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June 27, 2002

Via Federal Express and Facsimile

Advisory Group on Organizational Guidelines
c/o Office of Public Affairs, US Sentencing Commission
Suite 2-500 S. Lobby, One Columbus Circle, NE
Washington, DC 20002

Ladies and Gentlemen:

On behalf of the American Bar Association Section of Antitrust Law, the enclosed comments are being submitted for your consideration in response to your Request for Public Comment on the Organizational Guidelines of the U.S. Sentencing Commission.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and 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 position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Roxane C. Busey

Roxane C. Busey
Chair, Section of Antitrust Law

Enclosure

RESPONSE OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION TO THE REQUEST FOR COMMENTS BY THE ADVISORY GROUP ON ORGANIZATIONAL GUIDELINES TO THE UNITED STATES SENTENCING COMMISSION

The Section of Antitrust Law of the American Bar Association ("the Section") submits these comments in response to the Request for Public Comment issued by the Advisory Group on Organizational Guidelines to the United States Sentencing Commission. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly should not be construed as representing the policy of the Association.

These comments address three provisions that govern the sentencing of organizations.[1] In particular, the Section recommends that the two provisos under § 8C2.5(f), relating, respectively, to the participation of high level individuals and to self-reporting, be eliminated in their entirety; that the Guidelines be amended to clarify that waiver of privilege is not required for an organization to be deemed cooperative under

[1] The Guidelines employ a mechanistic formula for sentencing organizations. A series of computations is required which produces a range for the fine, and the court's discretion is confined to imposing a fine within that range. Initially, the base fine must be calculated. In most cases, a base fine table is used which sets an amount premised on certain offense characteristics. The base fine is the highest of the amount listed on this table, or the pecuniary gain or loss caused by the offense. In antitrust cases, however, the base fine is calculated as 20% of the amount of commerce affected by the violation. The base fine table is not used.

A multiplier will then be applied to the base fine to calculate a range for the total fine. The multiplier is derived from the computation of a "culpability score," and in most cases the multiplier can range from 0.05 to 4.0. Thus, depending on the multiplier, the total fine can be anywhere from 5% of the base fine to 4 times the amount of the base fine. In antitrust cases, however, the minimum multiplier must be at least 0.75.

In calculating the culpability score, each company begins with 5 points. If there are no adjustments, this would result in a multiplier range of 1.0 – 2.0. The total fine then would be between the base fine that was calculated and twice that amount. Points can be added to the culpability score, for example, if there was participation in or tolerance of the offense by high-level personnel. The number of additional points for this factor can range from 1 to 5, depending on the number of employees of the company. Also, points can be added if there is a history of similar conduct, if there was a violation of a court order, or if there was an obstruction of justice during the investigation. Points can also be deducted. Three points will be deducted if there was "an effective program to prevent and detect violations of law." Points can also be deducted if the company reports the violation, cooperates in the investigation, or accepts responsibility for the conduct. Once the culpability score has been determined, it will be used to calculate the minimum and maximum multipliers. The court must set the total fine within the range established by the application of the minimum and maximum multipliers to the amount of the base fine.

§ 8C2.5(g); and that the method of calculating the base fine for an antitrust violation become the focus of a separate study that would address whether antitrust violations should be treated differently from similar crimes (as they are currently); whether there is empirical support for the current presumptions; and what base fine calculation methodology would best promote the overall goals of the Guidelines and of the antitrust laws.

I. THE PROVISIONS ON COMPLIANCE PROGRAMS SHOULD BE AMENDED TO ALLOW CREDIT FOR EFFECTIVE ANTITRUST COMPLIANCE PROGRAMS.

The Section does not believe there is any need to amend the definition of an "effective program to prevent and detect violations of law" in 3(k) Application Note to § 8A1.1. Generally, the definition of an "effective program" is appropriate to describe a program "designed, implemented and enforced" to prevent and detect criminal violations of the antitrust law. Experience has shown that the seven steps set forth in Commentary 3(k) are generally clear, appropriate and achievable, and the Guidelines note that organizations have the flexibility to adapt the criteria as appropriate.

Section 8C2.5.(f), entitled "Effective Program to Prevent and Detect Violations of Law" provides the incentive to implement a compliance program. This section states that an organization will have three points subtracted from its Culpability Score if the violation "occurred despite an effective program to prevent and detect violations of law."

