Public Comment

Proposed Amendments

2005

MEMORANDUM

TO: Charles Tetzlaff
General Counsel

FROM: Alan DuBois
Federal Public Defender

Alison Weir
Supreme Court Fellow

DATE: March 31, 2005

RE: Public Comments to Proposed USSC Amendments

Attached are the public comments and summaries of those comments to proposed amendments to the Federal Sentencing Guidelines. The Sentencing Commission received comments from the Department of Justice (DoJ), the Federal Public Defenders (Defenders), the National Association of Criminal Defense Lawyers (NACDL), the Probation Officers Advisory Group (POAG), the Practitioners Advisory Group (PAG), and the American Bar Association's Antitrust Section (ABA). The majority of the comments were focused on the proposed changes to the Antitrust Offense guidelines (DoJ, PAG, and ABA), but there were also substantive comments regarding the proposed changes to the anabolic steroid drug equivalency (Defenders and NACDL) and to the aggravated identity theft (Defenders and POAG). Additionally, the POAG provided comments on the miscellaneous amendment package.

Please let us know if you have any questions regarding the comments or the summary.

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PUBLIC COMMENT SUMMARIES

March 25, 2005

Amendment 1 – Aggravated Identity Theft

A. Department of Justice
Deborah Rhodes, Counselor to the Assistant Attorney General

The Department supports the proposed guideline at § 2B1.6 for offenses of aggravated identity theft and the similar language of the guideline to that in §2K2.4. Likewise, the Department approves of the application note prohibiting the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. The Department notes that this application note is similar to the note in §2K2.4, and that it is appropriate to avoid double counting.

The Department also supports the amended application note to abuse of trust, §3B1.3, which expands the defendants subject to the enhancement to include those not in managerial positions. The Department urges the Commission to state unambiguously that the enhancement applies, without qualification, to everyone who exceeds or abuses the authority of his or her position to obtain, transfer, or use unlawfully any means of identification. The Department also suggests that the Commission provide examples. The Department would be pleased to provide draft language to the Commission staff. The Department disagrees, however, with the application note that the enhancement should not apply if the defendant is convicted of identity theft under §1028A. The Department notes that Congress recognized identity theft and abuse of trust are separate harms, and suggests that the note undercuts the intent of Congress in the Identity Theft Penalty Enhancement Act.

The Department opposes the amendment to §2B1.1(b)(10) and the corresponding application note. The Department notes the amendment would significantly narrow the application of the enhancement, contrary to the intent of Congress. The Department urges that the enhancement should not be restricted to defendants *convicted* of identity theft crimes but should apply instead if the underlying offense *involves* the unauthorized transfer, possession, and use of another person's means of identification (except in cases of aggravated identity theft, which already includes an enhancement).

B. Federal Public Defenders
Jon M. Sands

The Public Defenders caution that the new language proposed for §2B1.1(b)(10) may include offenders convicted of 18 U.S.C. §1028(a)(7) who would not have received the adjustment under the old language because the language of §1028(a)(7) is very broad and includes conduct not

addressed in (b)(10) before. They cite as an example an offender who may have committed a minor crime involving immigration documents who would now be subject to the adjustment. They recommend further study.

The Defenders urge the Commission to include strong language in the Guidelines indicating the court should impose concurrent sentences for multiple convictions of §1028A for cases involving the same course of conduct. They note that the Identity Theft Penalty Enhancement Act does not preclude concurrent sentences, as 18 U.S.C. §924(c) (use of firearm during a crime of violence) does. They note in an identity theft case, a defendant may use the means of identification of several persons, or even the same person many times. Greater harm as a result of multiple uses or multiple victims will be reflected in §2B1.1 in the calculation of loss and victims.

C. Probation Officers Advisory Group (POAG)
Cathy A. Battistelli, Chair

The POAG did not identify any application issues relative to the new guideline, but does suggest adding to the application notes an explanation of the rationale for not applying Chapters Three or Four to this offense, as the application notes do in §2K2.4.

The POAG had no difficulty with the additional language to §3B1.3 comment (n.1[B]), but did suggest for note 5, if a specific base level offense incorporates the abuse of trust factor, that it be annotated in the appropriate offense guideline. The POAG found the proposed method to be potentially confusing since officers do not know if a base offense level incorporates a particular factor unless it is written into the guidelines.

The POAG recommended more guidance in policy statement §5G1.2 with more examples. The POAG felt that disproportionate sentences might arise from multiple convictions of identity theft depending on AUSAs' charging practices given the current state of the guidance.

D. National Association of Criminal Defense Lawyers (NACDL)
Carmen D. Hernandez, Co-Chair Federal Sentencing Committee

The NACDL supports the comments of the Federal Public Defenders regarding the Aggravated Identity Theft amendment.

E. Practitioners Advisory Group

Mark Flanagan,
McKenna, Long & Aldridge, LLP

Gregory S. Smith,
Sutherland Asbill & Brennan LLP
Co-Chairs

The PAG provided no comments on the aggravated identity theft amendment.

Amendment 2 – Antitrust Offenses

A. Department of Justice
Deborah Rhodes, Counselor to the Assistant Attorney General

Overview

Congress recently increased the maximum term of imprisonment for violations of the Sherman Act from three years to ten years. It also increased the maximum fines for corporations from $10,0000,000 to $100,000,000 and for individuals from $350,000 to $1,000,000. Congress noted these changes will require the Commission to revise the existing antitrust guideline to increase terms of incarceration to reflect the new statutory maximums.

The Department believes Congress had two purposes for increasing the antitrust penalties. The first was to bring the punishment for antitrust offenses more in line with other serious white-collar crimes such as mail and wire fraud. The second purpose was to provide additional deterrence to large–scale cartel violations involving hundreds of millions, even billions, of dollars of affected commerce.

To achieve these purposes, the Department strongly supports amending U.S.S.C. §2R1.1 both by increasing the base offense level in §2R1.1(a) and by adjusting upward the volume of commerce table in §2R1.1(b)(2).

Base Offense Level

The Department believes the base offense level found at §2R1.1(a)(1) should be raised from 10 to 13. This increase is necessary to reflect the serious nature of antitrust violations, to punish these offenses proportionally to other white-collar crimes and to provide adequate deterrence.

The Department does not believe, however, that an increase in the base offense level is warranted to incorporate the one–level increase for bid–rigging violations now contained in §2R1.1(b)(1). While the Commission proposes this change on the ground that a "significant majority" of antitrust cases involve bid-rigging, this has not been the Department's experience. Over the last ten years, only about half of the individuals charged by the Antitrust Division have been charged with bid-rigging.

Volume of Commerce Table

Increasing the volume of commerce table in §2R1.1(b)(2) is also warranted. Such a change would foster greater proportionality with other fraud offenses and is also essential to provide

effective punishment for violations affecting greater than $100 million in commerce, the current highest volume of commerce adjustment. Since that limit was adopted in 1991, the Department has prosecuted a number of antitrust violations which affected more than $100 million–and even more than $1 billion–in commerce, and the volume of commerce table should be amended to reflect that new reality.

Recommended Table

The Department suggests amending §2R1.1 as follows:

(1) Section 2R1.1(a) is amended by striking "10" and inserting "13."

(2) The volume of commerce table in Section 2R1.1(b)(2) is amended to read as follows:

> "(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

Volume of Commerce (Apply the Greatest)	Adjustment to Offense Level
(A) More than $1,000,000	add 1
(B) More than $5,000,000	add 2
(C) More than $10,000,000	add 3
(D) More than $20,000,000	add 4
(E) More than $40,000,000	add 5
(F) More than $80,000,000	add 7
(G) More than $160,000,000	add 9
(H) More than $320,000,000	add 11
(I) More than $640,000,000	add 13
(J) More than $1,000,000,000	add 15."

Congressional Intent

The Department believes the table above implements the intent of Congress when passing the Act. One of the principal congressional purposes behind increasing the Sherman Act maximum was to acknowledge and punish cartel violations with very high volumes of affected commerce. For this reason, adjustments for affected volumes of commerce below $80,000,000 are set in two, rather than one, level increments. The need for greater deterrence of the largest offenses justifies the two-level increment. In addition, the proposed table acknowledges the greater absolute amounts of harm caused by the larger violations; i.e., the difference between an offense that affects $4 million more in commerce warrants less additional punishment than an offense that affect $360 million more in commerce.

This level of punishment implements the 10–year maximum penalty and ensures that the most serious offenders are sentenced toward the higher end of the spectrum. The proposal takes into account the fact that virtually all defendants will have a minimal criminal history. It also allows courts flexibility to impose Chapter III adjustments.

The proposal provides for punishment comparable to punishments for other serious white-collar crimes like wire and mail fraud. Under the revised volume of commerce table, antitrust violations would receive offense levels between four to eight levels lower than a fraud offense involving a comparable loss[1]. Under the current volume of commerce table, capped out at $100 million, there is a gap of eleven levels when compared with a fraud which resulted in a loss of $20 million. The Department believes that the proposed revisions to §2R1.1 appropriately narrow the gap between fraud and antitrust violations in accordance with Congressional intent.

Finally, the Department believes the new statutory maximums were designed to work in conjunction with recent enhancements to the Antitrust Division's leniency program. The Department concurs with Congress that increasing antitrust penalties while providing increased incentives to cooperate will result in more effective detection and deterrence of antitrust violations. The Department believes that by enhancing the effectiveness of tools both outside the Guidelines, such as the leniency policy, and inside the Guidelines, such as substantial assistance departures, higher levels of punishment for antitrust violations will lead to increased deterrence, greater cooperation with law enforcement, and strengthened enforcement of antitrust laws.

B. Federal Public Defenders
Jon M. Sands

The Federal Public Defenders adopt the comments of the Practitioners Advisory Group regarding the antitrust amendment.

C. Probation Officers Advisory Group (POAG)
Cathy A. Battistelli, Chair

The POAG notes it has limited experience with this guideline and declines to comment.

D. National Association of Criminal Defense Lawyers (NACDL)
Carmen H. Hernandez, Co-Chair Federal Sentencing Committee

The NACDL supports the comments of the PAG regarding Antitrust Offenses.

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[1]The Guidelines presume that pecuniary loss in antitrust offenses is 20% of the volume of commerce. The volume of commerce table of §2R1.1 can thus be roughly mapped against the loss table of §2B1.1 by applying this same conversion factor. For instance, a volume of commerce of more than $5,000,000 is comparable to a fraud loss of more than $1,000,000.

E. Practitioners Advisory Group

Mark Flanagan,
McKenna, Long & Aldridge, LLP

Gregory S. Smith,
Sutherland Asbill & Brennan LLP
Co-Chairs

Overview

The Practitioners Advisory Group (PAG) opposes increasing the base offense level for antitrust offenses. It also opposes incorporating the one-level enhancement for bid-rigging into the base offense level. PAG does, however, believe that the volume of commerce table should be modified to include one or more additional categories for offenses that affect more than $100,000,000 of commerce.

Proposed Changes to the Base Offense Level

PAG notes that a two-level increase in the current antitrust base offense level (BOL) translates into a 50% increase in punishment while a four-level increase would result in a 100% increase.

The Commission has identified three reasons to increase the antitrust BOL:
(1) to address Congressional concerns that some antitrust offenses do not receive punishment commensurate with their social impact;
(2) to foster greater proportionality between antitrust offenses and other fraud offenses; and
(3) to incorporate the one-level increase for bid-rigging because the Commission has found that this enhancement is now applied in a "significant majority" of cases.

PAG addresses each of these justifications.

A. Congressional Concern Regarding Some Antitrust Offenses

When Congress increased the maximum penalties for antitrust offenses, it did not indicate that it expected or desired every antitrust prosecution to result in more severe punishment. Presumably, Congress intended for the more serious antitrust offenses to be sentenced in excess of three years, and for the most serious offenses to receive up to ten years. The task before the Commission, therefore, is to determine *which* types of cases the Congress had in mind for increased punishment.

The difficulty with the Commission's proposed response to the Act is that increasing the BOL by two or four levels would significantly increase the punishment for *every* antitrust offense – a result not indicated by Congress' decision to raise the statutory maximum penalty. The more

appropriate way to reflect Congressional concern with the most serious antitrust offenses would perhaps be to add additional categories for offenses that affect volumes of commerce in excess of $100,000,000.

B. Proportionality With Fraud Offenses

Proportionality between the antitrust guideline and the fraud guideline is an important goal, however, the proposed two- or four-level increase in the antitrust BOL is not the appropriate means to achieve that proportionality precisely because of the nature of the changes to the fraud guideline cited in the Commission's synopsis. For statutes with a statutory maximum of less than twenty years, the BOL in the fraud guideline has never been increased. Increasing the BOL for antitrust offenses, which is already three or four levels higher than the BOL for fraud offenses, would actually result in *dis*proportionality between the fraud and antitrust guidelines.

The Commission has already considered this proportionality issue. The original Commission's guidelines provided for a BOL of 6 in fraud cases and an adjusted offense level of 8 in antitrust cases affecting less than $1,000,000 of commerce. Concerned that this did not adequately differentiate antitrust and fraud offenses, the Commission in 1991 increased the BOL in §2R1.1 from 9 to 10 while eliminating the one-level reduction in cases where the volume of commerce affected was less than $1,000,000. Nothing since then suggests that this earlier weighing of the BOLs for fraud and antitrust was incorrect.

As the Commission notes, one of the principal means by which the fraud guidelines were recently changed was through "expansion of the number of additional offense levels at the 'loss table' at 2B1.1(b)(1)." This suggests that the appropriate change to §2R1.1 to achieve proportionality with these changes in the fraud guideline would be to add additional levels to the volume of commerce table rather than increase the BOL.

C. Incorporating the "Bid-rigging" Adjustment

PAG has questions about the quality and extent of the data suggesting that a "significant majority" of antitrust cases involve bid-rigging. Given the relatively small number of antitrust cases prosecuted, the ratio of those involving bid-rigging may have been heavily influenced by a unique prosecutorial initiative in the Southern District of New York specifically targeted at bid-rigging in certain industries. We do not know what the data is regarding the cases outside that district. We similarly do not know whether the Southern District's initiative will continue, or whether we can indeed expect that most cases in the future will involve "bid-rigging."

Putting aside questions about the data, it is undeniable that at least some number of cases that do *not* involve "bid-rigging." If indeed these types of cases are less serious, there would seem to be no compelling reason not to recognize this fact. Incorporating the "bid-rigging" adjustment into the BOL will result in unwarranted disparity through treating unlike offenders in a like manner. Nevertheless, if the Commission decides to incorporate the "bid-rigging" adjustment into the

BOL notwithstanding the above concerns, it should avoid unwarranted disparity by providing for a *one-level downward adjustment* for cases that do not involve "bid-rigging."

The Proposed Changes to the Volume of Commerce Table

First, there is a question for comment regarding whether there should be changes to the threshold values in the table. The Commission should carefully consider whether such changes are necessary to achieve proportionality with the fraud guidelines in light of the changes made in 2001 to the threshold values in the loss table. PAG does not recommend such changes in light of the data regarding antitrust sentencing patterns and the statutory purposes of punishment articulated in 18 U.S.C §3553(a), as discussed below.

Second, there is a question for comment regarding whether the number of levels in the volume of commerce table should be reduced. There are presently seven levels in that table, as compared to sixteen in the loss and tax tables (§2B1.1, §2T4.1), nine in the burglary table (§2B2.1), and eight in the robbery table (§2B3.1). PAG does not see a compelling need to change the number of levels in the volume of commerce table.

The third issue for comment is whether the volume of commerce table should be modified to include one or more additional categories for offenses that affect more than $100,000,000 of commerce. As noted above, PAG believes that such additional levels should be added to the volume of commerce table. This would appear to be the most precise manner in which to effectuate Congress's intention to increase the maximum penalties for the most serious antitrust offenders.

PAG does not support the Department of Justice's proposal to change the top end of the table from one-level to two-level increments of adjustment. If volume of commerce functions in a similar manner in antitrust cases as loss functions in offenses governed by Guideline section 2B1.1, it will often overstate culpability to the detriment of other relevant factors such as role in the offense. Over-reliance on quantitative factors to the exclusion of other considerations frequently results in persons whose culpability is similar facing widely dissimilar sentences based on factors often outside their control.

In addition, the severity levels at the high end of the government's proposed table appear unwarranted. The combined impact of the government's proposed three-level increase in the BOL and its proposed eight-level increase in the top of the volume of commerce table is an eleven level increase for the most serious offenses. This represents a near *quadrupling* of sentence lengths. PAG is unaware of an instance in the Commission's history in which severity levels for an offense have ever been increased by an amount even close to eleven levels.

The Commission has not published a proposed table for public comment. The period for comment on what has been published has been abbreviated. The government has offered neither data nor analysis to support its proposed table. In light of these circumstances, PAG recommends

that any changes to the volume of commerce table be deferred to next year's amendment cycle to allow the study this issue requires.

Analysis of the Proposed Antitrust Guideline Amendments in light of *Booker* and the Sentencing Factors Set Out in 18 U.S.C. §3553(a).

PAG believes that in light of the decision in *Booker,* it is of paramount importance for the Commission to demonstrate its consideration of the § 3553(a) factors in as explicit a fashion as possible throughout the amendment process. This consideration of the § 3553(a) factors should be tied to the Commission's data and research regarding actual district court sentencing decisions. We discuss below our thoughts regarding the relationship between various sentencing factors and particular data.

A. Translating Data Regarding "Actual District Court Sentencing Decisions" into Consideration of the § 3553(a) factors.

The Commission's demonstration and documentation of its consideration of the § 3553(a) factors through the presentation and analysis of data requires an appropriate mode of analysis and an evaluation of which data sets pertain to particular statutory purposes of sentencing. PAG believes the data most pertinent to these factors are, among perhaps others:

a. *The rate of departures from present sentencing ranges*–A significant number of departures, either up or down, might suggest that the existing ranges are not adequately addressing the purposes of punishment.

b. *The location of sentences within guideline ranges*–Data suggesting that most sentences are at the high end of the guideline range might support an increase in severity levels. Where the data demonstrates sentencing at the lower portions of the guideline ranges to a degree substantially in excess of the median for all offenses, consideration should be given to decreases in severity levels.

c. *The recidivism rates of those sentenced under the existing guideline*– High rates of recidivism might indicate a need to increase severity levels while low rates of recidivism might indicate that penalties are correct or could be relaxed.

d. *The criminal history of those sentenced under the guideline in question*–Where the data shows that offenders sentenced under a particular guideline have significantly more or less criminal history than other categories of offenders, this would suggest that increases in sentencing severity either are or are not necessary to "protect the public from future crimes of the defendant."

e. *The age of those sentenced under the guideline in question*–Because age and recidivism are closely linked, there might be less need to increase the severity level of offenses committed primarily by older offenders.

f. *The extent to which courts are utilizing alternatives to incarceration*–Where the data show that courts are imposing fines and/or restitution to a degree substantially in excess of the median for all offenses, that may militate against increases in severity levels.

g. *The levels of education of those sentenced under the guideline in question*–Section 3553(a)(2)(D) directs the sentencing court to consider the need for the sentence imposed to "provide the defendant with needed educational or vocational training""in the most effective manner." In light of recent actions by BOP to curtail its educational and vocational programs, shorter rather than longer periods of incarceration may provide "the most effective manner" to advance this goal.

B. An Examination of the Pertinent Antitrust Data.

Using Commission data from 1995-2002, sentences imposed in antitrust cases can be analyzed in light of the factors described above.

a. *The rate of upward departures from the antitrust guideline*–The Commission data indicates over an eight-year period from 1995-2002, sentences were imposed in 166 antitrust cases. None of these involved an upward departure. Put another way, a federal district court has *never* found the existing guidelines range insufficiently severe.

b. *The location of sentences within guideline ranges*–The Commission's published data reflect that of the 166 antitrust sentencings, there have been only 3 cases – less than 2% – in which the district court determined that the appropriate sentence was within the top half of the range. Antitrust ranks *first* among all 31 offense categories in the rate at which sentencing courts have found the lower half of the guidelines to be the appropriate sentence.

c. *The recidivism rates of antitrust offenders*–PAG is not aware of publically available data reflecting rates of recidivism by antitrust offenders.

d. *The criminal history of antitrust offenders*–During the five years from 1995 to 2002 there have only been 4 antitrust offenders who were not criminal history category I. Antitrust ranks *first* among all 31 offense categories in the percentage of offenders in criminal history category I.

e. *The extent to which courts are utilizing alternatives to incarceration*–Antitrust offenders rank first among all offense categories in the rate at which they are fined and ordered to pay restitution. In 1995, 1996,1998, and 2002, the median antitrust fines were the highest of any offense category. In 2001, 2000, 1999, and 1997 only arson had a higher median fine.

f. *The levels of education of antitrust offenders*–Antitrust ranks first above all 31 other offense categories in education level of offenders.

g. *Trial rates*–In the eight years for which data is available, there have been only 14 antitrust offenders sentenced after a trial, and half of those cases were in 1999 alone. For the other seven years of data, there would be an average of only one antitrust trial per year.

h. *Frequency with which antitrust offenders provide substantial assistance to the government*– Antitrust offenders rank *first by far* among all 31 other offense categories in the rate at which the government is able to obtain substantial assistance.

i. *Age of antitrust offenders*–While the age of the offender may not be "ordinarily relevant," PAG believes the fact that antitrust defendants are by far the oldest of all federal offenders militates against an overall increase in severity levels.

In light of the data detailed above, PAG believes consideration of the § 3553(a) factors weighs heavily against any increase in overall severity levels for antitrust offenses. Indeed, an amendment increasing severity levels in the face of this data runs the risk of undermining the confidence district courts will have in giving such an amendment the substantial weight sought by the Commission for its guidelines.

F. American Bar Association Section of Antitrust Law

The Section of Antitrust Law of the American Bar Association has provided comments on the proposed amendments to the antitrust sentencing Guidelines. These comments have been approved by the Antitrust Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

Overview

The Section supports efforts to deter and prosecute cartel behavior. It favors substantial penalties for "those who engage in hard-collusion among rivals affecting prices, allocation of markets or customers and similar conduct."

However, the Section has concerns about the proposed amendments which, in its view, constitute a "dramatic increase" in antitrust penalties and which may adversely affect antitrust prosecutorial goals.

