STATEMENT OF SCOTT D. HAMMOND
ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST MODERNIZATION COMMISSION
HEARINGS ON CRIMINAL REMEDIES

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I. INTRODUCTION

Thank you for giving the Department of Justice the opportunity to present its views concerning the issues the Antitrust Modernization Commission has identified for study in the area of Criminal Remedies. The detection, prosecution, and deterrence of criminal cartels is the highest priority of the Antitrust Division, and appropriate remedies are vital to achieving this result.

In recent years the Division has placed a particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of harm that they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable executives, and obtaining record-breaking corporate fines. For example:

- During fiscal years 2001-2005, 81 individuals have served, or are currently serving, prison sentences in cases prosecuted by the Antitrust Division. The 11 longest jail sentences in the Division's history have all been imposed during this time period.
- Since FY 1997, nearly $3 billion in criminal fines have been obtained in Division cases, well over 90 percent of this total were obtained in connection with the prosecution of international cartel activity. In FY 2005, $338 million

in criminal fines were obtained against 13 corporations and 20 individuals.

Given that the criminal remedies topics selected for discussion today all relate to corporate fines, I would like to provide the Commission with a little more background in that area. As I noted, from the beginning of FY 1997 through FY 2005, nearly $3 billion in criminal fines have been obtained in Division cases. This total includes 51 corporate fines of $10 million or more, nine fines of $100 million or more, and one fine of $500 million–the largest criminal fine ever imposed in the United States under any federal criminal statute.

International cartels affect massive volumes of commerce. In some matters which the Division currently has under investigation the volume of commerce affected by the suspected conspiracy is more than $1 billion, and in roughly three-quarters of our international investigations the volume of commerce affected is more than $100 million. Because international cartels affect such a large volume of U.S. commerce and the U.S. Sentencing Guidelines fines are based in large part on the amount of commerce affected by the cartel, fines obtained by the Division have increased dramatically since FY 1997.

In the 10 years prior to FY 1997, the Division obtained, on average, $29 million in criminal fines annually. Between FY 1997 and 2004, the Division obtained more than $204 million, $265 million, $1.1 billion, $150 million,

$280 million, $75 million, $107 million, and $350 million in criminal fines respectively. In the recently concluded FY 2005, the Division obtained more than $338 million in criminal fines, including four corporate fines of $10 million or more.

Approximately 16 months ago, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("2004 Act").[1] This Act substantially increased the Sherman Act's maximum term of imprisonment and fines. The 2004 Act increased the maximum Sherman Act corporate fine from $10 million to $100 million, the maximum individual fine from $350,000 to $1 million, and the maximum Sherman Act jail term from 3 years to 10 years.

With respect to corporate fines, Congress was reacting to the dramatic increase in fines being obtained by the Division in excess of the then $10 million Sherman Act maximum and the potential that imposing such fines could involve the Division in time- and resource-consuming litigation over gain or loss in order to take advantage of the alternative maximum fine provision in 18 U.S.C. § 3571(d). As the House Judiciary Committee's legislative history of the 2004 Act states, "the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels without the need

[1] Pub. L. No. 108-237, 118 Stat. 665.

to engage in damages litigation during the criminal sentencing process."[2]

The United States Sentencing Commission responded to the 2004 Act earlier this year by revising the antitrust guideline–§2R1.1–to increase terms of imprisonment for antitrust violations while leaving the methodology for calculating corporate fines unchanged, quite appropriately since Congress had just increased the Sherman Act maximum corporate fine tenfold given the substantial fines called for by the existing antitrust guideline.

It is against this background that I would now like to address the specific criminal remedies questions posed by the Commission.

II. DO THE GUIDELINES ADEQUATELY DISTINGUISH THE SEVERITY OF CRIMINAL ANTITRUST VIOLATIONS?

The first discussion topic is whether the Sentencing Guidelines adequately distinguish between antitrust violations with differing degrees of culpability. The Department has always understood that the antitrust guideline applies only to *per se* unlawful, horizontal cartel violations. The antitrust guideline is entitled: "§2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors." The Background Commentary to the antitrust guideline explains that:

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[2] 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

> there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.
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> The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se.