Notwithstanding a general consensus that antitrust is a key area for compliance programs, the first proviso of subsection (f) eliminates the attraction of the potential three point reduction in virtually every case concerning an antitrust violation. The proviso states "that this section does not apply if an individual within high-level personnel of the

organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees . . . condoned or was willfully ignorant of the offense." Participation in an offense by an individual deemed to be among the "high-level personnel of an organization results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law."

Current antitrust criminal prosecutions focus on price-fixing, an offense generally committed by people within the organization who have "pricing authority" -- the ability to set or approve prices that the organization charges for products. The Antitrust Division of the United States Department of Justice ("Antitrust Division") presumes that anyone with this type of "pricing authority" is within "high-level personnel of the organization" or relevant unit, even though these "high-level" personnel routinely conceal their collusive conduct from corporate leadership. Therefore, the carrot of the three-point reduction is removed simply because of the nature of the violation.

Particularly in large organizations, "an effective program" may be implemented that still does not deter or result in the detection of all violations. Therefore, at least from the perspective of the application of the Sentencing Guidelines, the three point reduction does not provide much of a practical incentive.

The Section recommends that the good faith of the organization be evaluated separately from the identity of the perpetrators of the violation and the ultimate success of the compliance program. The organization should receive credit for attempting to

prevent and detect criminal conduct by virtue of the program, even if that program is not totally successful. Indeed, the Application Note 3(k) to § 8A1.2 explicitly recognizes this fact as follows:

> "failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."

If the organization has properly implemented the seven requirements of an "effective program to prevent and detect violations of law," its culpability score should be reduced.[2]

Similar issues arise with respect to the second proviso of § 8C2.5(f) regarding the requirement that the "organization [not] unreasonably [delay] reporting the offense to appropriate governmental authorities." This requirement does not promote compliance programs, nor does it provide an incentive to implement them.[3] Indeed, the proviso may produce the opposite effect.

This requirement is particularly problematic in antitrust cases where issues such as size of the market, length of the conspiracy, and scope of products involved may be

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[2] Any concerns that the program itself is a sham are handled adequately in the current Guidelines, and these comments do not suggest any retreat from that stance.

[3] Numerous other incentives for self-reporting exist apart from the Guidelines as practices related prosecutorial enforcement process. The Section, in particular, applauds the efforts of the Antitrust Division in this area with its unique "Corporate Leniency Policy," issued August 10, 1993, <<http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>>. This policy creates major incentives for a company to be the first to self-report an antitrust violation. In addition, the Antitrust Division has widely publicized its policies to incentivize speedy self-reporting even when a company is not the first.

disputed in good faith with the government. An organization's decision not to report the offense to the authorities may not relate to whether the company operates an "effective compliance program," but rather focus on whether the company believes an appropriate resolution can be achieved with the government. Other factors may influence whether and when the company decides to report suspected wrongdoing, such as considering the Antitrust Division's leniency program, the potential filing of civil damage actions, and the likelihood of other government enforcement actions around the world, including the European Commission. If the company terminates the illegal conduct, then the deterrence sought by the Guidelines has been achieved.

In addition, there is a certain irony in requiring the company to report itself to the government to receive credit for its compliance program. There is no legal obligation for a company to report an antitrust violation. Therefore, the presence of a good faith compliance program and self-reporting are two separate, unconnected concepts. The failure to report does not demonstrate there has been a loss of deterrence. It simply means the government has not been invited to investigate. The basic design and construct of the Guidelines further supports the distinction between compliance programs and self-reporting as separate concepts by providing separate provisions to give credit for each.

In sum, the Section believes the Guidelines should promote and provide an incentive for effective antitrust compliance programs. To advance that goal, these two provisos under section (f) should be deleted. The determination of whether the organization had an effective compliance program should focus on whether the design,

implementation and enforcement of the program establishes that the company was committed to complying with the law.