Accordingly, the Section "strongly urges" the Commission not to recommend any antitrust amendment to the Guidelines to Congress at this time and instead for the Commission to hold more substantive hearings on these issues.

Recommendations and Concerns

1. Increases in Recommended Antitrust Sentences Raise Complex Questions of Policy and Practice and Should be Adopted Only After Hearings or Public Briefings.

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

2. Commentary to the Antitrust Guidelines Should Make Explicit That the Recommended Penalties Apply Only to Hard Core Activities That Harm Competition and Consumers.

On its face, the Sherman Act covers an extremely broad range of conduct from relatively *de minimus* violations to extremely serious offenses. In many cases, the line between criminal and non-criminal conduct is hard to discern solely from the language of the statute. For this reason, the Antitrust Division of the Justice Department has, for years, been judicious in limiting criminal enforcement to hard-core, clandestine conduct such as price-fixing and bid-rigging.

The Commission should adopt a similar posture and make it clear the penalties recommended by the antitrust guidelines are to apply to this type of hard-core, serious conduct.

3. The Guidelines Should Reflect Consideration of the §3553(a) Factors That Govern Sentencing Determinations.

Any increase in the antitrust base offense level should be supported by analysis of its benefits and potential consequences. The Section is concerned that the Commission's proposal does not reflect consideration of the factors enumerated in 18 U.S.C. §3553(a). Nor, in the Section's view, do those factors appear to support the proposal. Especially in light of *Booker*, the Commission is under an obligation to provide specific and detailed support for its proposals.

When Congress raised the maximum penalties for antitrust offenses in 2004, it did so without holding hearings or collecting empirical data that could guide the Commission or the courts on the best range of sentences for such offenses. Similarly, the Commission's proposal does not provide either objective data or reasoned argument to show that an increase antitrust base offense level is either necessary or justified. These omissions are especially troubling in light of *Booker* which amplifies the need for the Sentencing Commission to offer empirical support for its recommendations so that courts will have sufficient understanding of the premises of the Guidelines to exercise their sound sentencing discretion.

Specifically, the Section is concerned that the present proposal fails to give adequate consideration to (a) whether the structure of increased penalties will increase deterrence; (b) whether the increase in penalties is necessary for societal protection or rehabilitation of offenders; (c) whether there is evidence that courts have been limited in imposing appropriate sentences by the current Guidelines; (d) whether the increase in penalties may inadvertently hinder antitrust prosecutions; (e) whether the increase in penalties may diminish foreign cooperation in such investigations. These issues, when viewed in the light of § 3553(a), suggest that the proposal should be reconsidered and more fully justified after the Commission gathers appropriate empirical data and holds hearings on these issues.

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

In the past, the Commission has taken the position that long jail terms are not the most effective means of deterring criminal violations of the antitrust laws. If the Commission no longer believes this to be true, it should disclose the basis for such a significant shift in viewpoint, and set forth the empirical basis for that conclusion in sufficient detail to allow scrutiny and challenge in the rulemaking process.

Deterrence is difficult to quantify or analyze, but any analysis must include two factors: whether the severity of the punishment is likely to be perceived as outweighing the rewards of the conduct, and whether the severity of the punishment in some manner reduces the likelihood of detection. Because both deterrence and the impact of higher sentences on enforcement are difficult, if not impossible, to quantify, the Commission should seek the views of those most experienced in this area, both prosecutors and defense counsel. The decision on increases in these penalties needs careful and thoughtful consideration and should be subjected to rigorous empirical and theoretical analysis through hearings or public briefings.

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

The ABA has adopted a resolution urging that lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.

The proposed revisions to the Sentencing Guidelines for antitrust violations do not explain how they take these concerns adequately into account. In the Section's view, the primary benefit of jail sentences for antitrust offenders is deterrence. There is no evidence that recidivism exists at all among antitrust offenders. Likewise, antitrust offenders are rarely a risk to their community if punished by the short periods of incarceration recommended by the Sentencing Commission in its earlier commentary. Thus, the proposed increase in the base level for antitrust sentences is not based upon any real threat of recidivism or harm to the community.

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

The sentences imposed by courts in antitrust cases over the last few years do not appear to be unduly limited by the current offense level. Even when the statutory maximum penalty allowed a sentence of up to three years, all sentences for antitrust violations of Section 1 of the Sherman Act have been less than two years. Thus, even as the average term of an antitrust sentence has risen, it would seem that courts concluded the current sentencing range was "sufficient."

7. Potential Unintended Adverse Impact On Successful Antitrust Enforcement

The Commission should consider whether higher sentences will have a chilling effect on the willingness of individuals to cooperate with the government in antitrust prosecutions. In the Section's experience, the success of a contested antitrust case often depends on negotiated settlement with individuals from a number of defendants. Substantially higher offense levels may make it more difficult for the government to negotiate agreements which would result in sentences cooperating defendants would be willing to accept. In evaluating these issues, the Commission should consider the perspective of both the career prosecutors familiar with the strategies for succeeding in such cases and of members of the defense bar who know the considerations that targets of such investigations – domestic and foreign – apply in determining whether to enter into a plea arrangement.

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

Over the years, the United States has gradually persuaded the international community to cooperate with efforts to investigate and prosecute illegal cartel behavior. This alliance is precarious however because the United States' enforcement efforts have focused on criminal prosecution and incarceration. Given past circumstances, there may be substantial concern by some foreign jurisdictions that the enforcement of antitrust laws in the United States is too severe – and especially unfair to foreign corporations and nationals. In particular, many foreign jurisdictions may be concerned by the combination of severe and escalating criminal penalties and civil actions for multiple damages. The Commission should analyze the possibility that an increase in Sherman Act prison sentences at the lower offense levels would cause other governments to reconsider or limit the cooperation that has been forthcoming in anti-cartel investigations.

9. A Presumption of Bid-Rigging to Increase the Sentence in Inappropriate

The proposed amendments include striking subdivision (1) of USSG § 2R1.1, which currently provides for a one level increase to the applicable offense level, if the conduct involved participation in an agreement to submit noncompetitive bids. The Commentary regarding the proposed amendments indicates that because "Commission data" reflects that a majority of the

cases sentenced under § 2R1.1 are "bid-rigging" cases, what was previously considered aggravating behavior would now be incorporated into the base offense level. However, a significant number of cases sentenced under § 2R1.1 are for violations that do *not* involve bid rigging, including most of the major antitrust cases. For this reason, the Section opposes creating what amounts to an implicit assumption of bid-rigging in every case.

10. Use of the Presumption of Loss by Reference to 20% of Affected Commerce for Organizations Contravenes Recent Supreme Court Case Law.

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

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. The Guidelines thus impose a conclusive presumption concerning the overcharge.

There is no publicly available data or consensus to support that presumption. The presumption that all antitrust conspiracies result in the same level of harm is inequitable and disproportionate – in both directions. It is ironic that the Sentencing Commission allowed this conclusive presumption because of the difficulty in calculating the actual gain or loss in an antitrust case, while the Antitrust Division has been effectively calculating alternative maximum fines under 18 U.S.C. § 3571(d) since the decision in *United States v. Archer Daniels Midland Co.* in 1996.

While the Supreme Court found in *Booker* that the constitutionality of the Sentencing Guidelines as a whole could be preserved by making them advisory rather than mandatory, serious questions exist on whether making the "twenty percent" fine presumption is in any way advisory, particularly if it results in a recommended fine in excess of the $100 million Sherman Act maximum. On its face, the twenty percent is not being applied simply to give the sentencing court guidance about the exercise of discretion in determining the right range of sentence, but rather as the basis for imposing a sentence, one that may exceed the statutory maximum under the Sherman Act. Even if described as advisory, this twenty percent presumption invites judges to increase an antitrust defendant's fine based upon a presumed loss, rather than based upon an actual finding by the jury. Moreover, such a presumption also contravenes the goal of uniformity based on severity of the real conduct.

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

violations for the purposes of sentencing.

Amendment 3 – Anabolic Steroids

A. Department of Justice
Deborah Rhodes, Counselor to the Assistant Attorney General

The Department urges the Commission to treat anabolic steroids similarly to other Schedule III drugs by counting each pill as a unit, rather than the current accounting of 50 steroid pills as a unit, and similar accounting for liquid form in which standard Schedule III drugs are counted as one unit for 0.5 ml rather than the accounting of liquid steroid as one unit for 10 cc [note: one cc is equivalent to one ml]. The Department notes that the standard therapeutic dosing of steroids when used for licit purposes is comparable to the standard dosing of other Schedule III drugs which are measured with one pill corresponding to one unit on the drug quantity table. Although, as the Department notes, illicit use of steroids result in doses far higher than therapeutic doses, the Department understands that in the past, where a therapeutic dose is available, it has been used to establish the pertinent sentencing guideline. The Department recounts the history of the Commission's decision to change the drug equivalence for most Schedule III drugs to one tablet per one unit as a way to "simplify the guideline and more fairly assess the scale and seriousness of the offense," but notes that there was no explanation offered for the disparity between anabolic steroids and other Schedule III controlled substances.

The Department notes that the seizure amounts in major anabolic steroid cases also suggests a need for increased equivalency. In the largest seizure, 44,000 tablets of Methandienone were seized, resulting in a drug equivalency of 880 units, or a base offense level of 8, which would result in a sentence of 0-6 months for a first time offender, even before any downward adjustment for acceptance of responsibility. If the 44,000 tablets were treated as 44,000 units, the distributor would face a base offense level of 20.

The Department notes additionally that the current drug equivalencies result in traffickers of anabolic steroids being treated even more leniently than traffickers of Schedule IV substances. For example, a tablet of phentermine, a diet pill, equates to 62.5 mg of marijuana, while a tablet of an anabolic steroid equates to only 20 mg of marijuana, or less than one third the equivalency of the Schedule IV drug. Increased parity between other Schedule III drugs and steroids would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities.

B. Federal Public Defenders
Jon M. Sands

The Public Defenders believe that the Commission should study the need for a change in the

guideline with regard to anabolic steroids as a first step. They are unaware of any information that would demonstrate that a change is needed to achieve the purposes of sentencing and ask that they be allowed to comment on any information the Department of Justice may provide regarding such a need.

C. Probation Officers Advisory Group (POAG)
Cathy A. Battistelli, Chair

The POAG did not address the proposed changes to the anabolic steroid drug equivalency.

D. National Association of Criminal Defense Lawyers (NACDL)
Carmen H. Hernandez, Co-Chair Federal Sentencing Committee
Rick Collins, Esq.

The NACDL cautions against treating anabolic steroids like other Schedule III controlled substances and prefers the current equivalency of 50 tablets to one unit over the proposed change of one tablet to one unit. It notes that there are stark differences between the motivations, profiles, and patterns of possession and use of illicit steroids users and those of persons who use other drugs, and that there are inherent differences between steroids and other drugs. Anabolic steroids are the only hormones in the entire Controlled Substances Act, and testosterone, the substance against which all other anabolic steroids are measured, occurs naturally in the bodies of everyone. Despite the superstar athletic witnesses at the recent congressional hearing on steroids, typical users are neither elite athletes nor the teenagers who want to emulate them, but men using the steroids to achieve cosmetic effects (the NACDL compares steroid use to plastic surgery).

The NACDL also notes that the very different effects of anabolic steroids from those of other drugs impacts the buying patterns of steroid users. Steroid users are not using steroids for an immediate psychoactive effect, like the users of marijuana, LSD, cocaine, and other controlled substances. Psychoactive effects of such drugs, and Schedule III drugs like Oxycontin or Valium, can be achieved in a single dose, while for a steroid user, a single dose has little effect. Steroid users plan for a cycle of use lasting weeks or months to achieve their desired effect, thus steroid users are more likely to buy large quantities for the full cycle, rather than buying daily or weekly doses. It is unclear why the Commission chose the current equivalency (50 tablets per unit), but it may have been a recognition that steroid users purchase and possess steroids in much more massive amounts than other drug users. The NACDL also questions the assumption of 0.5 ml as a dose for liquid steroid. The NACDL suggests that the Commission should be able to explain why it is selecting a particular equivalency.

The NACDL also questions whether increased penalties would be applied more often to traffickers than to personal users. The NACDL notes that the Internet has become the favored tool of international steroid commerce, with international mail order now a common method of delivery. Traffickers are often far beyond American jurisdiction, while personal users are caught

in the "controlled delivery" of a mail order package by undercover agents. Often agents, seeing the large number of tablets (e.g. 1000) that constitute a minimum buy from some of these overseas sources, presume an intent to sell that does not account for the typical buying patterns of steroid users.

The NACDL feels that the differences between anabolic steroids and other controlled substances warrant differing approaches, and that the current drug equivalency for anabolic steroids better serve the purposes of sentencing than a "one-size-fits-all" Schedule III equivalency standard would.

E. Practitioners Advisory Group
Mark Flanagan, McKenna, Long & Aldridge, LLP

Gregory S. Smith,
Sutherland Asbill & Brennan LLP
Co-Chairs

The PAG did not address the proposed changes to the anabolic steroid drug equivalency.

Amendment 4 – Miscellaneous Amendments Package

A. Department of Justice
Deborah Rhodes, Counselor to the Assistant Attorney General

The Department did not address these proposed amendments.

B. Federal Public Defenders
Jon M. Sands

The Defenders did not address these proposed amendments.

C. Probation Officers Advisory Group (POAG)
Cathy A. Battistelli, Chair

The POAG commented on three issues in the package, including one element of the package that was not actually included in the final Federal Register notice.

> - The POAG felt that Amendment 4(B)does not go far enough in clarifying the cross reference application problems in §2B1.1(c)(3). In particular, the POAC noted that the situation in which a defendant lies to law enforcement about the underlying crime is not addressed. The POAG recommended either additional guidance or elimination of the cross reference provision.

- Members of the POAG recommended that the word change in §5D1.1 be added to §5C1.2 as well.

- The POAG disagreed with the considered (but not officially proposed) revision of the sentencing table changing level 43 from "life" to "360 to life." Any such change would result in no difference between level 42 and level 43, creating the only situation in the sentencing table where two levels have exactly the same sentencing options.

D. National Association of Criminal Defense Lawyers (NACDL)
Carmen H. Hernandez, Co-Chair Federal Sentencing Committee

The NACDL did not address these amendments.

E. Practitioners Advisory Group

Mark Flanagan, McKenna, Long & Aldridge, LLP

Gregory S. Smith,
Sutherland Asbill & Brennan LLP
Co-Chairs

The PAG did not address these amendments.

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U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General — *Washington, DC 20530-0001*

March 25, 2005

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in February, 2005. We thank the Commissioners and Commission staff for addressing these important issues in addition to the valuable work the Commission has already done in response to the Supreme Court's decision in United States v. Booker. We look forward to working with the Commission on these issues to ensure a fair sentencing guidelines system that serves justice and the American people.

IDENTITY THEFT

In 2004, Congress passed the Identity Theft Penalty Enhancement Act, Public Law 108–275, 118 Stat. 831 (July 15, 2004), which created new offenses and established penalties for aggravated identity theft, at 18 U.S.C. § 1028A. Specifically, § 1028A(a)(1) prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, certain enumerated felony fraud offenses. This section carries a two-year mandatory sentence that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. A second criminal offense, at 18 U.S.C. § 1028A(b)(1), prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, federal crimes of terrorism, enumerated in 18 U.S.C. § 2332b(g)(5)(B). This section carries a five-year mandatory sentence that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. The Act also expanded existing identity theft statutes, such as 18 U.S.C. § 1028(a)(7).

Finally, section 5 of the Act directed the Commission to "review and amend its guidelines and its policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses involving an abuse of position." Congress further directed the Commission to

"[a]mend U.S.S.G. section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification . . ."

Aggravated Identity Theft – § 2B1.6

The Department supports the proposed guideline at § 2B1.6 for the new offenses of aggravated identity theft. The new offenses carry a mandatory consecutive term of imprisonment; consequently, the proposed guideline provides that the "guideline sentence is the term of imprisonment required by statute." This guideline is consistent with § 2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), which applies to a statute carrying a mandatory consecutive term of imprisonment and provides that the "guideline sentence is the term of imprisonment required by statute."

In order to avoid double counting for defendants who are sentenced to enhanced penalties under the new guideline, the amendment proposes an Application Note prohibiting the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. The Department agrees that it is appropriate to avoid double counting and notes that this Application Note is consistent with one following § 2K2.4.

Abuse of Trust – § 3B1.3

The published proposal amends the Application Note to § 3B1.3 to include "a defendant who uses his or her position in order to obtain unlawfully, or use without authority, any means of identification . . ." The Department supports this amendment which ensures that all defendants – including clerks and similar employees – who abuse their position by stealing identity are punished for the abuse of trust, notwithstanding their lack of managerial discretion or whether the conduct significantly facilitated the commission or concealment of the offense. The Department suggests that the Application Note should unambiguously state that the enhancement applies, without qualification, to everyone who exceeds or abuses the authority of their position in order to obtain, transfer or use without authority any means of identification, as prohibited by the Act. The Department also suggests that the Application Note provide a variety of examples demonstrating this. The Department would be pleased to provide draft language to the Commission staff.

The published proposal also adds an Application Note which directs that the abuse of trust enhancement should not apply if the defendant is convicted of identity theft under 18 U.S.C. § 1028A. The Department disagrees with this limitation. Congress recognized that identity theft and abuse of trust are separate harms. That is why it directed the Commission to "ensure that the guideline offense levels and enhancements appropriately punish *identity theft offenses involving an abuse of position*." The proposed Application Note would undercut congressional intent because it would not distinguish *identity offenses involving an abuse of position* from other identity offenses. All defendants who abuse their position of trust in order to commit identity theft should receive an enhancement for the abuse of trust.

§ 2B1.1(b)(10)

The published proposal would also amend § 2B1.1(b)(10) and the corresponding Application Note to authorize a two-level enhancement for a defendant "convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or 1029(a)(4)." The Department opposes this amendment, which would significantly narrow the applicability of the enhancement in a way which was not intended by Congress. The amendment should not be restricted to defendants who are "convicted" of identity theft crimes. Rather, it should apply if the underlying offense "involved" the unauthorized transfer, possession or use of another person's means of identification (except for aggravated identity theft which already includes an enhancement).

ANTITRUST PENALTIES

The proposed guideline amendments for antitrust violations largely implement the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, recently passed by Congress. Section 215 of that Act increased the maximum term of imprisonment for violations of Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3, from 3 years to 10 years. The Act also increased the maximum fine for corporations from $10,000,000 to $100,000,000, and increased the maximum fine for individuals from $350,000 to $1,000,000. Finally, the legislative history of the Act provides that "this section (Section 215 of the Act) will require the United States Sentencing Commission to revise the existing antitrust sentencing guideline to increase terms of incarceration of antitrust violations to reflect the new statutory maximum."

We believe Congress had two purposes for this substantial increase. One purpose was to recognize that criminal antitrust violations are serious white-collar crimes meriting punishment more commensurate with other serious white-collar crimes such as mail and wire fraud. The second purpose was to provide additional deterrence to large-scale cartel violations of the type that the Department continues to uncover involving hundreds of millions, and even billions, of dollars of affected commerce. There is no indication that Congress had any reservations concerning how sentences are calculated for antitrust violations under § 2R1.1; there is only a desire expressed that the Commission amend § 2R1.1 "to increase terms of incarceration . . . to reflect the new statutory maximum."

The Department strongly supports amending § 2R1.1, both by increasing the base offense level in § 2R1.1(a) and by adjusting the volume of commerce table in § 2R1.1(b)(2) upward to reflect the increased penalties provided for antitrust violations by Congress and the higher volumes of affected commerce that the Department has encountered in antitrust cases since the table was last amended in 1991. Failure to do so would be a repudiation of the congressional intention that the antitrust guideline implement the enhanced punishment for antitrust violations provided in the Act.

Base Offense Level

The Commission has solicited comment on whether to increase the base offense level in § 2R1.1(a) from 10 to somewhere in the range of 12 to 14. We support such an increase, and suggest a base offense level of 13. We believe that this is necessary to reflect the serious nature of antitrust violations and the harm caused by them, to punish the antitrust offenses proportionally to other sophisticated white collar offenses, and to deter others from committing antitrust offenses.

We do not, however, believe that an increase in the base offense level is warranted to incorporate the one-level increase for bid-rigging violations now contained in § 2R1.1(b)(1). The Commission proposes doing so for the stated reason that the "significant majority" of antitrust cases sentenced under the Guidelines have been bid-rigging cases. That is not in accord with the Department's experience. While there have been years where particular investigations have resulted in large numbers of bid-rigging cases, over the last 10 years only about one-half of the individuals charged by the Antitrust Division have been charged with bid rigging.

Volume of Commerce Table

Increasing the volume of commerce table in § 2R1.1(b)(2), in conjunction with increasing the base offense level, is also warranted. Doing so would, in the words of the Commission, "foster greater proportionality between § 2R1.1 offenses and fraud offenses sentenced pursuant to § 2B1.1." It is also essential to provide effective punishment for violations affecting greater than $100 million in commerce, the current highest volume of commerce offense level adjustment. Since that limit was adopted in 1991 (increased from the original $50 million limit set in 1987), the Department has prosecuted a number of antitrust violations affecting more than $100 million – and even more than $1 billion – in commerce, and the volume of commerce table should be amended to reflect this new reality.

Starting in 1996, the Department began prosecuting international price-fixing and market-allocation cartels that involved volumes of commerce well beyond $100 million. The first such case involved the U.S. company Archer-Daniels-Midland and various co-conspirators from Europe and Asia that conspired to fix prices and allocate sales volumes of the food additive citric acid and the feed additive lysine. We calculated ADM's volume of commerce to be approximately $150 million in the lysine conspiracy and $350 million in the citric acid conspiracy. Other notable defendants in these conspiracies included Ajinomoto Co., with a $122 million volume of affected commerce in the lysine conspiracy, and Haarmann & Reimer Corp., with $400 million in affected commerce in the citric acid conspiracy.

In 1998, the Department began prosecuting companies involved in fixing prices and allocating markets for graphite electrodes. UCAR International, Inc. was the first company to be charged in this conspiracy. UCAR's volume of affected commerce was $713 million during the period of the conspiracy. Subsequent companies sentenced in the graphite electrode conspiracy included SGL Carbon AG, with $485 million in affected commerce, Showa Denko Carbon, Inc., with $325 million in affected commerce and Mitsubishi Corp., with $175 million in affected commerce.

