, and has been since its passage in 1890, a criminal statute. In recognition of the seriousness of these crimes, and of the need strongly to deter them, Congress in 1974 amended the Sherman Act to make such violations felonies, punishable by up to three years imprisonment. Virtually all <u>criminal</u> antitrust cases involve intentional agreements among competitors to increase prices by means such as covert price fixing, bid rigging, and

market allocation. In exceptional instances, monopolization or attempted monopolization also is prosecuted criminally. While the antitrust laws may also be invoked civilly by the government or private plaintiffs to challenge open and notorious business conduct that may have the effect of restraining competition, only intentional conduct that is clearly harmful to consumers and clearly illegal under established precedent is prosecuted criminally. For the sake of brevity, I shall refer to conduct subject to criminal antitrust prosecution simply as "price fixing."

There can be no doubt that price fixing is a serious crime. It cannot be inadvertently committed, it causes substantial social harm, and it creates no redeeming social benefits. Unfortunately, while we have at least some tools to punish and deter it, current sentencing has not made most effective use of those tools.

As amended in 1974, the Sherman Act provides for prison sentences of up to three years for individuals and fines for corporations of up to a million dollars. The Criminal Fine Enforcement Act of 1984 increased the maximum fine for individuals to $250,000 and provided for the possibility of an alternative maximum fine for individuals and corporations of the greater of twice the pecuniary gain or loss arising from

the offense. The newer maximum fines are applicable only to offenses committed after 1984, but the felony jail sentence has been in place throughout the last decade, during which numerous price-fixing conspiracies have been discovered and vigorously prosecuted. These substantial penalties could have a substantial deterrent effect, but the deterrent effect of the actual sentences that have been meted out by the courts is far less and, in my view, grossly inadequate.

During fiscal years 1984 and 1985, 126 individual defendants were sentenced in criminal antitrust cases. We recommended incarceration for 107 of them, about 85 percent, and for all but one of the rest we made no sentencing recommendation. Only 40 of these individuals--about 32 percent--actually were sentenced to even a single day in prison. The average time imposed, averaged over all 126 defendants including those not incarcerated at all, was only about 30 days.

Fines imposed on defendants sentenced during fiscal years 1984 and 1985 also were rather modest, averaging less than $16,000 over all 126 individuals. The average fine for the 180 corporations sentenced was about $133,000.

Of the 126 individuals, 36--about 28 percent--received some form of community service as part of their sentence. Of these 36, the Division had recommended incarceration in 34 instances and, as part of a plea agreement, made no sentencing recommendation for the other two. Only 7 of the 36 felons who received community service as part of their sentence also received any actual jail time, however.

Deterrence is the primary goal of criminal antitrust enforcement, and we are convinced that accomplishing this goal requires the use of very substantial penalties in the form of both fines and imprisonment. The penalties currently being imposed by the courts are simply insufficient to curb price fixing.

The failure of our sentencing system to achieve deterrence is evident from our continuing discovery of significant numbers of price-fixing conspiracies each year. The explanation for this is also obvious. Price fixing offers the opportunity to extract huge sums from consumers, and there is a good chance that price fixers will escape detection despite our best efforts. To deter so potentially lucrative an enterprise requires much higher levels of fines and imprisonment than are currently imposed.

Before addressing fines and imprisonment, however, I would like to explain why four kinds of alternative sentences or sanctions--community service, probation, debarment, and restitution--are not adequate substitutes for imprisonment and heavy fines. Such alternative sentences or sanctions often impose little hardship on offenders, and their very availability leads all too often to their substitution for more meaningful sanctions, thus undermining deterrence.

First, many of the community service sentences imposed in recent years were not punishment at all. One defendant's community service involved coordinating an annual rodeo for a charity. A defendant in another antitrust proceeding was required to organize a golf tournament fund raiser for the Red Cross. This experience proved so pleasant that he quickly agreed to organize the golf tournament again the next year! In yet another case, the defendant was sentenced to give thirty hours of speeches explaining the economic effects of his criminal activities--punishment that in practice is more likely to frustrate than to advance the purposes of the antitrust laws. Such penalties can do nothing but trivialize the offense in the eyes of the business community and the public.