II. THE COMMISSION SHOULD CLARIFY THAT COOPERATION DOES NOT REQUIRE WAIVER OF LEGAL PRIVILEGES.

Under § 8C2.5(g), entitled "Self-Reporting, Cooperation, Acceptance of Responsibility," the Guidelines provide that either five points or two points can be subtracted from an organization's culpability score under a variety of circumstances including that the organization "fully cooperated in the investigation." Application Note 12 to § 8C.25 requires that the organization's "cooperation must be both timely and thorough. . . . To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization." Many federal prosecutors have interpreted Application Note 12 to require organizations to disclose information held by the organization's attorneys that is covered by the attorney-client privilege and attorney work product immunity. The Antitrust Division, however, has rejected that interpretation and not required waiver of legal privileges.[4] As reflected by its impressive enforcement record in criminal cartel cases, this approach has not impaired prosecutions of antitrust offenses. In fact, through its Leniency Policy, the Antitrust Division has secured self-reporting and cooperation on an unprecedented scale without demanding actual attorney-client communications. Working with counsel for the cooperating parties, the Antitrust

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[4] The Guidelines also permit downward departures based on cooperation. U.S.S.G. § 8C.4.1. Just as waiver of legal privileges should not be a factor under § 25, waiver should also not play any role in evaluating cooperation for downward departures based on substantial assistance. The Antitrust Division has also been extraordinarily successful in promoting defendants to provide

Division has obtained the full range of corporate cooperation, including witnesses, documents and counsel proffers without the need to obtain privileged documents. The Antitrust Division's success in this area should serve as the model for the Guidelines' approach.

The Section believes that requiring organizations to waive the attorney-client privilege and attorney work product immunity creates a disincentive to create or implement compliance programs and self-report offenses to the appropriate governmental authorities. Therefore, the Section recommends amending the Guidelines to clarify that waiver is not a requirement for a corporation to be considered cooperative under § 8C2.5(g).

The attorney-client privilege is the oldest of the confidential communication privileges known to the common law and its purpose is to encourage forthright and complete communication between attorneys and their clients.[5] It is well established that the attorney-client privilege applies when the client is a corporation,[6] and, therefore, if the Commission decides to address the requirement that a corporation waive this privilege when it self-reports, the possible implications must be understood.

First and foremost, the ability to force the discovery of privileged communications between a corporation and its counsel is antithetical to one of the main

(continued...)

substantial assistance through the use of this Guidelines provision without requiring any waiver of legal privileges.

5 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961)).

6 *See id.* at 390 (citing *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915)).

principles supporting the attorney-client privilege -- that solid legal advice cannot be rendered without full disclosure from the client.[7] In most instances, an attorney representing a corporation must rely on information conveyed by employees. If, in order to obtain credit for self-reporting, a corporation is forced to waive the attorney-client privilege, the result may be that these employees are less forthcoming with the company's attorneys in the first instance. Attorneys then would be forced to advise their clients on matters without the benefit of complete and accurate information. Conversely, when advising their corporate client, both inside and outside counsel may be far less candid in their investigations and documentation if they know that their work product is discoverable. The result would be deficient advice to the client.

Second, waiving the attorney-client privilege may discourage corporations from creating and enforcing effective compliance programs, particularly in the antitrust area. A major purpose of the Sentencing Guidelines is to foster deterrence by rewarding organizations who engage in these preventative measures. By forcing corporations to waive the attorney-client privilege, corporations may be discouraged from conducting a thorough investigation when internal wrongdoing is suspected. Instead of seeking counsel's advice (that is then open for the government attorneys to examine if self reporting occurs), corporations may simply ignore the possible violation and assume the risk of a future governmental inquiry. The corporation's incentive to investigate and enforce their compliance program may lessen if they are forced to disclose the attorney's work product because the alternative may appear less costly.

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[7] *See id.* at 389 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

Moreover, the history of antitrust enforcement indicates that antitrust compliance programs are a necessary and critical component of effective deterrence and that legal counseling and advice concerning antitrust issues particularly foster compliance. As antitrust is a field of law with grey areas that can be confusing and non-intuitive to business persons, legal counseling is beneficial as a matter of public policy.

Third, forcing corporations to waive the attorney-client privilege may discourage corporations from self-reporting their offenses to the appropriate governmental authority. If the communications between the corporation and counsel were no longer privileged, corporations would be far less likely to self-report because they run the risk of raising new issues revealed by the attorney's investigation. On the other hand, by not waiving the privilege, corporations may be more willing to self-report on the recommendation of counsel because they have received a complete, candid and thorough analysis of the situation and the possible consequences.