In 1999, F. Hoffmann-La Roche Ltd. and BASF AG, respectively Swiss and German pharmaceutical companies, pled guilty to price fixing and market allocation with respect to vitamins used as nutritional supplements or to enrich human food and animal feed. Hoffmann-La Roche's volume of commerce affected by the conspiracy was calculated to be $3.280 billion; BASF's volume of affected commerce was $1.460 billion. Other companies participating in the vitamins conspiracy included Takeda Chemicals Industries, Ltd., with $361 million in affected commerce and Eisai Co., Ltd., with $194 million in affected commerce.

High volume of commerce cases continue to be prosecuted. Among the more recent examples, in 2004, Bayer AG pled guilty to participating in an international conspiracy to fix the price of rubber

chemicals, with a volume of affected commerce of $233 million. Also in 2004, as part of an ongoing investigation of an international conspiracy to fix prices of dynamic random access memory (DRAM) – a commonly used semiconductor memory product providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication and consumer electronic products – Infineon Technologies AG pled guilty with a volume of commerce of $1.050 billion. In addition, the Department has recently entered into plea agreements which are not yet public where the volumes of affected commerce are $133 million, $379 million and $411 million. Clearly, this history justifies adding additional adjustments for volume of commerce between the current $100 million top and $1 billion.

Recommended Table

The Department suggests amending § 2R1.1 as follows:

(1) Section 2R1.1(a) is amended by striking "10" and inserting "13".

(2) The volume of commerce table in Section 2R1.1(b)(2) is amended to read as follows:

"(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

Volume of Commerce (Apply the Greatest)	**Adjustment to Offense Level**
(A) More than $1,000,000	add 1
(B) More than $5,000,000	add 2
(C) More than $10,000,000	add 3
(D) More than $20,000,000	add 4
(E) More than $40,000,000	add 5
(F) More than $80,000,000	add 7
(G) More than $160,000,000	add 9
(H) More than $320,000,000	add 11
(I) More than $640,000,000	add 13
(J) More than $1,000,000,000	add 15."

At the low end of the table, the adjustments for "more than $400,000" and "more than $2,500,000" in affected commerce currently found in § 2R1.1 have been eliminated. This is principally a reflection of the passage of time since 1991. Due to inflation, an offense affecting $1,000,000 in commerce today is similar in impact to an offense affecting $400,000 in 1991, and the interval between $1,000,000 and $2,500,000 no longer captures the significant increase in harm that it did 14 years ago.

Congressional Intent

We believe the table above implements the intent of Congress when passing the Act. One of the principal congressional purposes behind increasing the Sherman Act maximum was to acknowledge and punish cartel violations with very high volumes of affected commerce – higher than the current $100 million top adjustment. As such, the adjustments for affected volumes of commerce up to "more than $40,000,000" are one level while adjustments for affected volumes of commerce beginning at "more than $80,000,000" are two levels. Thus, while increases in levels of punishment are warranted for antitrust offenses across-the-board, the need for greater deterrence of the largest offenses justifies the two-level increases for violations affecting commerce greater than $80 million. In addition, our proposed table acknowledges the greater absolute amounts of harm caused by the larger violations, i.e., the difference between an offense that affects $4 million more in commerce warrants less additional punishment than an offense that affects $360 million more in commerce.

This level of punishment appropriately reflects and implements the 10-year maximum penalty provided by Congress for antitrust violations, ensuring that the most serious offenders are sentenced toward the higher end of the spectrum. The proposal takes into account the fact that virtually all defendants to be sentenced under the guideline will have a Criminal History Category of I. It also allows courts ample flexibility to impose any applicable Chapter III adjustments.

For example, under our proposed table, a defendant guilty of participating in a cartel violation affecting more than $1 billion in commerce would receive an offense level of 28 before any adjustments. Such a defendant who did no more than enter a timely guilty plea, and thus qualify for a three-level downward adjustment for acceptance of responsibility, would receive an offense level of 25, punishable by a possible sentence of 4 years and 9 months in prison, or less than half the statutory maximum. On the other hand, the ringleader of a $1 billion plus cartel who refused to accept responsibility, was convicted, and received a four-level upward adjustment for aggravating role in the offense would have an offense level of 32, and would be incarcerated for the statutory maximum.

Another way to consider our proposal is by comparing the offense levels for an amended § 2R1.1 with the offense levels provided in existing §2B1.1 for wire and mail fraud offenses (which carry 20-year statutory maximum terms of incarceration), inasmuch as Congress increased the Sherman Act maximum in part to obtain greater comparability in sentences between these similar white-collar crimes. To begin, some conversion factor needs to be applied to the volume of commerce table in § 2R1.1(b)(2) so that it can be compared to the loss table in § 2B1.1(b)(1). The Guidelines provide such a conversion factor in § 2R1.1(d)(1), which states that for antitrust offenses pecuniary loss should be considered to be 20 percent of the affected volume of commerce. On that basis, the following comparison can be made:

§ 2R1.1		§ 2B1.1	
Volume of Commerce	**Offense Level**	**Loss**	**Offense Level**
Base	13	Base	6
More than $1,000,000	14	More than $200,000	18
More than $5,000,000	15	More than $1,000,000	22
More than $10,000,000	16	More than $1,000,000	22
More than $20,000,000	17	More than $2,500,000	24
More than $40,000,000	18	More than $7,000,000	26
More than $80,000,000	20	More than $7,000,000	26
More than $160,000,000	22	More than $20,000,000	28
More than $320,000,000	24	More than $50,000,000	30
More than $640,000,000	26	More than $100,000,000	32
More than $1,000,000,000	28	More than $200,000,000	34

The base offense level for fraud offenses applies to violations that cause a loss of $5,000 or less – far smaller than the smallest antitrust violation that would be prosecuted by the Department. By the time an antitrust violation has reached the first volume-of-commerce adjustment, it would receive an offense level four levels lower than a comparable fraud violation. From there on, antitrust violations would receive offense levels between six and eight levels lower than a comparable fraud violation. By contrast, under the current version of § 2R1.1 an antitrust violation affecting more than $100 million in commerce receives an offense level of 17, while a fraud violation causing a loss greater than $20 million has an offense level of 28, a difference of 11 offense levels. We believe that the revisions to § 2R1.1 that we propose appropriately narrow the gap between antitrust and fraud violations in light of the new Sherman Act maximum penalty and congressional intent to foster greater proportionality between antitrust and fraud offenses.

The increased Sherman Act statutory maximums provided in Section 215 of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 were designed to work in conjunction with the enhancements to the Antitrust Division's leniency program set out in Sections 211-214 of the Act. Congress determined that increasing antitrust penalties while providing increased incentives to cooperate with the Department would result in more effective detection and deterrence of antitrust violations. We concur in that determination. The Department believes that with the tools at our disposal both outside the Guidelines, such as the Antitrust Division's leniency policy, and inside the Guidelines, such as substantial assistance departures and acceptance of responsibility adjustments, higher levels of punishment for antitrust violations as set out in our proposal will lead to increased

deterrence, greater cooperation with government prosecutors and strengthened enforcement of antitrust laws.

The Department strongly supports amending § 2R1.1 in the manner we have described. We believe the guideline amendments we recommend reflect congressional intent by properly imposing sentences within the entire range of increased penalties and by reflecting both the rate of inflation and the higher volumes of affected commerce that the Department has encountered in antitrust cases since the table was last amended in 1991.

ANABOLIC STEROIDS

The Commission requested comment on the implementation of Section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108-358, which directs the Commission to review the Federal sentencing guidelines with respect to offenses involving anabolic steroids and to consider amending the guidelines to provide for increased penalties in a manner that reflects the seriousness of the offense and the need to deter anabolic steroid trafficking and use.

Background

Anabolic steroids are Schedule III controlled substances. 21 U.S.C. § 812(c)-Schedule III(e); 21 C.F.R. § 1308.13(f). The maximum penalty for a Schedule III controlled substance offense under 21 U.S.C. § 841 is five (5) years, or 10 years if the person has a prior felony drug offense conviction. 21 U.S.C. § 841(b)(1)(D); 21 U.S.C. § 960(b)(4) (5 year maximum term of imprisonment for import violations).

Anabolic steroids are synthetic drugs that mimic the actions of the primary male sex hormone, testosterone. In the licit market, they require a prescription, and are dispensed to treat conditions associated with low testosterone levels, such as delayed puberty or body wasting associated with AIDS. See Testimony of Nora D. Volkow, M.D., Director of the National Institute on Drug Abuse (NIDA), before the House Committee on Government Reform, "Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use," March 17, 2005.

Synthetic testosterone promotes skeletal muscle growth and enhances physical performance. As such, anabolic steroids are diverted as performance enhancing drugs by athletes, body builders, and those aspiring to improve their competitiveness or appearance. As Dr. Volkow noted in her congressional testimony, however, steroid abuse carries significant side effects, including liver and heart disease, stroke, and behavioral changes such as increased aggression and depression. Id. The consequences can be devastating. See Testimony of Donald M. Hooten before the House Committee on Government Reform, March 17, 2005 ("I am convinced that [my teenage son's] secret use of steroids played a significant role in causing the severe depression that resulted in his suicide").

The sentencing guidelines currently treat anabolic steroids differently than other Schedule III controlled substance pharmaceuticals. Under § 2D1.1, Notes to Drug Quantity Table (F), for Schedule III drugs, one "unit" equals one pill, capsule or tablet, or if in liquid form, one unit equals 0.5 ml. In

contrast, for anabolic steroids, one "unit" means 50 tablets, or if in liquid form, one unit equals a 10 cc vial of injectable steroid. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g. one 50 cc vial equals five 10 cc vials). §2D1.1, Notes to Drug Quantity Table (G).

The Drug Equivalency Table under § 2D1.1 establishes one unit of a Schedule III substance to be equivalent to one gram of marijuana. In the Drug Quantity Table, § 2D1.1(c), offenders responsible for 40,000 or more units of Schedule III substances receive a maximum base offense level of 20.

History of Sentencing Guideline Amendments

It is useful briefly to set forth the history of the guidelines pertaining to anabolic steroids. The Anabolic Steroid Control Act of 1990, which was part of the Crime Control Act of 1990, Pub. L. 101-647, placed anabolic steroids in Schedule III of the Controlled Substances Act. Effective November 1, 1991, in Amendment 369, the Commission amended § 2D1.1 to provide that one unit of anabolic steroids was equivalent to 50 tablets or a 10 cc vial, and 40,000 units or more of anabolic steroids would yield a base offense level of 20. The Commission explained its rationale for the amendment as follows: "[b]ecause of the variety of substances involved, the Commission has determined that a measure based on quantity unit, rather than weight, provides the most appropriate measure of the scale of the offense." U.S.S.G. Appendix C, Vol. I, at 229-30 (describing Amendment 369).

At the time Amendment 369 became effective, sentencing for other Schedule III controlled substances, and Schedule I and II depressants, was based on the weight of a mixture or substance, with 20 kilograms or more of Schedule III controlled substances or Schedule I and II depressants necessary to achieve a base offense level of 20. This changed on November 1, 1995, through Amendment 517, which implemented the current "unit" based system for Schedule III controlled substances that remains in place today.

Under Amendment 517, offense levels in the Drug Quantity Table for Schedule III, IV and V controlled substances were to be based on the number of tablets rather than the gross weight of the tablets. While the definition of a "unit" for anabolic steroids remained the same, a unit of a Schedule III non-anabolic controlled substance was calculated to be "one pill, capsule, or tablet . . . If the substance is in liquid form, one 'unit' means 0.5 gms." See U.S.S.G. Appendix C, Vol. I, at 426-29 (describing Amendment 517); see also Note (F) to § 2D1.1(c). Noting that the pre-Amendment 517 system led to offense levels based on the total weight of the pill, most of which was "filler" rather than controlled substance, the Commission concluded that applying the Drug Quantity Table based on the number of pills "will both simplify the guideline and more fairly assess the scale and seriousness of the offense." Id. at 429. Neither Amendment 369 nor 517 set forth an explanation for the disparity between anabolic steroids and other Schedule III controlled substances.

In its Federal Register notice of February 23, 2005, the Commission requested public comment regarding whether the guidelines should be amended, consistent with the Anabolic Steroid Control Act of 2004, to provide for increased sentences for anabolic steroid offenses. More specifically, the Commission asked whether (and if so, how) the Drug Equivalency Tables and/or the Notes to the Drug Quantity Table in § 2D1.1 should be amended to provide a heightened marijuana equivalency for anabolic steroids. The Commission asked whether anabolic steroids should be treated as all other

Schedule III controlled substances, with one unit equal to one tablet, and hence equal to one gram of marijuana.

Treatment of Steroids Under Schedule III

We believe that the Notes to the Drug Quantity Table should be amended so that anabolic steroids are treated the same as other Schedule III controlled substance pharmaceuticals. Recent congressional hearings, and the attention brought to the issue by the passage of the Anabolic Steroid Control Act of 2004, have highlighted the dangers associated with illicit anabolic steroid use, and the current dosage equivalency is inadequate to address the problem.

For all Schedule III drugs other than anabolic steroids, a "unit" is defined as one tablet or pill. Thus, a dosage unit for sentencing purposes equates to a therapeutic dose of the Schedule III drug. Hydrocodone in pill form, known by the common trade names of Vicodin and Lortab, is available in various pill strengths, including 5 mg, 7.5 mg and 10 mg of active ingredient. See Physicians Desk Reference, Thompson PDR 58th Ed., 2004, at 525-28 (Vicodin 5/500mg – "usual adult dosage is one or two tablets every four to six hours . . . the total daily dosage should not exceed 8 tablets," PDR at 526); Vicoden ES 7.5/750 mg (daily dosage is one tablet every four to six hours with daily dosage not to exceed 5 tablets, PDR at 527); Vicoden HP 10/660 mg, usual adult dosage is one tablet every four to six hours, with daily dosage not to exceed 6 tablets, PDR at 528). Lortab is available in tablets of 2.5/500 mg (one or two tablets every four to six hours not to exceed 8 tablets); 5/500 mg (same); 7.5/500 mg (one tablet every four to six hours not to exceed 6 tablets); and 10/500 mg (same), with adult dosages as indicated in parenthesis. PDR at 3236.

Similarly, we believe that a dosage unit under the guidelines for anabolic steroids should be equal to one tablet, which constitutes a therapeutic dose. For instance, oxandrolone, an anabolic steroid sold under the trade name Oxandrin, is available in 2.5 mg and 10 mg tablets. It is used to promote weight gain following extensive surgery or severe trauma, and the normal adult dosage varies from 2.5 mg to 20 mg daily. See PDR, at 3043. Another anabolic steroid, Testosterone Ethanate, sold under the brand name Delatestryl, is indicated for testosterone replacement therapy in the case of primary hypogonadism or delayed puberty and is sold as a single dose injectable 1 ml solution containing 200 mg/ml. See PDR, at 3042.

We recognize that anabolic steroids are ingested at much higher levels by body builders in the illicit market. In a process known as "stacking," weight lifters frequently ingest two or three different anabolic steroids in various dosages over a six to 12 week cycle. Nevertheless, we understand that in the past, where a therapeutic dose is available, it has been and should be the basis for establishing the pertinent sentencing guideline.

The PDR dosing information clearly indicates that therapeutic doses of anabolic steroids are consistent with the therapeutic doses of other Schedule III controlled substances. Accordingly, for sentencing purposes, anabolic steroid dosage equivalencies should be made to conform to other Schedule III substances.

Drug Seizure Data

An analysis of drug seizure data from DEA's analytical laboratories also lends support to the Department's position that the current sentencing regime is inadequate. Over the last two years, DEA has completed two significant anabolic steroid investigations, and DEA's laboratory system analyzed exhibits from those investigations. In addition, DEA analyzed exhibits from seizures at the border and cases where anabolic steroids were found during the execution of search warrants or at seizures made as a result of searches incident to an arrest.

The first DEA steroid investigation targeted an organization using a source of supply located in Asia. The drug trafficking organization distributed anabolic steroids to at least 100 identified customers in the United States and was responsible for the distribution of approximately 20,000 to 23,000 dosage units per month. The second case involved a drug trafficking organization with approximately 50 identified U.S. customers. The organization distributed between 17,000 and 25,000 dosage units per month.

DEA's laboratory seizure analysis from 2003 suggests that anabolic steroid seizures in major cases consist of quantities in the order of magnitude of 20,000 to 40,000 tablets and 2,000 to 6,000 ml. We assume that the largest seizures involve distributions by major traffickers, and the average seizure is more reflective of personal use quantities.

A partial list of DEA laboratory data includes the following:

Drug Type	No. of Exhibits	Largest Seizure	Ave. Seizure
Methandienone	4	44,000 tablets	11,258 tablets
Methandrostenolone	95	15,213 tablets	751 tablets
Methenelone Enanthate	4	1,752 ml	455 ml
Nandrolone Decanoate	106	6,000 ml	109 ml
Oxymetholone	29	6,000 tablets	508 tablets
Stanozolol	100	9,576 tablets	369 tablets
Testosterone	118	5,800 ml	162 ml
Testosterone Cypionate	54	5,000 ml	292 ml
Testosterone Ethanoate	77	2,270 ml	125 ml
Testosterone Propionate	102	6,030 vials	177 ml
Trenbolone Acetate	32	1,600 tablets	79 tablets

From this data, we note that even in the case of the largest seizure involving 44,000 tablets of Methandienone, the current dosage conversion under the guidelines would be 880 units (44,000 divided by 50), which yields a base offense level of 8. A first time offender would face a sentence of 0-6 months and would be in Zone A of the sentencing table, even without credit for acceptance of responsibility. Similarly, for injectable steroids, the largest exhibit was 6,000 ml, which equates to 600 10 cc vials, or 600 units. Again, this yields a base offense level of 8. These sentences are inadequate. They do not reflect the seriousness of the offense, or provide adequate deterrence.

Finally, our analysis suggests that the current equivalencies are inconsistent with congressional intent that anabolic steroids be treated as Schedule III controlled substances. Indeed, under the current

regime, anabolic steroid traffickers are treated more leniently under the guidelines than drug traffickers who illegally distribute equivalent quantities of Schedule IV drugs. For instance, 1 tablet of an anabolic steroid equals 1/50th of a dosage unit, and because 1 unit equals 1 gram of marijuana, 1 tablet of an anabolic steroid equals 1/50 of a gram of marijuana, or 20 milligrams of marijuana. In contrast, 1 tablet of a Schedule IV controlled substance such as Xanax (benzodiazepine) or phentermine (diet pill) equals 1 unit, which equals .0625 grams of marijuana, or 62.5 mg of marijuana. In other words, it takes three (3) anabolic steroid tablets (20 mgs of marijuana x 3) to equal one (1) Xanax or phentermine tablet (62.5 mgs of marijuana) for sentencing purposes.

The Department asks the Sentencing Commission to acknowledge the dangerous effects of anabolic steroids and to amend the guidelines to more accurately reflect the seriousness of offenses involving such substances. For the purposes of the guidelines, there is no principled basis for distinguishing between anabolic steroids and all other Schedule III controlled substances. If anabolic steroids were treated as other Schedule III substances, then a large scale distributor would face a base offense level of 20 based on a drug trafficking scheme involving 40,000 or more dosage units. DEA drug seizure data suggests that modification of the dose equivalencies as advocated by the Department would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities. Accordingly, the Department urges the Commission to adopt parity between anabolic steroids and other Schedule III drugs for sentencing purposes.

* * * * * * *

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,

Deborah J. Rhodes
Counselor to the Assistant Attorney General

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March 25, 2005

Honorable Ricardo H. Hinojosa
U.S. Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002

RE: Proposed 2005 Amendments and Issues for Comment

Dear Judge Hinojosa:

Thank you for the opportunity to comment on the proposed amendments and issues for comment regarding Aggravated Identity Theft, Antitrust Offenses, and Anabolic Steroids.

The Federal Defenders submitted a letter commenting on the proposed amendment to the Identity Theft guidelines to Deputy General Counsel Paula Desio dated March 9, 2005. A copy of that letter is attached.

The Federal Defenders adopt the comments of the Practitioners' Advisory Group regarding Antitrust Offenses.

We believe that before the Commission takes any action regarding penalties for offenses involving Anabolic Steroids, it should collect and evaluate data and information demonstrating what change, if any, is needed to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). We are not aware of any such data or information at this time, and for that reason cannot offer an intelligent proposal. We ask to be informed of whatever data and information is submitted to the Commission by the Department of Justice, so that we can provide effective comment and alternatives pursuant to our statutory responsibility under 28 U.S.C. § 994(o). We note that the Federal Defenders share the concerns expressed by the National Association of Criminal Defense Attorneys in its letter regarding changes in the penalties for offenses involving Anabolic Steroids.

As always, we thank you for the opportunity to respond to the proposed amendments. Please feel free to contact us with any questions or for further comment.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel, Federal Defender Sentencing Guidelines Committee

cc: Hon. Ruben Castillo
Hon. William K. Sessions
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl Howell
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March 10, 2005

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RE: Comments to Proposed Amendment: Aggravated Identity Theft

Dear Ms. Desio:

Thank you for the opportunity to comment on the proposed amendment dealing with aggravated identity theft. We have reviewed the proposed amendment and have the following comments and observations.

A. Amendment to U.S.S.G. § 2B1.1(b)(10)

The Commission proposes revising § 2B1.1(b)(10) by striking the original language and inserting language that any defendant who is convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4) shall receive this adjustment. This amendment may have the effect of including some defendants who would not have received this adjustment under the prior language, and excluding others who might have received the (b)(10) adjustment under the prior language. We perceive no change as to those defendants convicted of violations under §§ 1028(a)(5) and 1029(a)(4). The (b)(10) adjustment probably would have applied to them under the old language as it will under the new language. On the other hand, not all defendants convicted of § 1028(a)(7) may have received the adjustment under the old language. The language of § 1028(a)(7) is very broad, and encompasses criminal conduct that previously was not described in (b)(10).