Per se horizontal cartel violations are intentional crimes committed for profit, with no cognizable social or economic benefits. The antitrust guideline imposes incarceration and significant fines for these offenses with the goal of general deterrence, and the Department supports the approach of §2R1.1 as entirely appropriate.

III. IS VOLUME OF COMMERCE AN APPROPRIATE MEASURE OF HARM?

The next topic raised by the Commission is whether the volume of commerce affected by the violation provides an adequate measure for distinguishing the severity of antitrust offenses. Use of volume of commerce to compute corporate antitrust fines has been part of the antitrust guideline since its inception in 1987, and the 20-percent proxy found in §2R1.1(d)(1) has been in place since Chapter Eight was adopted in 1991.

For almost two decades there has been unswerving support by the Department of Justice, the U.S. Sentencing Commission, and Congress for substantial corporate antitrust fines based on a company's volume of commerce affected by the violation. There are few issues in the area of antitrust criminal remedies more firmly settled than that volume of commerce is the most appropriate method for distinguishing the severity of criminal antitrust violations.

All corporate fines under the Sentencing Guidelines are calculated according to Chapter Eight. The one way in which the Guidelines calculation of corporate fines for antitrust violations differs from that for other federal crimes is that "20 percent of the volume of affected commerce" is substituted for pecuniary loss caused by the organization when computing the base fine amount.

The reason that the Sentencing Commission chose volume of affected commerce as the measure of economic harm for antitrust offenses is set out in the Commentary and Background to §2R1.1. Since there is relatively little recidivism among corporate antitrust offenders, yet *per se* unlawful activity affecting U.S. commerce persists, the controlling factor underlying the antitrust guideline is general deterrence. The Commission concluded that punishment for antitrust violations did not need to be based on precise calculations of actual gain or loss. This is because it is difficult and time consuming to establish gain or loss in antitrust cases and because general deterrence does not require an exact correlation between harm and punishment. "The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well."[3]

In 1990, Congress raised the maximum corporate fine for Sherman Act violations tenfold, from $1 million to $10 million, as part of the Antitrust Amendments Act of 1990.[4] Treating the Antitrust Amendments Act as a congressional endorsement of the existing Guidelines methodology for calculating corporate antitrust fines, the Commission determined to continue using volume of commerce to measure economic harm.

The Commission in 1987 estimated average price-fixing overcharges in criminal antitrust violations to be 10 percent of the volume of affected commerce based on empirical data then available. Since fines needed to be higher than

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[3] USSG §2R1.1, comment. (backg'd).

[4] Pub. L. No. 101-588, 104 Stat. 2879.

overcharges to achieve general deterrence, the Commission initially set antitrust corporate fines at 20 to 50 percent of the volume of commerce affected by the violation.

When the Commission moved the calculation of corporate antitrust fines from the antitrust guideline to the new organizational sentencing provisions of Chapter Eight in 1991, it set the base fine amount at 20 percent of the affected volume of commerce, reflecting the fact that losses from antitrust offenses exceed overcharges.[5]

In 2004, Congress again revisited the issue of antitrust criminal penalties, in part in response to the Division's aggressive pursuit of international price-fixing cartels affecting very substantial amounts of U.S. commerce–billions of dollars in some instances. Once again, the response was a tenfold increase in the maximum corporate fine, this time to $100 million, along with an increase in maximum fines for individuals to $1 million and the maximum period of incarceration to 10 years. The House Judiciary Committee's legislative history of the 2004 Act states:

> Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. The presumption is sufficiently precise to satisfy the

[5] USSG § 2R1.1, comment (n.3).

> interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations.[6]

Understandably, when the Sentencing Commission revised the antitrust guideline earlier this year to implement the provisions of the 2004 Act, it left the 20-percent presumption unchanged.

Several recent empirical studies show that the Commission's original estimate of a 10-percent overcharge, which supports the 20 percent volume of commerce calculation, may in fact be too low.[7] Moreover, based on studies estimating overcharges in various of the Division's international cartel cases of between 11 and 34 percent,[8] it does not appear that the percentage overcharge becomes smaller

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[6] 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

[7] Jeffery H. Howard & David Kaserman, *Proof of Damages in Construction Industry Bid-Rigging Cases*, 34 Antitrust Bull. 359 (1989); Lance E. Brannman & J. Douglas Klein, *The Effectiveness and Stability of Highway Bid-Rigging, in* Empirical Studies in Industrial Organization: Essays in Honor of Leonard W. Weiss 61 (David B. Audretsch & John J. Siegfried, eds. 1992); Luke M. Froeb, Robert A. Koyak & Gregory J. Werden, *What is the Effect of Bid-Rigging on Prices?*, 42 Econ. Letters 419 (1993); Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 Antitrust Bull. 369 (1993); John E. Kwoka, Jr., *The Price Effect of Bidding Conspiracies: Evidence from Real Estate "Knockouts,"* 42 Antitrust Bull. 503, 515 (1997); Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding*, 30 RAND J. Econ. 263, 283-87 (1999); Martin Pesendorfer, *A Study of Collusion in First Price Auctions*, 67 Rev. Econ. Stud. 381, 405 (2000).

[8] B. Adair Morse & Jeffery Hyde, Estimation of Cartel Overcharges: The Case of Archer Daniels Midland and the Market for Lysine (Staff Paper 00-8, Dep't of Agricultural Economics, Purdue University)(Oct. 2000); John M. Connor, Global Price Fixing: Our Customers are the Enemies 264 (2001); John M. Connor & Robert

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as the volume of affected commerce becomes larger.

IV. IS THE GAIN OR LOSS IN 18 U.S.C. § 3571(d) THE GAIN OR LOSS FROM THE OFFENSE AS A WHOLE?

The next discussion topic involves the application of the alternative maximum criminal fine provision found in 18 U.S.C. § 3571(d) to antitrust violations. This provision reads:

> If 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, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

The plain language of § 3571(d) is strongly suggestive that the gross gain or loss is that of the violation as a whole and not the gain or loss attributable to individual participants. The "gain" in § 3571(d) is pecuniary gain derived by "any person" from the offense. In any conspiracy case this would include the other members of the conspiracy, and so gross gain in an antitrust conspiracy must mean the gross gain by all coconspirators combined. The "loss" language in § 3571(d) is as broad as the language regarding gain, and is most easily understood to mean the

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[8](...continued)
H. Lande, *How High Do Cartels Raise Prices*, Tulane L. R. (forthcoming 2006).

cumulative loss to all the victims of a conspiracy caused by all the coconspirators.

The legislative history supports the plain language conclusion. It notes that § 3571(d) was being amended from the earlier alternative fine provision found in 18 U.S.C. § 3623(c)(1) specifically to cover not only gain derived by the defendant from the offense but also gain to any person that the defendant "knows or intends that his conduct will benefit."[9]

Furthermore, 18 U.S.C. § 3571(d) is a general criminal fine statute that applies to individuals as well as companies and to antitrust violations in the same manner that it applies to all other federal crimes. That is, it applies equally to all types of criminal conspiracies–to bank robbery as well as price fixing–and to all types of pecuniary gains and losses, not just those resulting from commercial transactions. The legislative history of the nearly identical alternative fine predecessor to 18 U.S.C. § 3571(d)–18 U.S.C. § 3263(c)(1)–enacted as part of the Criminal Fine Enforcement Act of 1984,[10] supports this proposition.