The impact of the waiver can also reach far beyond the government investigation. Once the attorney-client privilege is waived, the attorneys' work product may be discoverable in any civil lawsuits against the corporation. In antitrust cases, which allow for treble damages and are based on joint and several liability, a waiver that results in counsel's investigatory files being available at trial in a treble damage action could be far more costly to the corporation than any benefit derived from cooperating with the government. When weighing the risks, corporations may choose not to investigate, to limit the scope of the investigation or to not self-report. Each of these alternatives

directly contradicts the goals, spirit and purpose of the Sentencing Guideline's provision on compliance programs.

It is important to note that even without a waiver, there are other ways for the government to obtain the facts contained within an attorney's investigation. This occurs in antitrust investigations including in disclosures under the Leniency Policy. Nothing precludes the government from questioning the very employees involved in the alleged transgression or reviewing corporate documents submitted by a cooperating organization. Despite the convenience to the government of obtaining the point-by-point results of an attorney's investigation, "such considerations of convenience do not overcome the policies served by the attorney-client privilege."[8]

Finally, a corporation's decision to preserve the attorney-client privilege should never be viewed as unwillingness to cooperate with the government. In a 1999 memorandum, then Deputy Attorney General Eric Holder, Jr. listed eight factors that prosecutors should consider when determining whether to charge a corporation with a crime. He explicitly noted that a corporation's decision to maintain the attorney-client privilege is not a sole determinative factor.[9] Holder stated that the Justice Department does not "consider waiver of a corporation's privileges an absolute requirement" and that "prosecutors should consider the willingness of a corporation to waive the privileges...as

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[8] *Id.* at 396.

[9] Holder, Eric Jr., *Bringing Criminal Charges Against Corporations*, U.S. Department of Justice (July 16, 1999) *available at* http://www.usdoj.gov/04foia/readingrooms/6161999.htm.

only one factor in evaluating the corporation's cooperation."[10] As a policy matter, waiver of privilege should not be a factor in assessing cooperation.

Accordingly, the Section recommends amending Comment 12 to § 8C2.5 of the Sentencing Guidelines to make clear that corporations need not waive the attorney client privilege or disclose the attorney's work product to obtain the benefits of § 8C2.5(g)(1) or (2). Such an amendment would further the objective of the attorney-client privilege as well as encourage corporations to create and implement effective compliance programs and self-report.

III. A COMPREHENSIVE STUDY OF THE METHODOLOGY FOR CALCULATION OF THE BASE FINE FOR ANTITRUST OFFENSES SHOULD BE CONDUCTED.

The method of calculating the base fine for an antitrust violation is substantially different from the method used in most sentencing calculations. The Antitrust Guideline, U.S.S.G. § 2R1.1, mandates a base fine computed from the volume of commerce affected by the conspiracy, not the gain or loss resulting from the offense. Once the court calculates the volume of commerce, the Guideline then presumes an overcharge of 10% and mandates that it be doubled. Hence, the base fine is calculated on 20% of the volume of commerce affected, *not* the actual harm that the conduct caused. This presumption overstates the impact of the conspiracy in many cases – and understates it severely in many others – causing inequity in many sentencing decisions.

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[10] *Id.*

The Section recommends that a study be conducted to evaluate the base fine calculation methodology for antitrust offenses. There are a number of reasons that this method of calculating a base fine is likely to lead to inequitable results. First, no publicly available empirical evidence has ever been presented to support the presumed ten percent overcharge. Second, the presumed ten percent overcharge is in conflict with the broad inclusion of sales in the calculation of "affected" commerce. That calculation includes sales where the conspiracy had a minimal, or even no effect, on pricing. Third, the doubling of the ten percent overcharge to reflect a measure of injury from the violation merely compounds the problem of a Guideline methodology, adding a second presumption to the presumption of the amount of overcharge. Fourth, the Guidelines' methodology does not take into account the extent to which the defendants actually implemented the alleged price conspiracy, an important issue in assessing their relative culpability. Thus, the methodology for calculating a base fine needs extensive review.

A. A Brief History Of Criminal Antitrust Fine Legislation

The history of criminal fine legislation regarding antitrust offenses reflects the goals of deterrence and preventing offenders from profiting from wrongdoing.

The Sherman Act, 15 U.S.C. §§ 1-3, has been amended to increase criminal penalties three times since enactment in 1890. In 1990, the Sherman Act criminal fine for a corporation was raised to the current maximum of $10 million. While sufficient deterrence was the watchword for each increase, the issue of over-deterrence was also raised when the statute was amended to upgrade Sherman Act violations to felonies in 1974.