For example, a defendant convicted of bank fraud, which involved fraudulent use of another's credit card or checking account, would not receive the (b)(10) adjustment, because bank fraud is not a conviction under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4) . But, a defendant convicted under § 1028(a)(7) may have committed arguably less serious criminal conduct such as a minor crime involving immigration documents and yet this adjustment would apply to him. Because this amendment may advantage some defendants and disadvantage others, we have no position on the amendment. However, we suggest that the Commission continue to study this amendment and ascertain how it is applied to defendants and in what types of cases.

B. Multiple Counts of Aggravated Identity Theft under 18 U.S.C. § 1028A

Section 2 of the Identity Theft Penalty Enhancement Act, at 18 U.S.C. § 1028A(b)(4), states that a term of imprisonment for a violation of the aggravated identity theft statute may run concurrently to another conviction for § 1028A, "provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission." This language invites the Commission to address this issue in the Guidelines, and we believe that the Commission should do so. If Congress believed that concurrent sentences were never appropriate then it clearly would have said this in the statute, as it has in the context of convictions for use of a firearm during a crime of violence or drug trafficking offense (18 U.S.C. § 924(c)), which never run concurrently.

We believe that the criteria set forth in the grouping rules together with the relevant conduct rules set forth the correct criteria for determining whether convictions for § 1028A should run concurrently. If the conduct that is the subject of multiple convictions for § 1028A involved acts or transactions that were connected by a common criminal objective, constituted part of a common scheme or plan, or would otherwise qualify as "relevant conduct," as that term is defined in U.S.S.G. § 1B1.3, then the sentences for such violations of § 1028A should run concurrently with each other.

In the commission of such offenses, a defendant might use an individual's "means of identification" on multiple occasions. Or, in the course of committing a large scale fraud, a defendant might use the means of identification of several different persons. A defendant who commits fraud by using one person's identification 20 times should not serve 20 consecutive terms of imprisonment for aggravated identity theft. Nor should the individual who uses the identity of 100 persons in the commission of a large scale fraud be facing 100 consecutive terms of imprisonment. If the harm is greater because of either the number of times an identity was used or the number of identities used, then this greater harm will be reflected in the sentence for the underlying offense, which will take into account, under § 2B1.1, the amount of loss and number of victims. Therefore, we strongly urge the Commission to include strong language in the Guidelines indicating that the court should impose concurrent sentences for convictions of § 1028A any time the conduct involves the same course of conduct.

As always, we thank you for the opportunity to respond to the proposed amendments. Please feel free to contact us with any questions or for further comment.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Committee

JANE L. McCLELLAN
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to the United States Sentencing Commission

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March 18, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
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Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

While the Probation Officers Advisory Group (POAG) did not have the opportunity to meet in Washington for our spring meeting, we have formulated comments and recommendations to the United States Sentencing Commission regarding the proposed amendments published for comment in February 2005. We are submitting comments relating to the following proposed amendments.

Revised Proposed Amendment: Aggravated Identity Theft

POAG does not see any application issue relative to the establishment of the new guideline, USSG §2B1.6. However, we suggest that the application notes contain a reference similar to USSG §2K2.4, comment. (n.5), explaining the rationale for not applying Chapters Three or Four to this type of offense and including references to §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and §5G1.2. As a practical manner, we propose additional language be added in the application notes regarding terms of Supervised Release and fine amounts similar to the wording found in §2K2.4 for cases in which the defendant is charged with a single count of 18 U.S.C. § 1028A.

While POAG does not see any difficulty in adding the language to §3B1.3, comment. (n.1[B]), there is a concern regarding note 5. Officers do not know whether a base offense level has incorporated a specific factor unless it is written in the guidelines. Therefore, we suggest if there are specific base offense levels that incorporate this factor, there be some mention in the applicable guidelines.

POAG agrees with and appreciates the Commission's attempt to simplify the application of §2B1.1(b)(10).

Regarding USSG §5G1.2, Issue for Comment, POAG believes that disproportionate sentences may arise from multiple convictions of Identity Theft depending on the various AUSA's charging practices. A comparison was made to cases involving smuggling illegal aliens. In some districts, the prosecutor may charge defendants per individual smuggled, thus subjecting them to multiple mandatory minimum, consecutive sentences for a small number of people. However, in other areas of the country, the prosecution charges by occasion and individuals receive lesser sentences for smuggling hundreds of people. More guidance in §5G1.2 with examples would be beneficial.

Revised Proposed Amendment: Antitrust Offenses

POAG has limited experience with this guideline and does not take a position on a specific base offense level as this is a policy decision for the Commission to determine.

Proposed Amendment: Miscellaneous Amendments Package

There are only three issues in this package on which POAG wishes to comment. While POAG appreciates the attempt to simplify the cross reference application problems which currently exist at §2B1.1(c)(3), the cross reference is still very general in nature and does not address the situation in which a defendant lies to a law enforcement agent about the underlying crime. For example, a defendant lies to the FBI about having been kidnaped and attempts to extort money from family members, but is convicted of making a false statement, a violation of 18 U.S.C. § 1001. Should this case remain in §2B1.1 or should there be a cross reference application? Perhaps, further instructions or guidance could be added to the commentary, or the cross reference provision be eliminated.

Section C of the Miscellaneous Package references the correction of the title change to §5C1.2 in §5D1.1. It was noted by some members that additional wording regarding this issue should be added to §5C1.2 as well, as many practioners may not proceed to §5D1.2.

Finally, POAG has some concern about the proposed change in the sentencing table regarding level 43. While we do not take a position on the policy decision regarding the proposed §3F1.1, we have concern with the change in level 43 from a life sentence to 360 to life. With this change there will be no difference in a level 42 or 43 in any of the criminal history categories. This would appear to be the only situation in the sentencing table where two offense levels have the identical sentencing options.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair

March 29, 2005

Honorable Ricardo H. Hinojosa, Chair
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RE: Proposed 2005 Amendments and Issues for Comment

Dear Judge Hinojosa:

As the Commission undertakes the first set of amendments since the Supreme Court's decision in *United States v. Booker,* 125 S. Ct. 738 (2005) made the guidelines a body of advisory provisions, the National Association of Criminal Defense Lawyers (NACDL) recommends that the Commission take special care to act in rigorous adherence to its statutory purposes and duties. Any new amendment should assure that the purposes of sentencing are met, provide certainty and fairness while avoiding unwarranted disparities, and reflect empirical knowledge. *See* 18 U.S.C. § 991(b)(1). The Commission ought to explain fully its reasons for amending a particular guideline so that both district and appellate courts and counsel may refer to them as necessary. Congress can also determine that its statutory directives are properly being addressed. Anything less, will invite the federal courts in exercising the discretion required by law to give less weight to the particular guideline.

While the lower federal courts have interpreted and applied *Booker* in differing ways – from giving the guidelines near presumptive weight to treating them as one of seven factors to be considered in imposing a sentence – it is clear that courts are faithfully attempting to carry out their obligations under the law. The process has not resulted in unmoored or unfettered discretion. Rather, each court is measuring the guidelines and the Commission's reasons and purposes in adopting them against the statutory purposes of sentencing and "the nature and circumstances of the offense and the history and circumstances of the defendant." 18 U.S.C. § 3553(a)(1). The Commission's reasoned action, coupled with explanations for any amendments will aid that process.

Of the three proposed amendments and issues published for comment, NACDL will focus its testimony on Anabolic Steroids while supporting the Comments of the Federal Defenders and the Practitioner's Advisory Group with respect to Aggravated Identity Theft and Antitrust Offenses, respectively.

I attach testimony and a paper prepared by NACDL member Richard D. Collins, who has extensive experience in defending and advising clients concerning anabolic steroids. As the testimony and paper make clear, anabolic steroids are different in many respects from all other controlled substances and for that reason have been treated so by the Commission. In particular, because of the nature and effect of steroid use, care should be taken to make sure that personal use quantities are not prosecuted and punished as trafficking offenses. Before the Commission acts to increase penalties for anabolic steroid offenses, it ought to consider expert testimony and empirical evidence to determine whether an increase is necessary and if so, at what level. Given the experience with how quantity-driven guidelines overrepresent culpability for a substantial number of offenders, the Commission should explore other avenues of addressing Congressional concerns before increasing the marijuana equivalency or the unit of prosecution. In any event, the Commission ought not just increase penalties willy nilly.

As always, NACDL appreciates the opportunity to comment on the Commission's work and is ready to provide any additional information that the Commission may require.

Very truly yours,

Carmen D. Hernandez
Co-Chair, Federal Sentencing Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

cc: Hon. Ruben Castillo
Hon. William K. Sessions
Commissioner John R. Steer
Commissioner Michael E. Horowitz
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Testimony to the United States Sentencing Commission

Washington, D.C.
April 12, 2005

Rick Collins, Esquire
National Association of Criminal Defense Lawyers

As a life member of the National Association of Criminal Defense Lawyers and on the association's behalf, I wish to thank the Commission for the opportunity to offer my commentary. The subject of anabolic steroids has received massive media attention lately, as well as new attention from Congress. However, much of the attention has been extremely limited in focus. I would like to offer some observations of illicit steroid use outside of professional baseball. I believe that these observations are relevant to the determination of how to implement the directive to this Commission set forth in Section 3 of the Anabolic Steroid Control Act of 2004. In particular, I will focus on the equivalency of steroids to other Schedule III drugs, and to controlled substances in general.

My comments are offered on behalf of NACDL based upon my "in the trenches" experiences in dealing with anabolic steroid criminal matters. Following a five year stint as a state court prosecutor in the 1980s, I entered private practice focusing on the typical variety of criminal defense matters. Over the last five years, however, my practice has shifted toward a niche practice centering on civil and criminal matters involving steroids and sports supplement matters. I represent and advise several non-profit organizations in the field of bodybuilding, health and fitness, including one with 173 affiliated national federations. Hundreds of matters involving anabolic steroids and related issues have crossed my desk, affording me a unique and extensive view of the intersection of non-medical steroid use and the criminal justice system in this country. I have attached a copy of my curriculum vitae for your reference. I hope that my practical experience in dealing with steroid cases of all types will be helpful to this Commission on the issue of drug equivalency.

Anabolic Steroids Are Different from Other Controlled Substances

At the outset, the Commission should consider that illicit steroid users are profoundly different from other illicit drug users, and a number of their differences bear upon the issue of equivalency. There is a stark contrast between the profiles, motivations, and patterns of possession and use of illicit steroid users and that of persons who use other drugs. Indeed, steroids themselves are different from other controlled substances.

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Anabolic steroids are the only hormones in the entire Controlled Substances Act, and testosterone, the criminalized steroid by which all others are measured, is naturally present in the bodies of every American man, woman and child. While the propriety of dealing with the societal problems associated with illicit steroid use via the mechanism of the Controlled Substances Act is not the primary focus of the Commission's interest at present, the Commission should understand that numerous legal reviewers have questioned or criticized the scheduling of steroids as controlled substances. I have attached a law journal article that analyzes the original Anabolic Steroid Control Act of 1990, which in turn references several other law review articles (by reviewers Black, Burge, and Hedges) that arrive at similar conclusions. These articles provide background information that bears on the appropriate equivalency between steroids and other controlled substances.

The profile of the typical steroid user has been misrepresented to the public, and to members of Congress. The "typical" steroid user has been presented as fitting one of two profiles: either the million dollar sports star, or the hapless teenager seeking to emulate him. Certainly, Jose Canseco was not the only steroid user in Major League Baseball. In fact, there are elite level athletes in a variety of professional and Olympic sports who are using or have used steroids to enhance athletic performance. A number of them use steroids in willful and unethical violation of the rules of fair play and may even deserve our scorn. But the Commission's concern cannot be about the regulation of athletic endeavors or the adulation deserved by athletes.

The star-struck adolescents who risk their health by emulating star athletes are deserving of our concern and protection and yet the Commission in amending the guidelines for anabolic steroids should first do no more harm to those young athletes as is likely to happen if penalties are increased without a thorough consideration and empirical analysis of the scientific and societal harms.

The steroid user who has been overlooked in the current focus of attention may be the most common user of steroids. Although I have met or corresponded with well over a thousand steroid users in the criminal justice context and have spoken with many of them expansively, it may come as a surprise that the majority of them were not teenagers, nor were they competitive athletes of any kind. The overwhelming majority were gainfully employed, health conscious adult males, between 25 and 45 years of age, using hormones not for athletic performance but to improve their appearance. These users typically are non-smokers who follow exercise routines including both strenuous weight training and *cardio* programs, and adhere to healthful diets. Do they put too high a premium on superficial appearances? In my opinion, absolutely. Are they overcompensating for underlying self-esteem issues? Perhaps, in many cases. Are they assuming risks that might potentially be harmful to them? Probably, yes, as do smokers, drinkers, and extreme sports enthusiasts. But however misguided we may judge non-medical users of these hormones to be, I seriously question whether they are the sort of dangerous criminals deserving of extended prison terms. Their motivations are identical to the motives of women who seek surgical breast augmentation or to those of men who seek face-lifts, eye jobs, tummy tucks and the like. Of course, while our laws permit

cosmetic surgeons to anesthetize and cut their patients to cater purely to vanity, doctors are forbidden from using hormones for the same purpose.

In any event, the medical and scientific experts I have come to know in this field share my views on the analogy of cosmetic steroid use to plastic surgery. Sadly, though, this view rarely achieves mainstream public exposure, because the media and the recent Congressional hearings seem to focus exclusively on the "hot" issues of steroids in pro sports and steroids as used by teenagers. Consequently, the public sees steroid use solely in the context of sports cheating, even though that is, in my experience, only a small part of the overall steroid pie, and only a minuscule fraction of the criminal justice steroid pie.

The elite athletes whose steroid use draws public attention and Congressional ire are virtually never prosecuted in the criminal justice context. In fact, I am unable to name a single professional athlete who has been arrested for steroid possession. On the other hand, I can show you file after file in my office of non-competing, mature adult males who have been prosecuted.

Patterns of Use and Long-Range Effects

Their motivation, whether labeled as vanity or an excessive quest for self-improvement, is unlike the motivation that drives the use of every other controlled substance. However misguided steroid use without medical supervision may be, it is long-range, goal-oriented behavior. Steroid users are the virtual antithesis of the typical drug offender. Steroid users do not take these hormones for any immediate psychoactive effect, and these hormones do not have any immediate psychoactive effect. They are not stimulants, depressants or hallucinogens. By contrast, the person who uses crack buys it, smokes it, and gets high from that dose. When he wants to get high again, he buys more. The behavior is largely the same with marijuana, LSD, cocaine, and all other controlled substances, including all other Schedule III drugs. Not so with steroid users. Because they seek long-range effects, not an immediate high, their habits are very different from narcotics abusers. Most steroid users plan out – typically memorialized in writing – a cycle of use lasting weeks or months. The plan will typically involve the use of several different drugs in a sometimes elaborate system of methodically planned dosages.

All of this long-range planning is reflected in the users' purchasing and possession habits. Steroid users never buy steroids daily or weekly. They typically purchase a quantity of steroids that will last for the full duration of at least one planned cycle. Many buy for several cycles. Steroid users are pack rats by nature. For example, those steroid users who use the oral steroid methandrostenolone will often buy it in a tub of one thousand five-milligram tablets, available for about $450 online from Thailand.

Purchase and usage patterns must also be taken into account when examining the equivalency issue. One shot of heroin, one snort of cocaine, or one tablet of Ecstasy produces a desired psychoactive effect. It may even make sense to make one tablet of Oxycontin or Valium a dosage unit. One tablet of oxandrolone, oxymetholone, or any other steroid, however, does absolutely nothing. In fact, a number of medical experts

have pointed out that a whole bottle of steroids most likely would have little adverse effect. Contrast that with the fact that were a person to ingest an entire bottle of aspirin, that person might die of an overdose. To designate a particular quantity as a "dosage unit," it must at a minimum have some effect. It must do something. Yet that is not the case with steroids.

Before amending the marijuana equivalency for steroids, the Commission ought to be able explain why it is selecting a particular number. It is unclear why the Commission set 50 tablets (the current equivalency) as the dosage unit for steroids, but it could have been a recognition that steroid users purchase and possess steroids in much more massive amounts than any other drug offenders. It may also be that there was some underlying uneasiness about Congress's decision – which was contrary to the testimony of the DEA, FDA, NIDA and AMA, all of which sent representatives to testify against scheduling steroids – about forcing these hormones into the Controlled Substances Act.

Regarding injectable steroids, to amend the guidelines to make half of one milliliter (0.5 milliliter) a steroid dosage unit would be a fiction, plain and simple. In all my experience with steroid users, I have never met or even heard of a person who regularly administered half of a milliliter at a time. The landmark 1996 *New England Journal of Medicine* study (that stunned many in the medical community when it found virtually *no* adverse effects when anabolic steroids were administered for ten weeks) used a dosage of 600mg per week (about six times natural replacement dose).

Targeting Traffickers

The argument that increasing the penalties through a revised drug equivalency will target traffickers does not comport with the reality of these cases. In my experience, most people being arrested today for steroid offenses are not traffickers, but personal users. This is because the Internet has become the favored tool of international steroid commerce, with international mail order now a common method of delivery. The traffickers, whoever they are, are often far beyond the jurisdiction of American authorities. The defendant who gets arrested is most often the end user, caught in a "controlled delivery" of the package by undercover agents.

In state courts across America, where the current federal drug equivalency for steroids offers no protection, personal use steroid defendants are being arrested and prosecuted. All too often, they are charged with "intent to sell" offenses, based on the misperception by law enforcers as to the amounts consistent with personal use. I have seen firsthand countless cases of individuals erroneously charged with possession with intent. The "intent to sell" problem is particularly prevalent in cases involving low dosage oral tablets, such as Anabol (methandrostenolone) from Thailand. One of these little pink pentagons provides only 5mg of anabolic steroids, while it is common for users of oral steroids to take 50 to 100mg of oral steroids daily or even more. A man in New York was recently charged with intent to sell in state court for possessing less than four hundred tablets in his car. In a California state case, prosecutors insisted that receiving a package of one thousand Anabol tablets by mail from Thailand proved an intent to sell,

despite the reality that one thousand tabs is the *minimum* quantity that could be ordered from that overseas source. I have seen two car-stop state cases in New York where possessors of Anabol, in the amounts of 207 tablets and 280 tablets, were charged with possession with intent to sell without any other evidence of such intent. In one of the many cases generated by the Maryland State Police, a man was charged with possession with intent to distribute steroids when his mother accepted a controlled delivery package containing 100 Anadrol tablets, two bottles of testosterone cypionate, three bottles of nandrolone and two bottles of stanozolol. The house search recovered an additional 400 steroid tablets, another steroid bottle, and some syringes. These are all typical examples of situations where the variety of substances combined with the total quantity was wrongly viewed by law enforcement as inconsistent with personal use.

To make each tablet a dosage unit, and every half a milliliter a dosage unit, would bring the injustices I have seen in state courts into federal courts, with heightened punishments not just for traffickers, but for the typical steroid possessors I have described to you. I suggest we should stop and consider whether that truly is beneficial to society. Personal users who are high profile cheating athletes should be dealt with through the administrative rules of their sports. If those rules are insufficient, let Congress continue to pressure the sports agencies. But as I said before, few if any sports heroes get arrested, and I have grave concerns that the ones who will suffer under a revised drug equivalency standard will be the gym rats. The only competitive athletes I predict will be targeted will be bodybuilders. I have known many former steroid users who have gone on to highly successful careers as lawyers and doctors. One of them went on to become the Governor of the State of California.

I challenge the argument that the current drug equivalency for steroids must be increased in order to make their prosecution worth the effort by the Department of Justice. Enforcing laws should not be based upon the length of potential sentences. The position of the NACDL, and my personal position, is that the current drug equivalency reflects a balanced compromise of concerns and considerations that is better tailored to anabolic steroids than a "one size fits all" Schedule III equivalency standard. We do not support an amendment to the guidelines as to steroid equivalency, especially if it adopts the standard used with other Schedule III drugs.

I hope that my comments have provided some food for thought on this issue. Should the Commission be interested in further information, I would be happy to provide it.

The Anabolic Steroid Control Act: The Wrong Prescription?

by Richard D. Collins

(Modified from the version originally published in the New York State Bar Association *Criminal Justice Journal*, Vol. 9, No. 2, Summer 2001)

According to the body of common knowledge, anabolic steroids are dangerous and deadly drugs. The mainstream media have thoroughly vilified these hormones for several decades. The use by mature adults of *any amount* of anabolic hormones to enhance physical appearance is invariably labeled anabolic steroid "*abuse*" and, consequently, the average American lumps the athletic steroid user into the same depraved category as the heroin or cocaine user. Law enforcement agents and prosecutors readily proceed accordingly in furtherance of our national "War on Drugs." Only the most progressive physicians accept the legitimacy of anabolic steroid use for any but the most limited medical purposes. Understandably then, the proposition that our current approach to the non-medical use of anabolic steroids is flawed, failing and in need of reform is provocative to many.

While rarely reported in the lay press, there are actually very compelling reasons to revisit the legitimacy of our current anabolic steroid laws. There is mounting evidence that the actual health dangers associated with anabolic steroids for mature adults are significantly *less* than were suggested to Congress or are commonly perceived by the public. There is evidence that the tight regulations have stifled research, undermined beneficial applications, and effectively severed any connection between physicians and most steroid users. Further, there are strong arguments that the legislation has failed to solve the very problems for which it was enacted; rather, it has exacerbated the situation.