> The fine authorized by section 3623(c) can be applied not only in white collar crimes (e.g., tax law violations), but also in other crimes. For example, someone convicted of

[9] H.R. Rep. No 100-390, at 6 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2137, 2142. *Cf.* United States v. Andreas, 1999 WL 116218 (N.D. Ill.) ("Congress amended subsection (d) to ensure that criminal defendants like Andreas would be liable for their conduct even if they intended to enrich a third party like ADM.").

[10] Pub. L. No. 98-596, 98 Stat. 3134.

> conspiracy to distribute could be fined up to twice the amount gained by the drug dealing. This provision should take some of the economic incentive out of such offenses.[11]

There is no indication that Congress intended gross gain or gross loss to have different meanings for different crimes.

Under the common law, "a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all . . . .'"[12] Put even more succinctly, "so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators."[13] Against this background, it is unlikely that Congress would have limited a conspirator's maximum fine to twice the gain to, or loss caused by, the conspirator alone when he, she, or it is legally liable for the actions of all the members of the conspiracy, at least not without using specific legislative language to that effect. Such language is not hard to draft. It can be found, for example, in USSG §8C2.4, where the Sentencing Commission uses "the pecuniary gain to the organization from the offense" and "the pecuniary loss from the offense caused by the organization" in computing a corporation's base fine amount.

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[11] H.R. Rep. No. 98-906, at 17 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5433, 5450.

[12] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-54 (1940).

[13] Salinas v. United States, 522 U.S. 52, 64 (1997).

This conclusion does not mean that a judge would impose the same fine on all the members of a price-fixing conspiracy, only that the maximum possible fine would be the same for all. The actual fine would be determined according to the Sentencing Guidelines and would be based on the defendant's own conduct. But that is a *completely separate* issue from the determination of the alternative maximum fine under 18 U.S.C. § 3571(d).

V. THE 20 PERCENT PROXY AND 3571(d)

The final topic for discussion is whether the "20 percent of the volume of affected commerce" proxy set out in §2R1.1(d)(1) should be used if it would result in a fine greater than the Sherman Act statutory maximum.

I can see no connection between the Guidelines methodology used to calculate corporate antitrust fines and whether the maximum fine in any particular case is based on the Sherman Act or § 3571(d). I have already discussed at length the reasons why the 20-percent proxy is the most appropriate basis on which to calculate corporate antitrust fines–a methodology that received congressional approval as recently as last year and Sentencing Commission approval just this year. Empirical studies have shown that the 10-percent overcharge presumption that underlies the 20-percent proxy does not decline with very large volumes of affected commerce – even those high enough to support criminal fines above $100 million. Thus, the appropriateness of the proxy is independent of the size of the resulting fine, let alone whether the resulting fine is arbitrarily more or less than the Sherman Act maximum.

Obviously, this does not mean that whether a Guidelines antitrust fine is more or less than the Sherman Act maximum is of no importance. After the Supreme Court's decision in *United States v. Booker*,[14] it is clear that we are able to prove volume of affected commerce under §2R1.1 to a judge at sentencing by a preponderance of the evidence, while post-*Blakely* we have to prove gross gain or loss under § 3571(d) to a jury at trial beyond a reasonable doubt. So, if use of the 20-percent proxy results in a fine in excess of $100 million and a defendant will not agree that imposition of the fine is appropriate under § 3571(d), we must be prepared to prove to a jury that the conspiracy resulted in sufficient gross pecuniary gain or loss to justify the Guidelines fine.

Establishing a conspiracy's gross pecuniary gain or loss is quite different, however, from establishing a particular antitrust defendant's appropriate base fine amount – a figure that the Sentencing Commission determined should not be based directly on pecuniary gain or loss but should also account for the dead-weight loss

[14] 125 S. Ct. 738 (2005).

that results from antitrust violations. The need to invoke § 3571(d) to establish an appropriate maximum fine amount provides no reason to either question or change the method of arriving at a correct corporate fine for any specific defendant under the antitrust guideline.