The Sherman Act potential maximum criminal penalties have been augmented by the general sentencing provisions of Title 18 of the United States Code, with three relevant amendments. The Sentencing Reform Act of 1984 provided the precursor to the current 18 U.S.C. § 3571. It provided that a corporation convicted of a felony could be fined a maximum of $500,000 or the maximum statutory penalty, whichever is greater, but had no impact on the Sherman Act maximum fine, as it had already been $1 million for ten years. While the Sentencing Reform Act was intended to prevent a corporation from retaining its ill-gotten gains, a "twice-the-gain/loss" provision was proposed and specifically rejected at that time because of opposition from the business community. The Senate Judiciary Committee concluded that an increase in the maximum fine levels for serious offenses would assure that the fine imposed would usually reach the defendant's ill-gotten gains while avoiding unnecessary complexity.

That same year, the Criminal Fine Enforcement Act of 1984 added the "twice-the-gain/loss" provision of 18 U.S.C. § 3571(d). The House Judiciary Committee identified the "twice-the-gain/loss" provision as a method used or approved in other contexts, such as the Model Penal Code § *6.03(5)*, the recommendation of the National Commission on Reform of Federal Criminal Laws,[11] and various other federal and state laws.[12] The goal was primarily to prevent convicted offenders from profiting from their wrongdoing, and,

11 Nat'l Comm'n on Reform of Fed. Crim. Laws, Final Report § 3301(2) (1971).

12 Embezzlement, 18 U.S.C. § 645; Bribery of public official 18 U.S.C. § 201; N.Y. Penal Law § 80.00(1)(b), 80.05(5) (McKinney ed. 1982).

the Committee reasoned, the most effective way was to calculate a fine based on the pecuniary gain from the wrongdoing.

Notably, this legislation expressly authorized the court 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 the court.[13] There is no suggestion in the statute or the legislative history that the court somehow ought to simplify or truncate the process of determining gain or loss by formulating and relying upon some form of mechanical proxy regardless of whether it reflects reality, *i.e.*, a presumption about the actual gain or loss attributable to the defendant's violation of the law.

Finally, in the Criminal Fine Improvements Act of 1987, Congress made one substantive change to 18 U.S.C. § 3571(d), by authorizing courts to impose such an alternative fine if a person other than the defendant derives pecuniary gain from the offense. Thus, if the defendant knows or intends that his conduct will benefit another person financially, the court can measure the fine imposed based on twice the benefit to that party as well.

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13 In *United States v. Andreas*, the district court 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).

B. The Sentencing Of Organizations Under The Guidelines Applicable To Antitrust Offenses -- Issues In The Calculation Of A Base Fine

The existing statutory structure for the sentencing of organizations in antitrust cases involves the calculation of fine ranges pursuant to the Sentencing Guidelines that are capped by the Sherman Act $10 million maximum or the "twice-the-gain/loss" provision of 18 U.S.C. § 3571(d), whichever is higher. As indicated, the focus of the recommended study is on the calculation of an organization's *base fine* in an antitrust case.

1. Base Fine Calculation

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 U.S.S.G. § 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 economic impact of the conduct -- twenty percent of the volume of commerce attributable to the defendant that was affected by the violation.[14]

a. Volume of Commerce Affected by the Violation

The "volume of commerce" is the cornerstone of the antitrust fine calculation. Unfortunately, the Guidelines offer little instruction on how to determine the volume of commerce other than stating that:

[14] As a U.S. prosecution must be premised upon effects in the U.S., only domestic commerce is generally included in the "volume of commerce."

> For the purposes of the [antitrust guideline] the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.[15]

The "volume of commerce" language has been the subject of much commentary and litigation.[16] The United States Courts of Appeals have generally applied the Guidelines' provisions on "affected" commerce broadly, and have required a minimal connection between the violation and a defendant's sales of the relevant product to deem those sales "affected" under the Guidelines. *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995) (all of a defendant's sales of the relevant product during the period of the conspiracy included in the calculation of affected commerce); *United States v. SKW Metals and Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999) (government must prove that the prices charged were "affected by" the conspiracy, but "[i]f the conspiracy was a non-starter, or if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals were not "affected by" the illegal agreement, and should be excluded"); *United States v. Andreas*, 216 F.3d 645,678-79 (7th Cir. 2000) (largely adopting Second Circuit approach but holding that the burden of proving which sales were not affected by the