The Congressional Hearings

In the mid 1980's, media reports of two problems came to the attention of Congress: the increasing use of anabolic steroids in professional and amateur sports, and a "silent epidemic" of high school steroid use. Between 1988 and 1990, Congressional hearings were held to determine the extent of these problems and whether the Controlled Substances Act should be amended to include anabolic steroids along with more serious drugs such as cocaine and heroin.[1] It is sometimes overlooked that the reported adverse medical effects of steroid use, such as potential liver damage and endocrinological problems, were completely irrelevant to the criteria for scheduling under the Controlled Substances Act.[2]

Many witnesses who testified at the hearings, including medical professionals and representatives of regulatory agencies -- including the FDA, the DEA and the National Institute on Drug Abuse -- recommended *against* the proposed amendment to the law. Even the American Medical Association repeatedly and vehemently opposed it, maintaining that abuse of these hormones does not lead to the physical or psychological dependence required for scheduling under the Controlled Substances Act. However, the records from the hearings suggest that any "psychologically addictive" properties of steroids were secondary considerations to Congress. The majority of witnesses called to testify at the hearings were representatives from competitive athletics. Their testimony, and apparently Congress' main concern, focused on legislative action far less to protect the public than to solve an athletic "cheating" problem.[3] Congress wanted steroids out of sports and classified steroids as Schedule III controlled substances. As a result, these sex hormones stand out as a strange anomaly among the codeine derivatives, central nervous system depressants, and stimulants that form the rest of Schedule III.[4]

The Anabolic Steroid Control Act of 1990

The Anabolic Steroid Control Act of 1990[5] added anabolic steroids to the federal schedule of controlled substances, thereby criminalizing their non-medical use by those seeking muscle growth for athletic or cosmetic enhancement. It places steroids in the same legal class as barbiturates, ketamine and LSD precursors. Those caught illegally possessing anabolic steroids even for purely personal use face arrest and prosecution. Under the Control Act, it is unlawful for any person knowingly or intentionally to possess an anabolic steroid unless it was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice (or except as otherwise authorized). A first offense simple possession conviction is punishable by a term of imprisonment of up to one year and/or a minimum fine of $1,000.[6] Simple possession by a person with a previous conviction for certain offenses, including any drug or narcotic crimes, must get imprisonment of at least 15 days and up to two years, and a minimum fine of $2,500, and individuals with two or more such previous convictions face imprisonment of not less than 90 days but not more than three years, and a minimum fine of $5,000.[7] Distributing anabolic steroids, or possessing them with intent to distribute, is a federal felony.[8] An individual who distributes or dispenses steroids, or possesses with intent to distribute or dispense, is punishable by up to five years in prison (with at least two additional years of supervised release) and/or a $250,000 fine ($1,000,000 if the defendant is other than an individual).[9] Penalties are higher for repeat offenders.[10]

The Health Risk Issues

Although the purported health risks of anabolic steroids are irrelevant to the criteria for scheduling controlled substances, they have provided a seemingly valid public basis for the enforcement of the legislation, justifying a policy favoring prosecution of mature adults involved with steroids over allowing them to "destroy themselves" with these substances. It is curious whether the policy would be publicly supported if the actual dangers to healthy adult males were significantly less than the general public has been led to believe. While a comprehensive review of the medical and scientific evidence of health risks is beyond the scope of this article, a few words on the subject are in order.

Without question, there are health risks involved in the self-administration of *any* prescription medicine, particularly in the absence of a physician's advice with respect to dosages and duration of use. Further, without regular monitoring by a doctor, some side effects may go unnoticed or untreated until it is too late. Anabolic steroids can have adverse effects upon the body, with particular risks for teenagers, who are more likely than adults to abuse anabolic steroids in dangerously high dosages and without any medical supervision.

But while steroids can have adverse side effects, including serious ones, to mature adult users as well, the scientific literature is far less conclusive than is claimed by government-sponsored physicians and anti-drug officials. Despite a virtually one-sided presentation in the lay press, the position that anabolic steroids are such dangerous substances as to warrant militaristic government enforcement tactics is surprisingly controversial. Mounting research strongly suggests that the actual health risks have been overstated to the public. A landmark 1996 study, for example, found virtually no adverse effects when anabolic steroids were administered at a dosage of 600 mgs per week (about six times natural replacement dose) for ten weeks.[11] The actual risk levels for mature adult males using steroids are related to various factors, such as the dosages and duration of use, the specific types of compounds administered, the existence of any preexisting pathologies, etc. Some highly knowledgeable authorities who have objectively reviewed the medical literature pertaining to mature adult users have concluded that "[a]s used by most athletes, the side effects of anabolic steroid use appear to be minimal."[12]

The public has been led to believe that "roid rage" -- the descriptive term for steroid-induced spontaneous, highly aggressive, out-of-control behavior -- is rampant among steroid users. While a handful of researchers have claimed that psychiatric symptoms including increased aggression are a common side effect of anabolic steroid use, these claims have been regarded with skepticism by experts. Indeed, the relationship between anabolic steroids and aggressive behavior is far more complex than the press has reported, and the most exhaustive review of the medical literature did *not* find consistent evidence for a direct causal relationship between steroid use and aggression even in those affected.[13]

Personal Freedom and General Comparative Risks

The law does not prevent individuals from skiing, scuba diving or even hang gliding, although all are extremely dangerous activities. As one reviewer noted: "People in this country can choose to have tummy tucks, breast implants, nose jobs, smoke cigarettes, drink alcohol excessively, or watch strippers as long as they don't hurt other people. Actually smokers are allowed free reign to harm others with second hand smoke in most places in the country except California, so why aren't people allowed to exert their freedom of choice in regards to use of things like marijuana and anabolic steroids, either of which can be credibly argued to be less dangerous or no more dangerous than cigarettes and alcohol."[14] Smokers are not subjected to arrest and criminal prosecution, even though many, many more deaths result from tobacco *annually* than in all fifty years of non-medical steroid use.[15] Each year, the use of non-steroidal anti-inflammatory drugs – including *over-the-counter* aspirin and ibuprofen – accounts for an estimated 7,600 deaths and 76,000 hospitalizations in the United States.[16] Although the inherent risks of dangerous sports and cosmetic surgery are unnecessary, and may well outweigh the benefits, we do not proscribe these activities. Is it appropriate, then, to prevent mature, informed adults from choosing cosmetic enhancement through physician-administered hormones?

Comparative Risks to Cosmetic Surgery

Commentators from both the legal and medical communities have noted an interesting cultural irony in the comparison of anabolic steroid administration to cosmetic surgery procedures. Under a physician's supervision, these represent different approaches toward a similar goal. In a society preoccupied with physical appearance, confidence and self-image are often intertwined with body shape and condition. Interestingly, under the current views and laws of our society, it is criminal for a physician to administer anabolic steroids to a healthy adult for purposes of cosmetic physical enhancement. However, it is perfectly acceptable (and quite lucrative) to perform the much more radical and dangerous procedure of surgically implanting foreign prosthetics into virtually all parts of the human anatomy for the same purpose, subjecting patients to the potentially fatal risks associated with general anesthesia and post-surgical infection. Many more people have died or been permanently injured from botched liposuctions, breast augmentations and other cosmetic surgery procedures in the past few years than in nearly fifty years of anabolic steroid use by athletes. Liposuction, for example, is now the most popular cosmetic surgical procedure in North America despite the fact that it has resulted in significant incidences of blood vessel blockage and death.[17] Given the comparative risks, it would seem that the current state of legality regarding non-medical steroid use and these procedures might best be reversed.

The Goals of Criminalization for Non-Medical Usage

Whether providing criminal penalties for illegal steroid use is the proper and most effective way of dealing with the "steroid problem" has been debated for quite some time.[18] Proponents of criminalization and law enforcement authorities say that the Control Act and similar state laws: (1) help to deter trafficking, (2) protect young people, and (3) preserve fair competition in sports. Against criminalization are arguments that such penalties have proven to be a failure in stemming abuse of other drugs and alcohol, that criminalization only increases the underground black market, and that efforts are best confined to education and rehabilitation.

Deterring Steroid Trafficking

Proponents of criminalization contend that stiff penalties help deter trafficking,[19] and that the strict controls associated with controlled substance status prevent pharmaceutical companies from manufacturing more product than could be legitimately used for FDA approved purposes. Indeed, it was the allegation of such a "diversion" problem that helped sway Congress to classify steroids even against the advice of medical authorities. The Control Act addresses the diversion problem by the triplicate "paper trail" that is associated with controlled substances. Every person who manufactures, distributes, or dispenses a controlled substance is required to register annually with the Attorney General.[20] But while the paper trail requirements have reduced the amount of legitimate steroids diverted, they have helped foster a booming counterfeit trade where underground labs make and label steroid products to mimic legitimate pharmaceuticals. An even bigger problem is the tremendous increase in production and

importation of non-FDA-approved foreign products that have come to replace domestic preparations. All of these products completely bypass the Control Act's paper trail.

In a 1990 statement to Congress, Department of Justice officials estimated the black market to be a 300 million dollar per year industry.[21] In January 2001, federal law enforcement officials announced that they seized more than 3.25 million anabolic steroid tablets in the single-largest steroid seizure in U.S. history.[22] Last year, U.S. Customs agents made 8,724 seizures, up 46 percent from 1999 and up eight-fold from 1994. Public health experts estimate that the steroid black market has grown larger – perhaps far larger – than the $300 million to $400 million estimated in 1988.[23] But as officials from the Office of National Drug Control Policy issue statements supporting even broader interdiction, the Congress takes steps toward further regulations, and prosecutors and lawmakers decry the dangers of this huge black market of illegitimate steroids, it seems only sensible to deride the "deterrent" effect of our approach.

Protecting Young People

Protecting young people from danger is a worthy goal of any legislation. The Control Act appears to have had the opposite effect. A primary effect of the Control Act's restrictions upon legitimate product has been the increased manufacture and distribution of black market counterfeit products and substandardly made veterinary steroids never intended for human consumption. Some of these black market products are tainted with impurities or contain other foreign substances, supporting the assertion that "continued enforcement of steroid legislation will worsen health risks associated with steroid use. An investigation by *The Atlanta Journal and Constitution* concluded that 'tougher laws and heightened enforcement'... have fueled thriving counterfeit operations that pose even more severe health risks."[24]

A second major effect of the criminalization approach has been to discourage illegal users, including teens, from admitting their steroid usage to physicians. Since some of the greatest dangers inherent in self-administered steroid use involve the failure to be monitored by a doctor, the Control Act has succeeded in greatly escalating this danger and has created an even wider gap between the users and the medical community. Because the self-administration of anabolics is a federal crime, few users are willing to confess their steroid use to physicians. And because federal enforcement efforts have targeted physicians, few doctors want anything to do with athletes taking steroids. Other than in legitimate and authorized research, physicians must prescribe steroids "for a legitimate medical purpose" and "in the usual course of professional treatment" or risk prosecution as a common drug dealer.[25] Doctors caught distributing steroids for bodybuilding have been criminally prosecuted.[26] The end result is that the people, including minors, using steroids illegally rarely get regular blood pressure checks, cholesterol readings, prostate exams and liver enzyme tests. "Thus, the risks involving the use of anabolic-androgenic steroids have increased well beyond those of the drugs themselves." [27] As one reviewer concluded: "By forbidding trained physicians from administering steroids in a controlled manner, the Legislature has forced athletes to either buy steroids off the black-market or seek out un-ethical and possibly incompetent physicians to supply them steroids.... [I]t appears that Congress' attempt at preventing steroid prescription has at best been futile and at worst harmful."[28]

Preserving Fair Competition in Sports

Issues of cheating, "hollow victories," "winning at any cost," etc., were probably the primary ideological foundation for the Control Act.[29] "Permitting steroid users to compete with drug-free athletes reflects on the fairness of athletic competition at every level. Allowing those with an unfair advantage to compete can pressure drug-free athletes to use anabolic steroids to remain competitive."[30]

The Control Act has been of extremely limited value in addressing this "cheating" problem. Elite athletes are almost never prosecuted under the Control Act, obtaining their steroid supplies through sophisticated channels that avoid detection by law enforcement. The extremely remote possibility of criminal prosecution deters few if any Olympic and professional level athletes. The most effective way to eradicate anabolic steroids from competitive sports is through systematic drug testing. Athletes who fail the steroid test are prohibited from competing. While testing for anabolic steroids is not perfect, it does remove identified steroid-users from the sport and also serves as the most effective deterrent today. Serious athletes devote huge amounts of time, energy and resources into training for an

event. The effect of drug testing -- preventing steroid-using athletes from competing -- is both a more effective and more appropriate deterrent than the Control Act's threat of making overly ambitious athletes into convicted felons. This is especially true because the vast majority of anabolic steroid users are *not* competitive athletes at all, but merely otherwise law-abiding adults who are using the hormones for physical appearance.

Endnotes

1 *See generally, Legislation to Amend the Controlled Substances Act (Anabolic Steroids): Hearings on H.R. 3216 Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary*, 100th Cong., 2d Sess. 99, July 27, 1988; *Steroids in Amateur and Professional Sports -- The Medical and Social Costs of Steroid Abuse: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 1st Sess 736, April 3 and May 9, 1989; *Abuse of Steroids in Amateur and Professional Athletics: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 92, March 22, 1990; *Hearings on H.R. 4658 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2nd Sess. 90, May 17, 1990.

2 Adverse physical effects are not a basis for controlled substance status; potential for abuse and dependency are. Pursuant to 21 U.S.C. 812(b), a substance in Schedule III is supposed to be placed there if: A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II; (B) The drug or other substance has a currently accepted medical use in treatment in the United States; and (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

3 John Burge, *Legalize and Regulate: A Prescription for Reforming Anabolic Steroid Legislation*, 15 Loy. L.A. Ent. L.J., 33, at 45 (1994).

4 21 U.S.C. § 812(c).

5 Pub. L. No. 101-647, Sec. 1902, 104 Stat. 4851 (1990), amending 21 U.S.C. § 812(c) (1981) to include anabolic steroids.

6 21 U.S.C. § 844(a).

7 *Id.*

8 21 U.S.C. § 841(a)(1).

9 21 U.S.C. § 841(b)(1)(D).

10 *Id.*

11 S. Bhasin, T.W. Storer, N. Berman, *et al., The Effects of Supraphysiologic Doses of Testosterone on Muscle Size and Strength in Normal Men*, 335 N Engl J Med (July 4, 1996), 1-7.

12 M.G. Di Pasquale, ANABOLIC STEROID SIDE EFFECTS: FACTS, FICTION AND TREATMENT (Warkworth, Ontario; M.G.D. Press, 1990), 5. *See* generally, Mark Myhal and David R. Lamb, *Hormones as performance-enhancing drugs*, in M.P. Warren and N. W. Constantini (Eds.), SPORTS ENDOCRINOLOGY (Totowa, NJ; Humana Press, 2000), 429-472; C. Street, J. Antonio, & D. Cudlipp, *Androgen Use by Athletes: A reevaluation of the health risks*, 21 Can. J. Appl. Physiol., 6 (1996), 421-440; R.D. Dickerman, R.M. Pertusi, *et al., Anabolic steroids-induced hepatotoxicity: is it overstated?*, Clin J Sports Med 1999; 01 (9):34-39; and this author's review of *The Health Risks of Anabolic Steroids,* January 15, 2001 [http://www.steroidlaw.com/healthrisks.htm].

13 Jack Darkes, *The Psychological Effects of Anabolic/Androgenic Steroids, Parts I through IV*, December 15, 2000 [http://www.musclemonthly.com/author/jack-darkes.htm].

14 Michael Mooney, *Decriminalizing Anabolic Steroids*, May 28, 2001 [http://www.decriminalizesteroids.com/michael.html].

15 According to the US Centers for Disease Control, from the beginning of 1990 through 1994 there was an average of 430,700 deaths annually attributed to smoking. *See*, http://www.drugwarfacts.org/causes.htm citing *Smoking - Attributable Mortality and Years of Potential Life Lost*, Morbidity and Mortality Weekly Report (Atlanta, GA: Centers for Disease Control, 1997), May 23, 1997, Vol. 46, No. 20, p. 449. But despite over fifty years of anabolic steroid use by athletes, "there is little evidence to show that their use will cause long-term detriment; furthermore, the use of moderate doses of androgens results in side effects that are largely benign and reversible." Street *et al., supra,* note 12.

16 R. Tamblyn, L. Berkson, W.D. Jauphinee, *et al., Unnecessary Prescribing of NSAIDs and the Management of NSAID-Related Gastropathy in Medical Practice*, Annals of Internal Medicine (Washington, DC: American College of Physicians, 1997), September 15, 1997, 127:429-438, from the web at

http://www.acponline.org/journals/annals/15sep97/nsaid.htm, (May 1, 2001), citing J.F. Fries, *Assessing and understanding patient risk*, Scandinavian Journal of Rheumatology Supplement, 1992;92:21-4.

[17] K.A. Smith; R.H. Levine, *Influence of suction-assisted lipectomy on coagulation*, Aesthetic Plast Surg. 1992;16(4):299-302.

[18] *See*, for example, Norma H. Reddig, *Anabolic Steroids: The Price of Pumping Up!*, 37 Wayne L. Rev. 1647 (1991), at 1670.

[19] *House Legislative Analysis Section, Analysis of H.B. 4081* (July 3, 1990).

[20] 21 USC Sec. 822(a)(1) and (2) (1988).

[21] Anabolic Steroids Control Act of 1990: *Hearings on H.R. 4658 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 90 (May 17, 1990) (statement of Leslie Southwick, Deputy Assistant Att'y Gen., Civil Division, U.S. Dep't of Justice).

[22] Jeannine Aversa, *Govt. Announces Steroid Seizure*, Associated Press (AP), January 19, 2001.

[23] Tom Farrey, *Yesterday's Drug Makes Comeback*, part of the series *Crossing the Line: The Failed War on Steroids*, ESPN.com, December 20, 2000 [http://espn.go.com/gen/s/2000/1207/929174.html].

[24] Burge, *supra*, note 3, at 54-55, citing Mike Fish, *Steroids Riskier Than Ever, Drugs Easy to Buy South of the Border*, Atlanta J. & Const., Sept. 28, 1993, at D1.

[25] 21 C.F.R. 1306.04(a).

[26] For example, Walter F. Jekot, M.D., a popular California physician who helped pioneer steroids for AIDS patients, was sentenced in 1993 to five years in federal prison for dispensing steroids to athletes.

[27] Myhal and Lamb, *supra*, note 12.

[28] Jeffrey Black, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 Dick. L. Rev. 131 (1992), at 140 (citations omitted).

[29] *See*, Burge, *supra*, note 3. *See also*, M.G. Di Pasquale, *Editorial: Why Athletes Use Drugs*, Drugs in Sports (Vol. 1, Number 1, February 1992) at 2: "Contrary to what most people believe (the media's irresponsible sensationalism has resulted in the widely held mistaken view that the use by athletes of anabolic steroids and other performance-enhancing drugs is a problem on par with heroin and cocaine abuse), the use of drugs, such as anabolic steroids, by athletes is a problem, not because of the addictive and dangerous side-effects of these compounds, but because these drugs offer an unfair advantage to the athletes who use them."

[30] *Abuse of steroids in Amateur and Professional Athletics: Hearings Before the Subcomm. On Crime of the House Comm. On the Judiciary*, 101st Cong., 2d Sess. 92 (Mar. 22, 1990) (statement of Frank D. Uryasz, Director of Sports Sciences, National Collegiate Athletic Association).

Curriculum Vitae

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Federal Courts: Eastern District of New York (6/1987)
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Law Partner, concentrating on muscle-enhancing drug cases and nutritional supplement law. Consulted regarding 1000+ matters involving anabolic steroids or other bodybuilding/fitness drugs or chemicals

Assistant District Attorney for Nassau County District Attorney's Office;
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ARTICLES AUTHORED IN LEGAL OR SCIENTIFIC PUBLICATIONS:

"Steroids and Steroid Precursors in College Sports: The Response to the 'Pills in the Locker' by Sports Bodies and Congress," authored for conference materials of "Winning at All Costs – Today's Addiction: A Conference on Sports Law and Ethics," Chicago, IL, sponsored by Valparaiso Univ. School of Law (2/2005)

"'Adulterated' Androstenedione: What FDA's Action against Andro means for Industry," *Sports Nutrition Review Journal* (Volume 1[1], 2004), (co-authored with Alan Feldstein, Esq.)

"Drug Packages and the Fourth Amendment," *New York State Bar Association Criminal Justice Journal* (Winter 2002)

"Drugs and the Body Beautiful: A Guide to Defending Anabolic Steroid Cases," *The Champion* (flagship publication of the National Association of Criminal Defense Lawyers) (cover story, March 2002)

"Anabolic Steroid Legislation: The Wrong Prescription?" *New York State Bar Association Criminal Justice Journal* (Summer 2001) [Translated into Italian for publication in *Olympian's News* (Italian version of *Ironman* magazine), March/April 2003]

Nassau Lawyer, journal of the Nassau County Bar Association (numerous articles on criminal justice issues and anabolic steroid issues, 1999 to present)

ARTICLES AUTHORED IN LAY PUBLICATIONS:

[Commissioned to write the TIME magazine essay on Steroids and Sports, "Stepping Up to the Plate: The Problem of Steroid Use in Sports and What to Do About it", publication pending]

Monthly Columnist for *Muscular Development* magazine (over 40 articles published)

Foreword, *ANABOLICS 2005* (Body of Science, 2005)

Numerous articles concerning sports drugs, dietary supplements and chemicals in bodybuilding and health & fitness magazines such as *MuscleMag International*

INTERVIEWS:

Interviewed as an authority regarding anabolic steroids or other performance-enhancing substances on television (NBC New York News; The Ricki Lake Show), radio, and by the *Wall Street Journal*, ESPN.com, *The New York Times*,

The Washington Post, The Los Angeles Times, The Village Voice, The Salt Lake Tribune, The Shreveport Times, The Wall Street Journal, Reason, the *Long Island Press*, and many others. Also the subject of an attorney profile in the *New York Law Journal*, a 7-page profile in *MuscleMag* magazine (July 2003), a profile in an upcoming issue of the *California Lawyer*, and featured in countless strength and fitness print and online magazines.

....

OPINION CONSULTATIONS:

Consulted by scores of lawyers, physicians, pharmacists, dietary supplement marketers, institutions, and individuals regarding anabolic steroid legal issues. Prepared and submitted opinion letters in both civilian and military cases

....

PRESENTATIONS:

Speaker and Panelist on College Doping Issues, "Winning at All Costs – Today's Addiction: A Conference on Sports Law and Ethics," Chicago, IL, sponsored by Valparaiso Univ. School of Law (2/2005)

"Legal Issues and Implications of Testosterone and HGH Therapy," 12th Annual World Congress on Anti-Aging Medicine 2004, Las Vegas

"Comments on FDA's Pre-market Notification for New Dietary Ingredients," Public Meeting, Food and Drug Administration, Md. (11/2004) (co-authored with Alan Feldstein, Esq.)