Second, probation for individuals or corporations is inappropriate as an antitrust penalty because it provides

little deterrence, and serves no real countervailing purpose in the typical antitrust context. Price fixing is an intentional offense committed by individuals whose background or reasons for committing it evoke little sympathy. In antitrust, using probation to "go easy" on first offenders is equivalent to eliminating entirely any effective penalties and deterrents. Probation is sometimes used to help ensure future compliance by those who have been convicted of breaking the law. In the case of antitrust violations, this function can and should be adequately served by fines and imprisonment alone. Neither individual nor corporate defendants need assistance from the government in learning how to "go straight" or, more specifically, how to avoid future criminal antitrust violations. Further, as to corporate defendants, "probation" implies unwarranted judicial regulation of the defendant's business activities.

Third, debarment generally also is an inappropriate sanction for price fixing. Ironically, by eliminating competitors, it can impose on society the same harm as does the crime it is designed to punish. Indeed, there could be situations in which all potential suppliers might be debarred, making the product, at least for a while, totally unavailable.

Fourth, restitution can be a meaningful sanction in many circumstances, but in a criminal antitrust case it is usually duplicative; those injured already can collect treble damages through private suits. Since any restitution would be credited against treble-damage awards, restitution would not significantly enhance deterrence where a follow-on private civil case could be expected anyway. The absence of a follow-on private civil case, moreover, is likely to indicate that the defendant is financially unreachable, or that there are severe difficulties with identifying the victims and the extent of their injuries. Thus, restitution is not a meaningful remedy. Moreover, it may significantly and unnecessarily increase the cost of criminal prosecution and might even "unduly complicate or prolong the sentencing process," and thus be statutorily barred.

Alternative sentences being ineffective or even counterproductive, fines and imprisonment should be the primary, if not the exclusive penalties for price fixing. For organizations, incarceration is not an option, so a fine clearly is the proper penalty. Objections to fining organizations are insubstantial in the case of price fixing. Since the firm's owners are the major beneficiaries of price fixing, there should be no concern about shareholders also bearing the cost of fines. Shareholders should no more be

insulated from the gains and losses from price fixing than from the gains or losses from any other risky management decision. Indeed, it is essential that shareholders have the incentives to institute appropriate safeguards to prevent criminal behavior.

The optimal fine for any given act of price fixing is equal to the damage caused by the violation divided by the probability of conviction in that particular case. Because the harm caused by price fixing to the rest of society is always greater than the benefits to the price fixer, such a fine would result in the socially optimal, i.e., zero, level of price fixing. Unfortunately, we cannot impose the uniquely appropriate fine in each case, since that would require knowledge of the perceived probability of conviction in each case. We can, however, estimate as an appropriate proxy the average probability of detection and conviction. We can get some idea of the probability of detection by looking at how long conspiracies that we eventually detected have typically managed to avoid detection. For example, though there has been substantial highway construction since World War I, with many thousands of contracts per year, we did not learn about and thus did not prosecute a highway bid-rigging case until 1972. Cases we have prosecuted have often involved continuous conspiracies more than 10 years old. It is quite probable that

many conspiracies operated for decades without ever being discovered.

In general, evidence on how long conspiracies have typically been in place leads us to believe that the probability of detection of price fixing generally is less than one in ten. Combined with the fact that not all of those detected may be indicted and then convicted, this indicates that the appropriate multiple is at least ten. Based on our experience that price fixing typically results in price increases of at least 10 percent, such a multiple would indicate that the appropriate fine must be at least equal to the total amount of sales made by the defendant entity pursuant to the price-fixing scheme.