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15 1991 U.S.S.G. § 2R1.1(b)(2). The commentary to the 1987 Guidelines indicated that the volume of commerce approach was selected because of the difficulty in calculating the amount of the damage caused or profit made. 1987 U.S.S.G. § 2R1.1, comment (background). The Commission also noted that sentences in pre-guidelines practice had typically increased in proportion to the amount of commerce involved in the violation. However, since 1996, the Antitrust Division has utilized the "twice the gain, twice the loss" provision of 18 U.S.C. § 3571(d) to establish the alternative maximum fine in its cases and performs this same analysis in virtually every case.

16 *See e.g.*, M. Cohen and D. Scheffman, *The Antitrust Sentencing Guidelines: Is the Punishment Worth the Costs?*, 27 M. Am. C. L. Rev. 331, 349 (1989).

conspiracy should be shifted to the defendant); *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) (rebuttable presumption that all defendant's sales of relevant product during the conspiracy period were affected, but if defendant rebuts presumption by offering evidence of sales which were not affected, then the government would have the burden of proof).[17]

Although it is reasonable to expect that the issue of what does and does not constitute "affected" commerce will continue to be the subject of litigation, there seems

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[17] According to the *Giordano* court,

> this approach does not require a "sale-by-sale accounting." In *Hayter Oil*, the Sixth Circuit relied on the *per se* rule applicable to price-fixing cases and the fact that it "avoids the necessity of making 'a burdensome inquiry into actual market conditions' to determine when the conspiracy 'involves anticompetitive conduct.'" 51 F.3d at 1273 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 & n. 25, 104 S. Ct. 1551, 1559-60 & n. 25, 80 L. Ed. 2d 2 (1984)). We agree with the Sixth Circuit that the district court should not undertake a "burdensome inquiry" into the volume of commerce for sentencing purposes. It is enough for the district court to determine the periods during which the conspiracy was effective. Once the conspiracy is found to have been effective during a certain period, there arises a rebuttable presumption that all sales during that period were "affected by" the conspiracy. *See United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000). The defendant may rebut that presumption by offering evidence that certain sales, even though made during a period when the conspiracy was effective, were not affected by the conspiracy. *See SKW II*, 195 F.3d at 93 (Newman, J., concurring) (Evidence of an unaffected transaction "would be peculiarly within the knowledge of the defendant," so "it is entirely appropriate to oblige him to prove it, or at least come forward with evidence of it"); *see also Andreas*, 216 F.3d at 679. When a conspiracy is a non-starter, however, or when the illegal agreement is ineffectual during a certain time period, those sales should not be included in the volume of commerce, because they were not "affected by" the illegal agreement. *SKW II*, 195 F.3d at 91; see also *Andreas*, 216 F.3d at 677 ("Like the Second Circuit, we disagree with the *Hayter Oil* holding in so far as it implies that all sales during the time period of the price-fixing conspiracy should be counted for purposes of § 2R1.1 simply because they occurred during the period of the conspiracy.").

261 F.3d at 1146-47 (footnotes omitted).

to be judicial consensus that the term "affected" ought to be construed broadly and that even a minimal effect on prices would justify inclusion in the calculation. The majority view, however, clearly rejects the inclusion of all of a defendant's sales of the relevant product during the conspiracy period without regard for whether there was some discernable effect.[18]

In any event, the broad inclusion of a defendant's sales in the calculation of "affected" commerce to include even those sales where the effect on prices may have been minimal, should be considered in light of the Guidelines' application of a presumed ten percent overcharge - - which is then doubled in the calculation of the base fine. As discussed below, such liberal inclusion in calculating the amount of "affected" commerce, even when the conspiratorial impact is minimal,[19] conflicts with that presumed overcharge. Moreover, such a presumption is subject to question even when the conspiracy's target price has been fully implemented.

b. *The Twenty Percent "Effect" Presumption for Determining Base Fine*

As indicated, the "affected volume of commerce" is one of two variables in calculating the base fine. In antitrust cases only, there is a specific Guidelines provision

[18] The Section notes that the Sentencing Commission could bring greater consistency and clarity to the process for antitrust offense sentencing during the time period of a study on the issue of overall methodology for base fine calculation by clarifying the definition of "affected" to include only those sales directly affected by the alleged violation.