"Insider's Update on the Regulatory Issues Surrounding Sports Supplements," International Society of Sports Nutrition 2004 Annual Conference, Las Vegas (6/2004)

"The Future of Sports Nutrition after Ephedra and the Steroid Scandal," The FitExpo, Pasadena, CA (2/2004)

"Supplement Jeopardy," Olympia Expo, Las Vegas (10/2003)

"Steroids: Twenty Questions," Olympia Expo, Las Vegas (10/2003)

"Defending the Body Beautiful (Muscle, Drugs and the Law)," Criminal Courts Bar Association of Nassau County, Mineola, NY (2/2002)

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Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 25, 2005

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2005 Sentencing Guidelines Amendment Cycle

Dear Judge Hinojosa

The Practitioners' Advisory Group ("PAG") submits the following comments with respect to proposed amendments regarding antitrust, identity theft and steroids offenses.[1]

COMMENTS REGARDING ANTITRUST AMENDMENTS

I. The Proposed Increase to the Base Offense Level

The proposed amendment provides two options for raising the existing Base Offense Level ("BOL") of 10 – either a two-level increase to a BOL of 12 or a four-level increase to a BOL of 14. A two-level increase translates to a 50% increase in punishment, while a four-level increase would result in a 100% increase – or doubling – of every sentence under this guideline.

The Commission has published a "synopsis" of this proposed amendment, which appears to be the only public material relating to this proposed amendment at this time. According to the synopsis, there are three reasons for an increase in the BOL:

1) to "recognize congressional concern that some of the offenses currently referenced to §2R1.1 do not receive punishment commensurate with their social impact;"

2) to "foster[] greater proportionality between §2R1.1 offenses and fraud offenses sentenced pursuant to §2B1.1" which "were made more severe due to various changes,

[1]The Co-Chairs wish to thank James E. Felman, a principal in Kynes, Markman & Felman P.A. of Tampa Florida, for the preparation of these comments.

notably an expansion of the number of additional offense levels at the 'loss table' found at §2B1.1(b)(1);" and

3) to incorporate the 1-level increase for "bid-rigging" cases because "Commission data indicate that a significant majority of the cases historically sentenced under §2R1.1 are 'bid-rigging' cases."

Each of these three justifications for an increase in the BOL is addressed in turn below.

A. Congressional Concern Regarding Some Offenses

The primary impetus for this proposed amendment is to respond to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which raised the statutory maximum term of imprisonment for antitrust offenses from three years to ten years. This Act also raised maximum fines from $10,000,000 to $100,000,000 for corporations and from $350,000 to $1,000,000 for individuals. From this Congressional action, the Commission correctly observes that Congress must have been concerned that "*some* of the offenses currently referenced to §2R1.1 do not receive punishment commensurate with their social impact." Presumably, Congress intended for the more serious antitrust offenses to be sentenced in excess of three years, and for the most serious offenses to receive up to ten years. The task before the Commission, therefore, is to determine *which* types of cases the Congress had in mind for increased punishment. This will not be easy, however, because Congress held no hearings before enacting this legislation, and there is nothing in the legislative history to the Act which lends any significant insight on this question.

The difficulty with the Commission's proposed response to the Act is that increasing the BOL by two or four levels would significantly increase the punishment for *every* antitrust offense – a result not indicated by Congress' decision to raise the statutory maximum penalty. Increasing the BOL by four levels, with the result of *doubling* every antitrust sentence, would seem to lack any direct connection with the Congressional enactment. The more appropriate way to reflect Congressional concern with the most serious antitrust offenses would perhaps be to add additional categories for offenses that affect volumes of commerce in excess of $100,000,000.

B. Proportionality With Fraud Offenses

A second justification offered in the Commission's synopsis is that an increase in the BOL is needed to foster greater proportionality between antitrust offenses and fraud offenses because the fraud guidelines were made more severe "due to various changes, notably an expansion of the number of additional offense levels at the 'loss table' at 2B1.1(b)(1)." While proportionality between this guideline and the fraud guideline is an important goal, the proposed two- or four-level increase in the antitrust BOL is not the appropriate means to achieve that proportionality precisely because of the nature of the changes to the fraud guideline cited in the Commission's synopsis. For statutes with a statutory maximum of less than twenty years, the BOL in the fraud guideline has never been increased. Indeed, even those fraud statutes which, unlike the antitrust statutes, have a statutory maximum of twenty years or more, the BOL was

only raised by one level in 2003. Increasing the BOL for antitrust offenses, which is already three or four levels higher than the BOL for fraud offenses, would actually result in *dis*proportionality between the fraud and antitrust guidelines. A person who commits a zero-loss fraud faces a range of 0-6 months. If the proposed four-level increase were enacted, a zero-loss antitrust defendant would receive a range of 15 to 21 months.

There may perhaps be a need for a higher BOL in antitrust cases as compared to fraud cases to reflect the serious nature of and the difficulty of detecting antitrust offenses.[2] The original Commission's guidelines provided for a BOL of 6 in fraud cases and an adjusted offense level of 8 in antitrust cases affecting less than $1,000,000 of commerce. Concerned that this did not adequately differentiate antitrust and fraud offenses, the Commission in 1991 increased the BOL in §2R1.1 from 9 to 10 while eliminating the one-level reduction in cases where the volume of commerce affected was less than $1,000,000. *See* Amd. 377. In connection with this 1991 amendment, the Commission explained that it had expressly considered the proper relationship between the fraud and antitrust base offense levels when setting the new antitrust BOL at 10. *See* Amd. 377 Reason for Amendment.

None of the recent changes to the fraud guidelines suggest that the 1991 Commission's weighing of the BOLs for fraud and antitrust was incorrect. The Commission's synopsis of the proposed amendment does not address the Commission's earlier assessment of this issue, much less demonstrate that the 1991 Commission's balance of the fraud and antitrust BOLs was so askew that it is necessary to *double* the base offense penalties for all antitrust offenses. PAG believes that an increase in the antitrust BOL would render that guideline less rather than more proportional to the fraud guideline.

As noted in the Commission's synopsis, one of the principal means by which the fraud guidelines were recently changed was through "expansion of the number of additional offense levels at the 'loss table' at 2B1.1(b)(1)." This suggests that the appropriate change to §2R1.1 to achieve proportionality with these changes in the fraud guideline would be to add additional levels to the volume of commerce table rather than increase the BOL. Such changes should continue to reflect the Commission's existing policy that "the offense levels for antitrust offenses based on the volume of commerce [should] increase less rapidly than the offense levels for fraud, in part, because, on average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved." *See* Amd. 377.

C. Incorporating the "Bid-rigging" Adjustment

The third justification in the Commission's synopsis for raising the antitrust BOL is to incorporate the one-level upward adjustment in the present guideline for "bid-rigging" cases.

[2] In light of the wide variety of fraud cases, this is actually a point on which reasonable minds may differ. Many outright thefts are more serious than selling legitimate goods and services at artificially inflated prices. This may explain why Congress has set the maximum penalty for offenses such as mail and wire fraud twice as high as the new ten year maximum for antitrust offenses.

Evidently, "Commission data indicate that a significant majority of the cases historically sentenced under §2R1.1 are 'bid-rigging' cases."

PAG does not have access to the data in question, but we understand that only a limited number of years' worth of cases were examined to reach this conclusion. It bears noting that the overall number of antitrust cases each year is rather small. Cases sentenced under 2R1.1 from 1995 to 2002 (the last year for which there is public data) are as follows:

1995:19
1996:15
1997:10
1998: 11
1999: 41
2000: 29
2001: 18
2002: 23

Total: 166

Moreover, it is our understanding that for the last few years, the majority of these cases have been brought in the Southern District of New York and represent an initiative in that jurisdiction to prosecute bid-rigging in specific industries within that district. We do not know what the data is regarding the cases outside that district or in earlier years. We similarly do not know whether the Southern District's initiative will continue, or whether we can indeed expect that most cases in the future will involve "bid-rigging."

Putting aside these questions about the data, however, the small number of cases involved and the relative clarity of the "bid-rigging" adjustment suggest that leaving the adjustment in place will not result in an undue burden on the courts. And, of course, there will certainly be at least some number of cases that do *not* involve "bid-rigging." If indeed these types of cases are less serious, there would seem to be no compelling reason not to recognize this fact. Incorporating the "bid-rigging" adjustment into the BOL will result in unwarranted disparity through treating unlike offenders in a like manner. Nevertheless, if the Commission decides to incorporate the "bid-rigging" adjustment into the BOL notwithstanding the above concerns, it should avoid unwarranted disparity by providing for a *one-level downward adjustment* for cases that do not involve "bid-rigging."

For the reasons set forth above, PAG does not believe that (1) the recent Congressional enactment, (2) the need for proportionality with the fraud guideline, or (3) the desire to incorporate the "bid-rigging" adjustment demonstrate the need to increase the BOL for antitrust offenses sentenced under §2R1.1. This does not mean, however, that changes to the volume of commerce table may not be warranted. That issue is addressed below.

II. The Proposed Changes to the Volume of Commerce Table

The Commission has not published a proposed amended volume of commerce table, and for this reason PAG cannot address this issue with detail. Some general observations about the issues published for comment are nevertheless possible.

First, there is a question for comment regarding whether there should be changes to the threshold values in the table. The Commission should carefully consider whether such changes are necessary to achieve proportionality with the fraud guidelines in light of the changes made in 2001 to the threshold values in the loss table. As noted above, any such changes should be made in a manner consistent with the Commission's previously expressed observation that "the offense levels for antitrust offenses based on the volume of commerce [should] increase less rapidly than the offense levels for fraud, in part, because, on average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved." *See* Amd. 377. PAG does not recommend such changes, however, in light of the data regarding antitrust sentencing patterns and the statutory purposes of punishment articulated in 18 U.S.C §3553(a), as discussed below.

Second, there is a question for comment regarding whether the number of levels in the volume of commerce table should be reduced. There are presently seven levels in that table, as compared to sixteen in the loss and tax tables (§2B1.1, §2T4.1), nine in the burglary table (§2B2.1), and eight in the robbery table (§2B3.1). PAG does not see a compelling need to change the number of levels in the volume of commerce table.

The third issue for comment is whether the volume of commerce table should be modified to include one or more additional categories for offenses that affect more than $100,000,000 of commerce. As noted above, PAG believes that such additional levels should be added to the volume of commerce table. This would appear to be the most precise manner in which to effectuate Congress's intention to increase the maximum penalties for the most serious antitrust offenders.

Although the Commission has not yet published a proposed volume of commerce table for public comment, PAG has been afforded an opportunity to review the table proposed to the Commission by the Department of Justice. Because the Department does not appear to have submitted any materials to explain or support its proposed table, only limited comments on this proposal are possible.

PAG does not support the Department's proposal to change the top end of the table from one-level to two-level increments of adjustment. If volume of commerce functions in a similar manner in antitrust cases as loss functions in offenses governed by Guideline section 2B1.1, it will often overstate culpability to the detriment of other relevant factors such as role in the offense. Over-reliance on quantitative factors to the exclusion of other considerations frequently results in persons whose culpability is similar facing widely dissimilar sentences based on factors often outside their control. PAG would not support exacerbating this problem by switching to two-level adjustment increments in the volume of commerce table.

In addition, the severity levels at the high end of the government's proposed table appear unwarranted. The combined impact of the government's proposed three-level increase in the BOL and its proposed eight-level increase in the top of the volume of commerce table is an eleven level increase for the most serious offenses. This represents a near *quadrupling* of sentence lengths. PAG is unaware of an instance in the Commission's history in which severity levels for an offense have ever been increased by an amount even close to eleven levels.

As noted above, PAG does support the addition of offense levels to the top of the volume of commerce table to reflect the recent Congressional enactment. On the other hand, the issues presented by the volume of commerce table are extraordinarily complex. The underlying offenses regulate conduct which is itself quite complex. The Commission has not published a proposed table for public comment. The period for comment on what has been published has been abbreviated. The government has offered neither data nor analysis to support its proposed table. In light of these circumstances, PAG recommends that any changes to the volume of commerce table be deferred to next year's amendment cycle to allow the study this issue requires.

III. Guideline Amendments in the Post-Booker Era and Consideration of the §3553(a) Factors

PAG believes it is of critical importance for the Commission to document and explain its amendment processes and procedures to the fullest extent possible in light of *United States v. Booker*, 125 S. Ct. 738 (2005). Justice Breyer's opinion for the remedial majority makes plain that "the Sentencing Commission remains in place, writing Guidelines, collecting information about *actual district court sentencing decisions*, undertaking *research*, and revising the Guidelines *accordingly*." *Booker*, 125 S. Ct. at 767 (emphasis added). It should be an important principle of the Sentencing Commission that revisions to the guidelines should be "according" to and premised on "research" and data about "actual district court sentencing decisions."

In recent testimony before the House Subcommittee on Crime, Terrorism, and Homeland Security, Chair Hinojosa explained the need for district courts to afford the guidelines substantial weight, in large measure because "the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision." The Commission's consideration of the § 3553(a) factors when drafting and amending the guidelines is also a critical aspect of the reasoning underlying judicial decisions to afford the guidelines substantial weight after *Booker*. *See, e.g.*, *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005).

PAG believes that it is of paramount importance for the Commission to demonstrate its consideration of the § 3553(a) factors in as explicit a fashion as possible throughout the amendment process. This consideration of the § 3553(a) factors should be tied to the Commission's data and research regarding actual district court sentencing decisions described above.

The Commission's synopsis of the reasons for the antitrust amendments, although not explicitly citing § 3553(a), notes the need for proportionality between the antitrust and fraud guidelines. This reflects consideration of "the need to avoid unwarranted sentence disparities among defendants ... who have been found guilty of similar conduct," § 3553(a)(6). Any amendment to the guidelines would benefit from additional materials reflecting the Commission's consideration of the remainder of the § 3553(a) factors. Courts will have greater confidence giving substantial weight to an amended antitrust guideline if it is clear that the Commission considered each of the § 3553(a) factors while drafting the amendment.

As for data, the Commission's synopsis of reasons notes that "a significant majority" of the cases involved "bid-rigging." Additional materials accompanying any amendment would benefit from discussion and analysis of the Commission's other data and research regarding antitrust sentencing decisions.

Consideration of the statutory purposes of sentencing and the data regarding actual sentences raises questions regarding both the relative weight to be accorded each factor and the manner in which data assists in answering these questions. We discuss below our thoughts regarding the relationship between various sentencing factors and particular data.

A. Translating Data Regarding "Actual District Court Sentencing Decisions" into Consideration of the § 3553(a) factors.

The Commission's demonstration and documentation of its consideration of the § 3553(a) factors through the presentation and analysis of data requires an appropriate mode of analysis and an evaluation of which data sets pertain to particular statutory purposes of sentencing. For example, a number of the § 3553(a) factors deal with considerations such as "the nature ... of the offense," the need for the sentence to reflect "the seriousness of the offense," "to provide just punishment," and "to provide adequate deterrence." §§ 3553(a)(1), (2)(A), (2)(B). These factors are somewhat similar in their focus and suggest consideration of similar sentencing data and research. PAG believes the data most pertinent to these factors are, among perhaps others:

The rate of departures from present sentencing ranges. A large percentage of upward departures (compared with the median for all offenses) would indicate that the existing ranges are inadequate to provide sufficient punishment to meet the statutory factors, and would thus support an increase in punishment levels. A large percentage of downward departures would indicate the opposite.

The location of sentences within guideline ranges. The location of sentences within the existing ranges (compared with the median for all offenses) would demonstrate the degree to which the ranges should be raised or lowered to best effectuate the statutory purposes of punishment. To support an increase in severity levels, the data should demonstrate that actual sentences are in the upper portions of the guidelines ranges to a greater degree than the median of all offense categories. Where the data demonstrates sentencing at the lower portions of the guideline ranges to a degree substantially in excess of the median for all offenses,

consideration should be given to decreases in severity levels.

Section 3553(a)(2)(C) focuses on recidivism and the need for the sentence imposed "to protect the public from further crimes of the defendant." The data most relevant to this factor might include:

The recidivism rates of those sentenced under the existing guideline. Ideally, the Commission would have and consider rates of recidivism by offense category. High rates of recidivism might indicate a need to increase severity levels while low rates of recidivism might indicate that penalties are correct or could be relaxed.

The criminal history of those sentenced under the guideline in question. As a proxy for the risk of future recidivism, the Commission may also wish to consider the criminal history of the class of offenders sentenced under a particular guideline. As the Commission's recent recidivism report recognized, offenders with less criminal history are significantly less likely to recidivate than are offenders with higher criminal history categories. *See* MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES (U.S. Sentencing Commission May 2004) ("MEASURING RECIDIVISM"). Where the data shows that offenders sentenced under a particular guideline have significantly more or less criminal history than other categories of offenders, this would suggest that increases in sentencing severity either are or are not necessary to "protect the public from future crimes of the defendant."

The age of those sentenced under the guideline in question. While age is categorized as "not ordinarily relevant" under Guideline section 5H1.1, PAG would note the direct statistical connection between advanced age and lower rates of recidivism. *See* MEASURING RECIDIVISM at 14 ("Among all offenders under age 21, the recidivism rate is 35.5 percent, while offenders over age 50 have a recidivism rate of 9.5 percent").

Sections 3553(a)(3) and (a)(7) direct the consideration of the "kinds of sentences available" and "the need to provide restitution to any victims of the offense." Translating these considerations into pertinent data may be inherently subjective, but one possible consideration under this factor might be:

The extent to which courts are utilizing alternatives to incarceration. Where courts find forms of punishment such as fines and/or restitution to be of assistance in crafting an appropriate sentence, this may have significance for the necessity for incarceration. That is, where the data show that courts are imposing fines and/or restitution to a degree substantially in excess of the median for all offenses, that may militate against increases in severity levels.

Section 3553(a)(2)(D) directs the sentencing court to consider the need for the sentence imposed to "provide the defendant with needed educational or vocational training" "in the most effective manner." The data most pertinent to this factor includes:

The levels of education of those sentenced under the guideline in question. Congress presumably included this sentencing factor in recognition that some offenses stem from the defendant's lack of educational or vocational training. If the defendant had better educational or vocational training, perhaps he or she would have less disposition to commit crime. In light of recent actions by BOP to curtail its educational and vocational programs, shorter rather than longer periods of incarceration may provide "the most effective manner" to provide defendants with "needed educational and vocational training." Moreover, Section 3582(a) counsels that "imprisonment is not an appropriate means of promoting correction and rehabilitation." In any event, this factor would benefit from additional data on the availability and effectiveness of our institutional training programs. Consideration of this factor may involve an analysis of the data regarding the level of educational or vocational training among offenders by category of offense.

The Commission may also choose to consider data that does not relate to the statutory purposes of sentencing. Such data might include trial/guilty plea rates, the extent of the government's ability to obtain cooperation, whether particular severity levels have unintended but unwarranted disparate impact, and other factors deemed particularly aggravating or mitigating.

B. An Examination of the Pertinent Antitrust Data.

The Commission's data is most readily available through its Annual Sourcebook on Federal Sentencing Statistics, posted on its Webcite at www.ussc.gov/annrpts.htm. This publication is currently available for the years 1995-2002. The data presented below is derived from these Annual Sourcebooks.

1. *The rate of upward departures from the antitrust guideline*

Year	Number of Cases	Number of Upward Departures
1995	19	0
1996	15	0
1997	10	0
1998	11	0
1999	41	0
2000	29	0
2001	18	0
2002	20	0
Total	166	0

The Commission's published data over this eight-year period reflect that a federal district court has *never* found the existing guidelines range insufficiently severe. The Commission's data by offense category reflects 31 different categories of offenses. Antitrust is one of only two of these 31 categories of offenses (national defense is the other) for which there has never been an upward departure.

2. *The location of sentences within guideline ranges*

Year	Number of Cases	Sentences Within Top Half of Range
1995	19	1
1996	15	0
1997	10	0
1998	11	1
1999	41	0
2000	29	0
2001	18	1
2002	23	0
Total	166	3

The Commission's published data reflect that of the 166 antitrust sentencings from 1995 to 2002, there have been only 3 cases – less than 2% – in which the district court determined that the appropriate sentence was within the top half of the range. Antitrust ranks *first* among all 31 offense categories in the rate at which sentencing courts have found the lower half of the guidelines to be the appropriate sentence.

3. *The recidivism rates of antitrust offenders*

PAG is not aware of publically available data reflecting rates of recidivism by antitrust offenders.

4. *The criminal history of antitrust offenders*

Year	Number of Cases	Offenders Above Category I
1995	19	0
1996	15	0
1997	10	1
1998	11	0
1999	41	1
2000	29	1
2001	18	1
2002	23	0
Total	166	4

During the five years from 1995 to 2002 there have only been 4 antitrust offenders who were not criminal history category I. Antitrust ranks *first* among all 31 offense categories in the percentage of offenders in criminal history category I.

5. *The extent to which courts are utilizing alternatives to incarceration.*

Antitrust offenders rank first among all offense categories in the rate at which they are fined and ordered to pay restitution. In 1995, 1996,1998, and 2002, the median antitrust fines were the highest of any offense category. In 2001, 2000, 1999, and 1997 only arson had a higher median fine. Antitrust offenders are typically fined and ordered to pay restitution with greater frequency than all other offense categories:

Year	% w/ Both Fine And Restitution	% w/o Fine Or Restitution
1995	5.6 (12th highest)	11.1 (lowest)
1996	20 (highest)	46.7 (13th lowest)
1997	0	9.1 (lowest)
1998	9.1 (3rd highest)	0 (lowest)
1999	9.1 (2d highest)	13.6 (lowest)
2000	25 (highest)	5 (lowest)
2001	22.2 (highest)	22.2 (3rd lowest)
2002	35.3 (highest)	11.8 (lowest)

6. *The levels of education of antitrust offenders*

Antitrust ranks first above all 31 other offense categories in education level of offenders.

Year	% College Graduates	Rank Among Offense Categories
1995	61.1	1
1996	53.3	1
1997	63.6	1
1998	30	5
1999	58.1	1
2000	70.3	1
2001	52.6	2
2002	41.2	1

7. *Trial rates*

In the eight years for which data is available, there have been only 14 antitrust offenders sentenced after a trial, and half of those cases were in 1999 alone. For the other seven years of data, there would be an average of only one antitrust trial per year.