There are, however, limits on the utility of setting antitrust fines on the basis of the sales made by a defendant. In many if not most cases, sales subject to the conspiracy will exceed the Sherman Act statutory maximum of $1 million. The "twice the gain or loss" alternative currently in effect under the Criminal Fine Enforcement Act could yield larger maximums, but in the unique antitrust context entails great potential complexities and should only be approached with caution. Where optimal fines substantially exceed $1 million, or where defendant firms are otherwise unreachable because of

insufficient corporate assets, the best course would appear to be to impose what fine is practically available, and emphasize even more the importance of deterring the individuals whose conduct inculpates their corporate employers.

In the case of individuals both fines and incarceration are available, and the Antitrust Division supports the use of both. Fines alone simply cannot do the job. Even fines large enough simply to deter most price fixing would be huge, often far greater than the statutory maximum, because the potential gains from price fixing are very large and the likelihood of detection is, regrettably, fairly small. Few individuals or even corporations have the resources needed to pay fines large enough to deter price fixing. The typical cases in recent years have involved individuals and corporations who would have found it difficult or impossible to pay even a fine equal to the damage from the violations, much less the amount--perhaps ten times the damages--that would have been necessary to deter the violation. Thus, neither individuals nor corporations can be deterred adequately by fines alone--no matter how high--because they know that their limited resources make the true cost of being caught far less than the nominal fine.

In fashioning a schedule of specific penalties for price fixing, a number of guiding concepts are relevant. The first

is that the punishment should be directly related to the harm caused. Punishment that increases as harm increases will provide additional deterrence for more socially undesirable behavior.

Second, when deterrence has failed, the penalty scheme should impose more severe penalties. Thus, recidivists should be dealt with more harshly than first offenders. I must emphasize, however, that I am not saying that we should go easy on first-time price fixers, but rather that we should deal even more harshly with subsequent offenses.

Third, the enforcement costs of maintaining a given level of deterrence should be minimized. This implies, first, that there needs to be some mechanism for rewarding both pleas of guilty and, even more important, cooperation with the government's investigation or prosecution of the offense. A second implication of the need to keep down enforcement costs is that all offense and offender characteristics on which sentences are based should be objective and fairly easy to ascertain. This is necessary in order to minimize the costs of sentencing--discovery of the facts, hearing, and appeal--as well as to minimize the potential for error. For example, while sentences should vary according to the harm caused, the measure of harm should be a simple one. I would suggest that

the amount of sales affected is an appropriate way to measure harm in price-fixing cases.

Finally, there are strong arguments for reducing judicial variance with respect to both fines and imprisonment. Substantial variance in fines for the same offense exacerbates the problem of unreachability. For example, two $500,000 fines imposed in two equivalent price-fixing cases are likely to result in a greater total amount of money being paid--and thus are likely to have a greater deterrent effect--than would a single $1 million fine imposed on one convicted price fixer while no fine is imposed on the second. Deterrence depends on the expected fine, but when this expected fine has a large variance at least some of the large fines that would be imposed on the few are likely to cross the threshold of ability to pay, and thus not be imposed at all.

There is an even more compelling reason to strive for certainty with respect to imprisonment. There is general agreement among antitrust analysts that the deterrent effect of certain prison sentences is far greater than the effect of less certain, but possibly longer, sentences. I believe that certainty as to the likelihood of a jail sentence is the key to antitrust deterrence. Given the type of individual likely to be involved in an antitrust felony--an executive in a large

firm or an owner or manager of a smaller company--even a modest jail sentence is likely to have a significant adverse effect on his or her reputation, social status, and future earning power. Thus, a certain jail sentence would be a strong deterrent to potential antitrust violators. This argues strongly for a substantial minimum term of imprisonment for all first-time price fixers--except perhaps those whose cooperation with the government leads to the conviction of others.

In conclusion, Mr. Chairman, we recommend that corporations and individuals be fined amounts that increase in direct relation to the harm caused by their antitrust violations; that all individuals receive, in addition, a certain term of imprisonment that begins with some fixed minimum and increases to some degree with harm; and that the sales affected by price fixing serve as the measure of the harm caused.

I would be happy to address any questions the Commission may have.