[19] Or, in the case of the Sixth Circuit, sales may be included in the calculation if there was no affect on the prices charged.

that establishes the base fine as twenty percent of the "affected volume of commerce." U.S.S.G. § 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.

U.S.S.G. § 2R1.1 cmt. n.3.

The Guidelines thus impose a conclusive presumption concerning the overcharge. The Section takes strong issue with this approach. There is no publicly available data to support that presumption and any review of this Guideline should include such an empirical study. The presumption that all antitrust conspiracies result in the same level of harm is inequitable and disproportionate – in both directions.

c. *The Presumed Ten Percent Overcharge/Twenty Percent Effect Is the Wrong Approach*

There are a number of reasons why rigid application of a twenty percent "effect" factor is inappropriate. First, there is no publicly available empirical evidence or known

economic analysis that supports the presumption of a ten percent overcharge, particularly in cases that do not involve allegations of bid rigging.[20] Nor is there any basis for the further presumption that doubling the overcharge will more closely approximate the loss or injury from the violation. To the contrary, there is strong reason to believe that the presumed overcharge of ten percent is grossly overstated in many cases and may be grossly understated in others.[21]

Second, in reality, the amount of any overcharge is likely to vary based on a number of factors including, without limitation, the following:

- The extent to which a defendant followed the alleged agreement;
- The type of agreement alleged;[22]
- The historical margins earned in the markets in which the products in question are sold, *e.g.*, lower margin, high volume products are more likely to result in a lower percentage overcharge when compared with higher margin, low volume products;

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20 At the time the Guidelines' presumption was drafted, the recent history on criminal antitrust enforcement had focused primarily on localized bid-rigging to government agencies for which there were few civil treble damage actions and no developed evidentiary record on potential overcharges. Those cases bear little relation to the types of international cartel actions that now dominate the criminal antitrust agenda. Moreover, the recent cartel cases have spawned far more detailed inquiries and evidentiary development regarding their economic impact as evidenced by the Antitrust Division's routine use of 18 U.S.C. § 3571(d) to determine the alternative maximum fine.

21 *See Cohen & Scheffman, supra* note 14, at 8-9.

22 While currently the Division generally attempts to restrict its criminal prosecutorial agenda to hard-core price-fixing or bid-rigging, it must be remembered that this is merely a matter of prosecutorial discretion and that such broad policy decisions have dramatically changed over time. In the past, the Division has criminally prosecuted price discrimination and a wide variety of vertical agreements. The methodology of the Guidelines would yield even more inequitable results if the winds of prosecutorial discretion were to blow in a different direction. Yet, even in the current environment, there are a wide variety of agreements that may be prosecuted.

- Competition encountered from substitute products or those from other geographic markets; and,
- The elasticity in demand for the product and the resulting effect on output/consumption.

Third, as discussed above, based on the prevailing case law, the amount of "affected" commerce is an all-inclusive number and may include sales where there is little if any effect on price. Given the low threshold for including sales in affected commerce, it is imprudent to presume a ten percent overcharge -- and losses of twice that amount.

The Application Notes to the Guidelines suggest that a substantial difference in the actual percentage overcharge can be adequately taken into consideration by the court when it sets the fine within the guideline fine range. The Section respectfully submits that this view is erroneous. To the extent that the actual overcharge, in reality, is substantially less in a particular case, the presumption mandated by the Guidelines carries the potential for a substantially inflated and disproportionate fine.

Assume, for example, that the amount of "affected" commerce for a particular defendant is found to be $20 million and that the culpability score assigned to that defendant is six. If one were to apply the Guideline's twenty percent multiple (based on the presumption of a ten percent overcharge), the fine would be calculated as follows:

$20 million (affected sales)

x 20%

$4 million (base fine)

With a culpability score of six, the minimum multiplier would be 1.20, and the maximum multiplier would be 2.40. Therefore, the Guideline fine range would be $4.8 million (1.20 *x* $4 million) to $9.6 million (2.40 *x* $4 million).

Assume instead that the *actual* effect on prices is an overcharge of approximately three percent. Even if one were to assume the same doubling of the hypothetical overcharge and the same culpability score and resulting multipliers, the fine would be calculated as follows:

$20 million (affected sales)

x 6% (twice the actual overcharge, in order to approximate estimated loss)

$1.2 million (base fine)

With a base fine of $1.2 million and minimum and maximum multipliers of 1.20 and 2.40 respectively, the minimum fine in the Guideline range would be $1.44 million (1.20 *x* $1.2 million), and the maximum fine would be $2.88 million (2.40 *x* $1.2 million).