Year	Number of Guilty Pleas	Number of Trials
1995	17	1
1996	15	0
1997	9	2
1998	10	1
1999	37	7
2000	39	1
2001	19	0
2002	15	2
Total:	161	14

8. *Frequency with which antitrust offenders provide substantial assistance to the government*

Antitrust offenders rank *first by far* among all 31 other offense categories in the rate at which the government is able to obtain substantial assistance. The following table reflects the annual percentage of cases in which the offender provided substantial assistance and the number of percentage points by which antitrust ranks first over the next highest category of offense.

Year	% of substantial assistance	% by which highest offense category
1995	47.1	10
1996	14.3	N/A
1997	54.5	19
1998	45.5	14
1999	13.6[3]	N/A
2000	47.4	13
2001	42.1	14
2002	56.3	27

9. *Age of antitrust offenders*

While the age of the offender may not be "ordinarily relevant," PAG believes the fact that antitrust defendants are by far the oldest of all federal offenders militates against an overall increase in severity levels.

[3]The "other" downward departure rate that year was 45.5%.

Year	Median Age of Antitrust Offenders	% of Defendants over Age 50
1995	54 (highest by 6 years)	66.7 (highest by 25 percentage pts)
1996	57 (highest by 13 years)	86.7 (highest by 45 percentage pts)
1997	52 (highest by 6 years)	72.7 (highest by 32 percentage pts)
1998	54.5 (highest by 5 years)	70 (highest by 25 percentage pts)
1999	42 (6th highest)	31.8
2000	50 (highest)	46.9
2001	52 (highest)	60
2002	51 (highest)	52.9

IV. Conclusion

In light of the data detailed above, PAG believes consideration of the § 3553(a) factors weighs heavily against any increase in overall severity levels for antitrust offenses. Indeed, an amendment increasing severity levels in the face of this data runs the risk of undermining the confidence district courts will have in giving such an amendment the substantial weight sought by the Commission for its guidelines.

COMMENTS REGARDING IDENTITY THEFT AMENDMENTS

With respect to the proposed amendments to the guidelines regarding Identity Theft, PAG adopts by reference the comments of the Federal Defenders in the correspondence from Jon Sands to Paula Desio dated March 9, 2005. PAG agrees that the proposed revision to Section 2B1.1(b)(10) is deserving of additional study. We similarly agree that the grouping and relevant conduct rules provide appropriate criteria for determining whether Section 1028A convictions should receive concurrent or consecutive sentences. As noted above in connection with our comments regarding the proposed amendments to the antitrust guideline, PAG also believes any amendments to the guideline governing identity theft offenses should be accompanied by detailed materials reflecting the Commission's explicit consideration of the statutory purposes of sentencing and pertinent data regarding actual district court sentencing decisions.

COMMENTS REGARDING ANABOLIC STEROIDS AMENDMENTS

With respect to the Commission's general request for comments on the proper penalties for Anabolic Steroids, PAG believes that the Commission should survey and collect additional data before deciding whether, how, or to what extent these guidelines might be changed. When the distinction between Anabolic Steroids and other Schedule III substances was originally established, the Commission noted that a different penalty structure was being used for Anabolic Steroids "[b]ecause of the variety of substances involved." *See* U.S.S.G. Amendment 369. That "variety" has likely only increased and become more complex since 1991, and PAG believes that additional study, which might help to distinguish among the various types of substances now labeled as Anabolic Steroids, may be appropriate before the Commission acts.

In enacting Pub. L. 108-358, Congress did not send this issue to the Commission with an express statement of urgency. Although the Commission is to consider the possibility of increasing these guidelines, the legislative history also reflects a goal of making sure that the numbers ultimately chosen come out right. *See, e.g.*, H. Rep. 108-461 (Part 1) April 2, 2004, at 31 (noting how issue is sent "to the Sentencing Commission to make sure that the actual imposed penalties are *appropriately proportional*") (emphasis added); *id.* at 32 ("it is sent to the Sentencing Commission to review and *make appropriate findings.*") (emphasis added).

PAG does not know if the Commission currently has before it data that would allow for the consideration of statutory purposes we believe the Commission should engage in post-*Booker*, as noted above. To the extent that data or specific proposals are submitted to the Commission by the Department of Justice or others, however, PAG requests access to this information, so that it may evaluate those proposals and provide more effective commentary to the Commission. For example, the legislative history notes how Anabolic Steroids are often used to prevent "body wasting in patients with AIDS and other diseases that result in the loss of lean muscle mass." *Id.* at 4. The Commission may decide that such circumstances represent a mitigating factor that could support either a guideline adjustment or, in an appropriate case, authorization to depart.

As always, PAG appreciates this opportunity to assist the Commission's deliberations on these important issues. If any additional information on these comments would be of assistance, please do not hesitate to contact either of us or Mr. Felman.

Sincerely,

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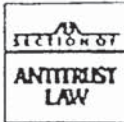

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March 24, 2005

Via Express Mail

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Comments on the Proposed Amendments to the United States Sentencing Guidelines for Antitrust Sentencing

Dear Sir or Madam:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the United States Sentencing Commission on the important issues raised in the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing.

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,

Rich Wallis

Richard J. Wallis
Chair, Section of Antitrust Law

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

The Section of Antitrust Law of the American Bar Association appreciates the opportunity to present its views to the United States Sentencing Commission on the important issues raised in the proposed amendments to the United States Sentencing Guidelines for antitrust sentencing.[1] The views expressed in these comments are those of the Section of Antitrust Law, and they have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

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

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

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

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

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

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

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

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

5 125 S. Ct. 738 (2005).

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

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

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

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

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

[7] For a concise review of the development of criminal antitrust enforcement see Roxane C. Busey and Patrick J. Kelleher, A Short History of Civil and Criminal Antitrust Remedies and Penalties, 2002 Section of Antitrust Law Spring Meeting. In April 2003, the Section held a two-day Remedies Forum where many experts in the field provided papers and testimony regarding antitrust remedies issues, including criminal penalties and the impact of civil damage actions on antitrust deterrence. The materials from the Forum are available on the Section of Antitrust Law's website at www.abanet.org/antitrust/remedies.

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

effective penalties for the cartel offenses and believes that the way to make these penalties most effective is to consider them not in a vacuum, but as part of the overall antitrust enforcement process where detection and prosecution are maximized and penalties are tailored to meet the societal goals of sentencing. Through a deliberative process that will elucidate and ground the data and mechanics of the recommendations with regard to antitrust sentencing, the Commission can provide the meaningful and appropriate tools needed by judges to impose reasonable sentences that meet the goals established by Congress.

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

The commentary and very structure of the Antitrust Sentencing Guidelines clearly relate only to hard-core price fixing, bid rigging, and allocation schemes. Yet, on the face of the Sherman Act, any violations of Sections 1, 2 and 3 may trigger criminal penalties. Sections 1 and 3 prohibit a broad range of unreasonable restraints of trade, while Section 2 prohibits monopolization, attempts to monopolize, or conspiracies to monopolize. The criminal penalties provisions of the Sherman Act do not differentiate among the various types of anticompetitive conduct that could violate the Act.[9] The facial breadth of criminal antitrust laws has been noted in the caselaw. The United States Supreme Court has acknowledged that the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits. . . ."[10]. Even the means of determining whether a restraint of trade is

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

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

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

For generations, the Antitrust Division has been judicious in limiting criminal enforcement to hard-core, clandestine conduct such as price fixing, bid rigging and customer, territorial or market share allocation schemes.[11] But this judgment is the product of prosecutorial discretion, not the dictates of statute.

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

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

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

[11] Indeed, the current Assistant Attorney General for the Antitrust Division has stated clearly and unequivocally that the type of conduct that will be prosecuted criminally "is hard-core cartel activity that each and every executive knows is wrongful. These cases we criminally prosecute at the Division are not ambiguous. They involve . . . clear knowledge on the part of the perpetrators of the wrongful nature of their behavior." Assistant Attorney General R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals (August 12, 2003) (available at http://www.usdog.gov/atr/public/speeches/201241.htm). It has been many years since a

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

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

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

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

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

13 Pub. L. 108-237.

14 125 S. Ct. 738 (2005).

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

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

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

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

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

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

The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of the subsection. The court, in determining the particular sentence to be imposed, shall consider--

1. the nature and circumstances of the offense and the history and characteristics of the defendant;

2. the need for the sentence imposed--

    a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

    b. to afford adequate deterrence to criminal conduct;

    c. to protect the public from further crimes of the defendant; and

    d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

3. the kinds of sentences available;

4. the kinds of sentence and the sentencing range established for...

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

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

Standard 18-2.1 Multiple purposes; consequential and retributive approaches

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

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

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

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

Standard 18-2.4 Severity Of Sentences Generally

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

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

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

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[19] USSG § 2R1.1 comment (n.8).

[127]

Deterrence is difficult to quantify or analyze,[20] but any analysis must include two factors: whether the severity of the punishment is likely to be perceived as outweighing the rewards of the conduct, and whether the severity of the punishment in some manner reduces the likelihood of detection. Based on its comprehensive study of remedy issues and based on the record generated by the Section of Antitrust Law's Remedies Forum in April 2003, the Section believes that the Sentencing Commission should address these difficult issues only after in-depth review in hearings and public discussion.

The Section recognizes that many antitrust enforcement officials argue that the amount of the criminal fine or civil damages is a far less potent deterrent than prison sentences for corporate executives, foreign and domestic.[21] Whenever questions of punishment and deterrence are raised, however, it becomes necessary to strike a balance of very complex concepts. When the incentives and rewards of competition versus collusion are put in this framework, the issues

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[20] Deterrence in white collar/corporate crime has been the subject of a number of scholarly articles, but there is little agreement on the impact of severe monetary penalties in deterring illegal conduct. The articles do not provide any consensus regarding adequate deterrence in the criminal antitrust environment. *See, e.g.*, Mark Cohen and David Scheffman, "The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?", 27 Am. Crim. L. Rev. 331, 1989; John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment,* 79 Mich. L. Rev. 386 (1981) (discussing many of the complex factors to be considered in evaluating the effectiveness of corporate fines and punishment generally); Richard A. Posner, *Optimal Sentences for White-Collar Criminals,* 17 Am. Crim. L. Rev. 409 (1980) (advocating fines over imprisonment as punishment of white collar crime); *see also* Gary Becker, *Crime and Punishment,* 76 J. Pol. Econ. 169 (1968). As noted by one commentator, however, measuring antitrust deterrence can be very difficult. *See* Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions,* 39 Ariz. L. Rev. 413 (1997), and Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 Law and Contemporary Problems 127 (1997). There are no known empirical studies on the adequacy of the present mix of criminal and civil antitrust sanctions from the standpoint of deterrence. One study, Joseph C. Gallo, Kenneth G. Dau-Schmidt, Joseph L. Craycraft & Charles J. Parker, *Criminal Penalties Under the Sherman Act: A Study in Law and Economics,* 16 Res. L. & Econ. 25 (1994), is based on data from time periods when substantially lower statutory fines were in effect and when prison sentences were much less likely to be imposed. Today, with the array of civil actions that follow substantial criminal antitrust fines, the analysis of deterrence factors should be far more complex.

[21] *See, e.g.,* Assistant Attorney General R. Hewitt Pate, Anti-Cartel Enforcement: The Core Antitrust Mission (May 16, 2003) (available at http://www.usdoj.gov/atr/public/speeches/201199.htm).

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become even more complex and difficult. Because both deterrence and the impact of higher sentences on enforcement are difficult, if not impossible, to quantify, the Commission should seek the views of those most experienced in this area, both prosecutors and defense counsel. Will higher prison sentences cause corporate executives to think twice about entering into a cartel in the first place? If the corporate executive is investigated, will higher prison sentences make it more likely that the executive would cooperate, fearing a much higher sentence, or would the executive decide that the best alternative is to force the Antitrust Division to its proof? If the Division is unsuccessful in either developing cases or winning prosecutions because of less cooperation, does that undermine the deterrent effect of very high maximum prison sentences? It is for these reasons that the decision on increases in these penalties needs careful and thoughtful consideration and should be subjected to rigorous empirical and theoretical analysis through hearings or public briefings. The Section's Remedies Forum in April 2003 heard strong evidence that there is no easy or simple solution to this question.[22]

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

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

> the federal government to ensure that sentencing systems provide appropriate punishment without over reliance on incarceration as a criminal sanction, based on the following principles:
>
> (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.

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

(2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.[23]

The proposed revisions to the Sentencing Guidelines for antitrust violations do not explain how they take these concerns adequately into account. In the Section's view, the primary benefit of jail sentences for antitrust offenders is deterrence. There is no evidence that recidivism exists at all among antitrust offenders. Indeed, the members of the drafting committee for these comments could not identify a single instance in which an individual offender had been convicted of a second, later violation of the antitrust laws – and certainly, if there were one or two such situations, that would be a very small number in the 115 year history of the Sherman Act.

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

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

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

The Commission's proposal is particularly troubling because the sentences imposed by courts in antitrust cases over the last few years do not appear to be unduly limited by the current offense level. There is no objective data, for example, to support the conclusion that courts believed the current level is too low.[24] Based on the collective experience of the Section of Antitrust Law's leadership, all sentences for antitrust violations of Section 1 of the Sherman Act[25] have been less than two years where the statutory maximum was three years. Thus, even as the average term of an antitrust sentence has risen, it would seem that courts concluded the current sentencing range was "sufficient." An increase would not be justified, and would exceed that which is "necessary."

D. Potential Unintended Adverse Impact on Successful Antitrust Enforcement

The Commission should look at the practical impact higher sentences will have on potential cooperation that is uniquely important to effective prosecution of antitrust conspiracies. Next to the Antitrust Division's Leniency Program, which offers complete amnesty to the corporation and its cooperating employees, cooperation from executives willing to plead guilty in exchange for much reduced sentences is the chief source of evidence by which the Division builds its cases. In these cases where the principal element is proving an agreement among competitors, it is exceedingly difficult to establish a case

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

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

based on one witness' or one company's testimony, so the success of a contested case often depends on negotiated settlement with individuals from a number of defendants.

Based on that experience, and assuming a four level adjustment to the Guideline addressing antitrust offenses, there would be a significant increase in the periods of incarceration imposed in virtually all antitrust cases. The effect would be most evident with sentences imposed through a negotiated plea agreement, which is how the Antitrust Division obtains much of its cooperation. The Division has often negotiated an agreed-upon sentence at offense levels from Level 13 to Level 15. Level 13 requires the imposition of a sentence between 12 and 18 months, while a Level 14 is between 15 and 21 months, and Level 15, between 18 and 24 months.

If the four level increase were used, the comparable sentence would be at levels 17 through 19. This would result in a substantial increase in the period of incarceration that would have to be accepted by a defendant to negotiate a resolution. A Level 17 at 24 to 30, a Level 18 at 27 to 33 months, and a Level 19 at 30 to 37 months. In a typical case, raising the base offense level would approximately double the bottom of the sentencing range at the lowest level – a huge increase with little negotiating room for a lower sentence.[26] While the Antitrust Division can influence sentences for cooperating witnesses through downward departures under USSG § 5K1.1, the new higher sentences would always be the beginning point of sentencing calculations, and departures would have to be much larger to bring sentences down to a level many cooperating witnesses would accept – something many judges are reluctant to consider. Such a result will have practical consequences in affecting the willingness of defendants to negotiate plea agreements rather than put the Division to its

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

proof at trial. While no one can predict the magnitude of its impact, such sentences will tend to make cooperation less likely.

Given this circumstance, the Commission should consider the effect of higher sentences on deterrence and on the Antitrust Division's enforcement program. Because proof of an antitrust offense requires proof of a conspiracy, it presents unique prosecutorial challenges. Frequently, alternative explanations for pricing discussions or other market conduct are raised as a defense in antitrust prosecutions. Likewise, defendants in these prosecutions frequently will seek to convince a jury that competitor communications had no impact on price. Accordingly, successful antitrust prosecutions nearly always depend upon gaining the cooperation of several direct participants in the conspiracy as witnesses through plea or leniency arrangements. The Section submits that whether a significant increase in the base incarceration period could chill the willingness of individuals to negotiate plea agreements to help build the Division's cases for trial is a crucial question the Commission needs to confront. This concern is particularly true in cases involving the prosecution of international cartels, where key witnesses will frequently balance the benefit of accepting a limited prison term to regain the ability to travel in the United States with the fact that absent cooperation they are unlikely to be extradited and face prosecution in the United States. If cooperation is deterred, the Division would not only be deprived of the cooperation instrumental in helping to prove the conspiracy under investigation and to initiate investigations of other markets, but also would be required to expend substantial additional prosecutorial resources to prepare and try cases that otherwise would have been resolved by agreement.

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

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

In an era of international cooperation in fighting cartels, the Antitrust Division has benefited substantially from the cooperation of others in the world competition community. It took many years for the international community to accept enforcement of cartel cases and to begin cooperation with the United States in that effort. Although most nations now subscribe to the enforcement agenda, this alliance is still precarious principally because of the criminal enforcement – and incarceration – that the United States advances.[27] Given past circumstances, there may be substantial concern by some foreign jurisdictions that the

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

enforcement of antitrust laws in the United States is too severe – and especially unfair to foreign corporations and nationals. In particular, many foreign jurisdictions may be concerned by the combination of severe and escalating criminal penalties and civil actions for multiple damages.

The Commission should analyze the possibility that an increase in Sherman Act prison sentences at the lower offense levels would cause other governments to reconsider or limit the cooperation that has been forthcoming in anti-cartel investigations. It is likely that some jurisdictions would react adversely to higher penalties, especially when those penalties implicate their nationals. If a foreign jurisdiction is unhappy because of the level of U.S. penalties, that could affect cooperation efforts in the United States and in other jurisdictions. If this were to occur, the Division's very successful program to detect and prosecute international cartel activity could be compromised, affecting the detection and prosecution of cases.[28] Accordingly, the likely trade-offs stemming from more severe sentences could limit the amount of cooperation in many cases – non-U.S. executives would simply "stay home" and not travel to the United States or its extradition partners – and create conflicts with the Antitrust Division's international allies in anti-cartel prosecutions. This is a delicate question that requires careful analysis through hearings or public briefings to determine if such

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[28] Prior to the mid-1990s, the Antitrust Division had great difficulty securing the cooperation of the non-U.S. executives in its cartel investigations. Indeed, the Division's loss in *United States v. General Electric Co.*, the famous "diamonds" case, was at least in part the result of not obtaining cooperation from non-U.S. executives. After the *ADM* case, the Antitrust Division began to obtain cooperation first by making no-prison deals and later by short incarceration deals (three to four months), along with securing immigration status for non-U.S. executives. These developments increased the incentives of the non-U.S. executives to cooperate fully in a situation where the executive could continue his international business career after he had cooperated with the Antitrust Division and served his sentence. However, the difference between serving three months in a U.S. prison and a far longer sentence in the U.S. penal system is substantial, and the latter may be an offer many international executives would reject.

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

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

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

The proposed amendments include striking subdivision (1) of USSG § 2R1.1, which currently provides for a one level increase to the applicable offense level, if the conduct involved participation in an agreement to submit noncompetitive bids. The Commentary regarding the proposed amendments indicates that because "Commission data" reflects that a significant

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

majority of the cases sentenced under § 2R1.1 are "bid-rigging" cases, what was previously considered aggravating behavior would now be incorporated into the base offense level. The Section opposes this approach.[30]

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

Furthermore, in more detail below, the use of presumptions in sentencing contravenes the spirit of recent Supreme Court case law. This is true not only with regard to sentencing issues generally, but also with regard to many important issues of antitrust law. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."[31]

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

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

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

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

The existing statutory structure for the sentencing of organizations in antitrust cases involves the calculation of fine ranges pursuant to the Guidelines that are capped by the Sherman Act maximum (now $100 million) or the "twice-the-gain/loss" provision of 18 U.S.C. § 3571(d), whichever is higher. Under the Guidelines, determining the fine to be imposed against an organization in an antitrust case begins with a calculation of the "base fine," which almost always will be computed pursuant to the volume of commerce provisions of USSG § 2R1.1. For most federal crimes, the base fine is the greatest of the gain or loss resulting from the offense or an amount from a fine table corresponding to specific characteristics of the offense. However, for antitrust offenses, the Guidelines simplify the process by establishing a proxy for the economic impact of the conduct – twenty percent of the volume of commerce attributable to the defendant that was affected by the violation.

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

[33] It appears implicit in the design of the Guidelines that the upward adjustments for individuals from use of the volume of commerce tables contained in USSG § 2R1.1(b)(2)(b) are likely affected by the same presumptions as those explicitly noted with regard to the use of volumes of commerce for organizational sentencing discussed herein.

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

> It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the Guideline fine range.

USSG § 2R1.1 comment (n.3).

The Guidelines thus impose a conclusive presumption concerning the overcharge. There is no publicly available data or consensus to support that presumption. The presumption that all antitrust conspiracies result in the same level of harm is inequitable and disproportionate – in both directions.[34] It is ironic that the Sentencing Commission allowed this conclusive presumption because of the difficulty in calculating the actual gain or loss in an antitrust case, while the Antitrust Division has been effectively calculating alternative maximum fines under 18

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

U.S.C. § 3571(d) since its sentencing calculation in *United States v. Archer Daniels Midland Co.* in 1996.[35]

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

While the Supreme Court found that the constitutionality of the Sentencing Guidelines as a whole could be preserved by making them advisory rather than mandatory, serious questions exist on whether making the presumption that the base fine should be twenty percent of the affected volume of commerce in application is in any way advisory, particularly if it results in a recommended fine in excess of the $100 million Sherman Act maximum. On its face, the twenty percent is not being applied simply to give the sentencing court guidance about the exercise of discretion in determining the right range of sentence, but rather as the basis for imposing a

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

[36] 125 S. Ct. 738 (2005).

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

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

sentence, one that may exceed the statutory maximum under the Sherman Act. Even if described as advisory, this twenty percent presumption invites judges to increase an antitrust defendant's fine based upon a presumed loss, rather than based upon an actual finding by the jury. Moreover, such a presumption also contravenes the goal of uniformity based on severity of the real conduct.

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

VI. CONCLUSION

As these comments suggest, the Section of Antitrust Law believes that the proposed amendments and suggested areas of potential amendments involve central issues of antitrust enforcement in the United States and their impact around the world. The proposals are timely and important, and because of their importance should be the subject of extensive hearings to determine the magnitude of increased penalties and their impact on the enforcement policies of the Antitrust Division and to expose transparently the process for arriving at reasonable and appropriate sentences. The Section strongly believes that the way to make these penalties for serious violations of the law most effective is to consider them not in a vacuum, but as part of the overall antitrust enforcement process where deterrence, detection and prosecution are maximized and penalties are factually grounded and tailored to be sufficient but no greater than necessary to meet the societal goals of sentencing.

The Section urges the Commission to hold hearings on the important issues raised by these comments and to obtain the views of the Antitrust Division and others interested in these issues whose experience can inform Commission's consideration of proposed antitrust amendments.

Respectfully submitted,

Section Of Antitrust Law
American Bar Association

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S 167 RFH

109th CONGRESS

1st Session

S. 167

IN THE HOUSE OF REPRESENTATIVES

February 2, 2005

Referred to the Committee on the Judiciary, and in addition to the Committee on House Administration, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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AN ACT

To provide for the protection of intellectual property rights, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Family Entertainment and Copyright Act of 2005'.

TITLE I--ARTISTS' RIGHTS AND THEFT PREVENTION

SEC. 101. SHORT TITLE.

This title may be cited as the `Artists' Rights and Theft Prevention Act of 2005' or the `ART Act'.

SEC. 102. CRIMINAL PENALTIES FOR UNAUTHORIZED

RECORDING OF MOTION PICTURES IN A MOTION PICTURE EXHIBITION FACILITY.

(a) In General- Chapter 113 of title 18, United States Code, is amended by adding after section 2319A the following new section:

`Sec. 2319B. Unauthorized recording of Motion pictures in a Motion picture exhibition facility

`(a) Offense- Any person who, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof, from a performance of such work in a motion picture exhibition facility, shall--

`(1) be imprisoned for not more than 3 years, fined under this title, or both; or

`(2) if the offense is a second or subsequent offense, be imprisoned for no more than 6 years, fined under this title, or both.

The possession by a person of an audiovisual recording device in a motion picture exhibition facility may be considered as evidence in any proceeding to determine whether that person committed an offense under this subsection, but shall not, by itself, be sufficient to support a conviction of that person for such offense.

`(b) Forfeiture and Destruction- When a person is convicted of a violation of subsection (a), the court in its judgment of conviction shall, in addition to any penalty provided, order the forfeiture and destruction or other disposition of all unauthorized copies of motion pictures or other audiovisual works protected under title 17, or parts thereof, and any audiovisual recording devices or other equipment used in connection with the offense.

`(c) Authorized Activities- This section does not prevent any lawfully authorized investigative, protective, or intelligence activity by an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or by a person acting under a contract with the United States, a State, or a political subdivision of a State.

`(d) Immunity for Theaters- With reasonable cause, the owner or lessee of a motion picture exhibition facility where a motion picture or other audiovisual work is being exhibited, the authorized agent or employee of such owner or lessee, the licensor of the motion picture or other audiovisual work being exhibited, or the agent or employee of such licensor--

`(1) may detain, in a reasonable manner and for a reasonable time, any person suspected of a violation of this section with respect to that motion picture or audiovisual work for the purpose of questioning or summoning a law enforcement officer; and

`(2) shall not be held liable in any civil or criminal action arising out of a detention under paragraph (1).

`(e) Victim Impact Statement-

`(1) IN GENERAL- During the preparation of the presentence report under rule 32(c) of the Federal Rules of Criminal Procedure, victims of an offense under this section shall be permitted to submit to the probation officer a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

`(2) CONTENTS- A victim impact statement submitted under this subsection shall include--

`(A) producers and sellers of legitimate works affected by conduct involved in the offense;

`(B) holders of intellectual property rights in the works described in subparagraph (A); and

`(C) the legal representatives of such producers, sellers, and holders.

`(f) State Law Not Preempted- Nothing in this section may be construed to annul or limit any rights or remedies under the laws of any State.

`(g) Definitions- In this section, the following definitions shall apply:

`(1) TITLE 17 DEFINITIONS- The terms `audiovisual work', `copy', `copyright owner', `motion picture', `motion picture exhibition facility', and `transmit' have, respectively, the meanings given those terms in section 101 of title 17.

`(2) AUDIOVISUAL RECORDING DEVICE- The term `audiovisual recording device' means a digital or analog photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a copyrighted motion picture or other audiovisual work, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.'.

(b) Clerical Amendment- The table of sections at the beginning of chapter 113 of title 18, United States Code, is amended by inserting after the item relating to section 2319A the following:

`2319B. Unauthorized recording of motion pictures in a motion picture exhibition facility.'.

(c) Definition- Section 101 of title 17, United States Code, is amended by inserting after the definition of `Motion pictures' the following: `The term `motion picture exhibition facility' means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.'.

SEC. 103. CRIMINAL INFRINGEMENT OF A WORK BEING PREPARED FOR COMMERCIAL DISTRIBUTION.

(a) Prohibited Acts- Section 506(a) of title 17, United States Code, is amended to read as follows:

`(a) Criminal Infringement-

`(1) IN GENERAL- Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed--

`(A) for purposes of commercial advantage or private financial

gain;

`(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or

`(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

`(2) EVIDENCE- For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

`(3) DEFINITION- In this subsection, the term `work being prepared for commercial distribution' means--

`(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution--

`(i) the copyright owner has a reasonable expectation of commercial distribution; and

`(ii) the copies or phonorecords of the work have not been commercially distributed; or

`(B) a motion picture, if, at the time of unauthorized distribution, the motion picture--

`(i) has been made available for viewing in a motion picture exhibition facility; and

`(ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.'.

(b) Criminal Penalties- Section 2319 of title 18, United States Code, is amended--

(1) in subsection (a)--

(A) by striking `Whoever' and inserting `Any person who'; and

(B) by striking `and (c) of this section' and inserting `, (c), and (d)';

(2) in subsection (b), by striking `section 506(a)(1)' and inserting `section 506(a)(1)(A)';

(3) in subsection (c), by striking `section 506(a)(2) of title 17, United States Code' and inserting `section 506(a)(1)(B) of title 17';

(4) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively;

(5) by adding after subsection (c) the following:

`(d) Any person who commits an offense under section 506(a)(1)(C) of title 17--

`(1) shall be imprisoned not more than 3 years, fined under this title, or both;

`(2) shall be imprisoned not more than 5 years, fined under this title, or both, if the offense was committed for purposes of commercial advantage or private financial gain;

`(3) shall be imprisoned not more than 6 years, fined under this title, or both, if the offense is a second or subsequent offense; and

`(4) shall be imprisoned not more than 10 years, fined under this title, or both, if the offense is a second or subsequent offense under paragraph (2).'; and

(6) in subsection (f), as redesignated--

(A) in paragraph (1), by striking `and' at the end;

(B) in paragraph (2), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

`(3) the term `financial gain' has the meaning given the term in section 101 of title 17; and

`(4) the term `work being prepared for commercial distribution' has the meaning given the term in section 506(a) of title 17.'.

SEC. 104. CIVIL REMEDIES FOR INFRINGEMENT OF A WORK BEING PREPARED FOR COMMERCIAL DISTRIBUTION.

(a) Preregistration- Section 408 of title 17, United States Code, is amended by adding at the end the following:

`(f) Preregistration of Works Being Prepared for Commercial Distribution-

`(1) RULEMAKING- Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

`(2) CLASS OF WORKS- The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

`(3) APPLICATION FOR REGISTRATION- Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office--

`(A) an application for registration of the work;

`(B) a deposit; and

`(C) the applicable fee.

`(4) EFFECT OF UNTIMELY APPLICATION- An action under this

chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of--

`(A) 3 months after the first publication of the work; or

`(B) 1 month after the copyright owner has learned of the infringement.'.

(b) Infringement Actions- Section 411(a) of title 17, United States Code, is amended by inserting `preregistration or' after `shall be instituted until'.

(c) Exclusion- Section 412 of title 17, United States Code, is amended by inserting after `section 106A(a)' the following: `, an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement,'.

SEC. 105. FEDERAL SENTENCING GUIDELINES.

(a) Review and Amendment- Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including any offense under--

(1) section 506, 1201, or 1202 of title 17, United States Code; or

(2) section 2318, 2319, 2319A, 2319B, or 2320 of title 18, United States Code.

(b) Authorization- The United States Sentencing Commission may amend the Federal sentencing guidelines in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note) as though the authority under that section had not expired.

(c) Responsibilities of United States Sentencing Commission- In carrying out this section, the United States Sentencing Commission shall--

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements described in subsection (a) are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses described in subsection (a), if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of `uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.

TITLE II--EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO AND VIDEO CONTENT IN MOTION PICTURES

SEC. 201. SHORT TITLE.

This title may be cited as the `Family Movie Act of 2005'.

SEC. 202. EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO AND VIDEO CONTENT IN MOTION PICTURES.

(a) In General- Section 110 of title 17, United States Code, is amended--

(1) in paragraph (9), by striking `and' after the semicolon at the end;

(2) in paragraph (10), by striking the period at the end and inserting `; and';

(3) by inserting after paragraph (10) the following:

`(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.'; and

(4) by adding at the end the following:

`For purposes of paragraph (11), the term `making imperceptible' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

`Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.'.

(b) Exemption From Trademark Infringement- Section 32 of the Trademark Act of 1946 (15 U.S.C. 1114) is amended by adding at the end the following:

`(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act. This subparagraph does not preclude liability, nor shall it be construed to restrict the defenses or limitations on rights granted under this Act, of a person for conduct not described in paragraph (11) of section 110 of title 17, United States Code, even if that person also engages in conduct described in paragraph (11) of section 110 of such title.

`(B) A manufacturer, licensee, or licensor of technology that enables the

making of limited portions of audio or video content of a motion picture imperceptible as described in subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this Act, if such manufacturer, licensee, or licensor ensures that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. The limitations on liability in subparagraph (A) and this subparagraph shall not apply to a manufacturer, licensee, or licensor of technology that fails to comply with this paragraph.

`(C) The requirement under subparagraph (B) to provide notice shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2005.

`(D) Any failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption under subparagraphs (A) and (B) shall not be construed to create an inference that any such party that engages in conduct described in paragraph (11) of section 110 of title 17, United States Code, is liable for trademark infringement by reason of such conduct.'.

(c) Definition- In this section, the term `Trademark Act of 1946' means the Act entitled `An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes', approved July 5, 1946 (15 U.S.C. 1051 et seq.).

TITLE III--NATIONAL FILM PRESERVATION

Subtitle A--Reauthorization of the National Film Preservation Board

SEC. 301. SHORT TITLE.

This subtitle may be cited as the `National Film Preservation Act of 2005'.

SEC. 302. REAUTHORIZATION AND AMENDMENT.

(a) Duties of the Librarian of Congress- Section 103 of the National Film Preservation Act of 1996 (2 U.S.C. 179m) is amended--

(1) in subsection (b)--

(A) by striking `film copy' each place that term appears and inserting `film or other approved copy';

(B) by striking `film copies' each place that term appears and inserting `film or other approved copies'; and

(C) in the third sentence, by striking `copyrighted' and inserting `copyrighted, mass distributed, broadcast, or published'; and

(2) by adding at the end the following:

`(c) Coordination of Program With Other Collection, Preservation, and Accessibility Activities- In carrying out the comprehensive national film preservation program for motion pictures established under the National Film Preservation Act of 1992, the Librarian, in consultation with the Board established pursuant to section 104, shall--

`(1) carry out activities to make films included in the National Film registry more broadly accessible for research and educational purposes, and to generate public awareness and support of the Registry and the comprehensive national film preservation program;

`(2) review the comprehensive national film preservation plan, and amend it to the extent necessary to ensure that it addresses technological advances in the preservation and storage of, and access to film collections in multiple formats; and

`(3) wherever possible, undertake expanded initiatives to ensure the preservation of the moving image heritage of the United States, including film, videotape, television, and born digital moving image formats, by supporting the work of the National Audio-Visual Conservation Center of the Library of Congress, and other appropriate nonprofit archival and preservation organizations.'.

(b) National Film Preservation Board- Section 104 of the National Film Preservation Act of 1996 (2 U.S.C. 179n) is amended--

(1) in subsection (a)(1) by striking `20' and inserting `22';

(2) in subsection (a) (2) by striking `three' and inserting `5';

(3) in subsection (d) by striking `11' and inserting `12'; and

(4) by striking subsection (e) and inserting the following:

`(e) Reimbursement of Expenses- Members of the Board shall serve without pay, but may receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.'.

(c) National Film Registry- Section 106 of the National Film Preservation Act of 1996 (2 U.S.C. 179p) is amended by adding at the end the following:

`(e) National Audio-Visual Conservation Center- The Librarian shall utilize the National Audio-Visual Conservation Center of the Library of Congress at Culpeper, Virginia, to ensure that preserved films included in the National Film Registry are stored in a proper manner, and disseminated to researchers, scholars, and the public as may be appropriate in accordance with--

`(1) title 17, United States Code; and

`(2) the terms of any agreements between the Librarian and persons who hold copyrights to such audiovisual works.'.

(d) Use of Seal- Section 107 (a) of the National Film Preservation Act of 1996 (2 U.S.C. 179q(a)) is amended--

(1) in paragraph (1), by inserting `in any format' after `or any copy'; and

(2) in paragraph (2), by striking `or film copy' and inserting `in any format'.

(e) Effective Date- Section 113 of the National Film Preservation Act of 1996 (2 U.S.C. 179w) is amended by striking `7' and inserting `13'.

Subtitle B--Reauthorization of the National Film Preservation Foundation

SEC. 311. SHORT TITLE.

This subtitle may be cited as the `National Film Preservation Foundation

Reauthorization Act of 2005'.

SEC. 312. REAUTHORIZATION AND AMENDMENT.

(a) Board of Directors- Section 151703 of title 36, United States Code, is amended--

(1) in subsection (b)(2)(A), by striking `nine' and inserting `12'; and

(2) in subsection (b)(4), by striking the second sentence and inserting `There shall be no limit to the number of terms to which any individual may be appointed.'.

(b) Powers- Section 151705 of title 36, United States Code, is amended in subsection (b) by striking `District of Columbia' and inserting `the jurisdiction in which the principal office of the corporation is located'.

(c) Principal Office- Section 151706 of title 36, United States Code, is amended by inserting `, or another place as determined by the board of directors' after `District of Columbia'.

(d) Authorization of Appropriations- Section 151711 of title 36, United States Code, is amended by striking subsections (a) and (b) and inserting the following:

`(a) Authorization of Appropriations- There are authorized to be appropriated to the Library of Congress amounts necessary to carry out this chapter, not to exceed $530,000 for each of the fiscal years 2005 through 2009. These amounts are to be made available to the corporation to match any private contributions (whether in currency, services, or property) made to the corporation by private persons and State and local governments.

`(b) Limitation Related to Administrative Expenses- Amounts authorized under this section may not be used by the corporation for management and general or fundraising expenses as reported to the Internal Revenue Service as part of an annual information return required under the Internal Revenue Code of 1986.'.

TITLE IV--PRESERVATION OF ORPHAN WORKS

SEC. 401. SHORT TITLE.

This title may be cited as the `Preservation of Orphan Works Act'.

SEC. 402. REPRODUCTION OF COPYRIGHTED WORKS BY LIBRARIES AND ARCHIVES.

Section 108(i) of title 17, United States Code, is amended by striking `(b) and (c)' and inserting `(b), (c), and (h)'.

Passed the Senate February 1, 2005.

Attest:

EMILY J. REYNOLDS,

Secretary.

END

UNITED STATES SENTENCING COMMISSION
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March 15, 2005

MEMORANDUM

TO: Chair Hinojosa
Commissioners

FROM: Tim McGrath

SUBJECT: March Meeting Materials

The March Commission meeting is scheduled to begin on Tuesday, March 22, at 9:30 a.m. and conclude on Wednesday, March 23, by approximately 10:00 a.m. The "family dinner" is scheduled for 6:30 p.m. on Tuesday evening at Ten Phen, 1001 Pennsylvania Avenue, (202) 393-4500.

The meeting materials primarily focus on Booker issues and on the amendments that you may vote on at the April meeting (identity theft, antitrust, and miscellaneous amendments). Additionally, staff will provide information at the meeting on a possible anabolic steroids amendment.

If you have any questions, please call me at (202) 502-4556.

United States Sentencing Commission
Meeting Schedule
Tuesday, March 22, 2005
10:00 a.m.
Commissioners Conference Room
Washington, DC

Report of the Chair

Report of the Staff Director

Minutes

Legislative Update

Staff Reports

- Pending Amendments
    - Antitrust
    - ID Theft
    - Anabolic Steroids
    - Miscellaneous Amendments
- Booker Update
    - Data Collection
    - Case Law Review
    - Educational Efforts

Discussion Calendar

- Attorney Client Privilege Waiver
- Retroactivity
- Post Booker Guideline and Legislative Issues

Adjourn

United States Sentencing Commission
Meeting Schedule
Tuesday, March 22, 2005
9:30 a.m.
Commissioners Conference Room
Washington, DC

Report of the Chair

Report of the Staff Director

Minutes

Legislative Update

Staff Reports

Pending Amendments

ID Theft - Paula
Antitrust - Tom
Anabolic Steroids Lou
Miscellaneous Amendments Judy / CMT

Post-Booker Update

Data Collection - Linda
Case Law Review - Kelley
Educational Efforts - Pam

Discussion Calendar

Post-Booker Guideline and Legislative Issues

Adjourn

Retroactivity
Chap 8 - Privilege Waiver - request to revise 8C2.5

United States Sentencing Commission
Public Meeting
Wednesday, March 23, 2005
9:30 a.m.
Commissioners Conference Room
Washington, DC

Report of the Chair

Report of the Staff Director

Minutes

Post-Booker Update

Data Collection
Case Law Review
Educational Efforts

Adjourn

MINUTES

Minutes of the February 15, 2005
United States Sentencing Commission
Public Meeting

Chair Hinojosa called the meeting to order at 1:43 p.m. in the Judicial Conference Center, Thurgood Marshall Federal Judiciary Building.

The following Commissioners and staff participated in the meeting:

Ricardo H. Hinojosa, Chair
Ruben Castillo, Vice Chair
William K. Sessions, III, Vice Chair
John R. Steer, Vice Chair
Michael E. Horowitz, Commissioner
Beryl Howell, Commissioner
Deborah Rhodes, Commissioner Ex Officio
Edward F. Reilly, Jr., Commissioner Ex Officio
Timothy B. McGrath, Staff Director
Charles R. Tetzlaff, General Counsel
Judith Sheon, Special Counsel

Chair Hinojosa called the meeting to order and announced he would save the Chair's Report for his opening remarks at the public hearing at 2 p.m.

Chair Hinojosa then asked if there was a motion to adopt the January 27, 2005 minutes. Vice-Chair Steer made the motion, which was seconded by Vice-Chair Sessions. The motion passed unanimously.

Chair Hinojosa called on Charles Tetzlaff, General Counsel, to present the proposed amendments and issues for comment for a possible vote to publish in the Federal Register.

General Counsel Tetzlaff stated that the first proposed amendment implements the Identity Theft Penalty Enhancement Act, which creates two new offenses for aggravated identity theft. The Act provides for mandatory consecutive penalties for use of false identification documents in eleven categories of fraud offenses. A conviction carries a mandatory two-year consecutive sentence. A mandatory five-year consecutive sentence is required for use of false identification in a federal crime of terrorism.

The proposed amendment creates a new guideline at §2B1.6 (Aggravated Identity Theft) and sets the guideline sentence as the term of imprisonment required by statute. The proposed amendment also responds to the directive in section 5 of the Act and amends §3B1.3 (Abuse of Position of Trust or Use of Special Skills) to ensure that an adjustment under this guideline applies to a defendant who uses his or her position in order to unlawfully obtain any means of identification.

Finally, the proposed amendment seeks to simplify the identity theft enhancement at §2B1.1(b)(10) by changing it from an enhancement based on relevant conduct to an enhancement based on the offense of conviction. There is also one issue for comment.

General Counsel Tetzlaff stated that a motion to publish the proposed amendment and issue for comment was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa asked if there was a motion to that effect. Vice-Chair Steer so moved, and Vice-Chair Sessions seconded the motion. The motion passed unanimously.

General Counsel Tetzlaff stated that the second proposed amendment is in response to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased both the fines and statutory maximum terms of imprisonment under the Sherman Antitrust Act. The maximum term of imprisonment under the Act was raised from 3 years to 10 years.

The proposed amendment provides for a base offense level of either level 12 or level 14 under antitrust guideline, §2R1.1. The proposed amendment also eliminates the one-level increase for bid rigging cases at §2R1.1(b)(1) on the basis that the majority of cases reviewed involve bid rigging, and that factor can be incorporated into the new base offense level. There are two issues for comment.

General Counsel Tetzlaff stated that a motion to publish the proposed amendment and issues for comment was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa asked if there was a motion to that effect. Commissioner Castillo so moved, and Commissioner Howell seconded the motion. The motion passed unanimously with some discussion. Commissioner Castillo commented that in light of the Act passed by Congress and the Commission's work on public corruption and white collar offenses, he believes the increase is justified for this particular category of offenses and will push for the highest penalties.

General Counsel Tetzlaff stated that the third proposed amendment is comprised of seven miscellaneous issues. One is a proposed issue for comment in response to a directive from Congress to review and consider amending the guidelines to provide for increased penalties for offenses involving anabolic steroids. The issue for comment seeks general comment on how the Commission should implement the directive and specifically whether the Commission should amend the Drug Equivalency Tables and/or the Notes to the Drug Quantity Table in §2D1.1 to provide a heightened marijuana equivalency for anabolic steroids and if so, what should be the amended equivalency rate.

The remaining miscellaneous amendments were not specifically discussed as many were of a technical and conforming nature.

General Counsel Tetzlaff stated that a motion to publish the proposed miscellaneous amendments was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa asked if there was a motion to that effect. Vice Chair Steer made the motion but amended it to publish the proposed issue for comment relating to anabolic steroids separately from the other miscellaneous amendments. Commissioner Horowitz seconded the motion as amended. The amended motion passed unanimously.

There being no further matters for consideration, Vice-Chair Steer moved to adjourn, and Vice-Chair Sessions seconded the motion. The motion passed unanimously, and Chair Hinojosa adjourned the meeting at 1:53 p.m.