This example demonstrates that the *minimum* fine required, based on the Guidelines' presumed ten percent overcharge, would be $4.8 million, an amount 67% greater than the *maximum* fine of $2.88 million that would be calculated using the actual overcharge of three percent.

Accordingly, the premise that the court can exercise its discretion in the fine range to account for those cases where the amount of the overcharge is substantially less than ten percent or substantially more than ten percent may fall far short of that objective.

Such a case would still result in the imposition of a fine substantially in excess of the policy objectives of the Guidelines.

In addition, the calculation mandated by the Guidelines does not allow the court to distinguish between and among antitrust offenders based on their relative levels of culpability. The Section submits that, as a matter of policy, the Guidelines ought to distinguish between a defendant who maximizes the supra-competitive profits reaped from a conspiracy without constraint, from a defendant who maintains a level of competitive pricing. The Guidelines effectively preclude any such distinction in practice.

Considering the potential for disproportionate and inequitable fines, the Section recommends that the Sentencing Commission should consider additional facts. First, in many cases, the Guidelines treat antitrust offenses more severely than other white collar criminal offenses. The base fine for most other federal crimes is the greatest of three things: the gain resulting from the offense, the loss resulting from the offense, or the amount determined based on the fine table set forth in the organizational guidelines. Thus, the base fine for an antitrust offense, even assuming the appropriateness of the presumed ten percent overcharge, is *automatically* twice the amount that would often apply to most other white collar criminal offenses, where losses are not presumed to be twice the amount of gains. In addition, unlike other federal crimes, the Guidelines require a minimum multiplier of 0.75 to be applied to the base fine calculation, even where the defendant's culpability score might otherwise produce a much lower multiplier.

Lastly, there is some reason to believe that antitrust offenses may be the subject of over-deterrence, making the imposition of fines based on inappropriate or inflexible presumptions all the more problematic. In addition to facing substantial criminal fines, organizations convicted of price fixing must confront the prospect of a series of penalties imposed by international authorities[23] and treble damage actions brought by their customers, both direct and in many states, indirect. The threat of significant incarceration for executives found to have engaged in price fixing provides additional deterrence. All of this is on top of the potential for substantial harm to the company's commercial reputation.

While there is no debate that price fixing should be deterred through substantial and effective penalties, the interests of fairness and equity must not be disregarded. The imposition of potentially devastating fines ought to be reserved for those cases where it is appropriate.[24] The public suffers further if the end result of punishing antitrust violations is that competition in the marketplace is reduced.

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23 Numerous foreign jurisdictions now impose penalties for antitrust violations. These international penalties may be substantial, but will only be recognized within the Guidelines' methodology in the limited circumstance of when they affect an organization's ability to pay. Examples of penalties in other jurisdictions include European Commission fines of more than €2 billion ($1.8 billion) for international cartel activities last year, in industries ranging from vitamins (€855 million) and carbonless paper (€313) to German banks (€100) and Belgian beer (€91).

24 On first impression, it may be easy to dismiss the potential for societal harm caused by the over-deterrence of price fixing activity. One should keep in mind, however, that the penalties for a price fixing conviction may be viewed as so severe that they cause some firms to institute compliance procedures which prohibit what might otherwise be deemed procompetitive, economically beneficial activity, *e.g.*, participation in trade association activities, for the simple reason that the risk of being wrongly implicated in price fixing activity is not worth taking given the severity of the potential sanctions and other consequences. In addition, the potential for draconian fines carries with it the possibility that defendants sincerely believing in their innocence will elect to enter into plea agreements calling for substantially reduced fines (usually calculated

The Section respectfully recommends that serious study and empirical analysis is necessary and warranted to avoid that effect. The Section stands ready to assist the Advisory Group in undertaking this study.

(continued...)

using creative math and a strained application of the Guidelines) rather than taking the risk of incurring a severe and crippling fine. Lastly, even though the Guidelines allow for a reduced fine based on a defendant's ability to pay, it may still result in a fine so high and disproportionate that it substantially reduces an organization's ability to compete effectively in the marketplace.