TESTIMONY OF JAMES E. FELMAN, ESQ.
Kynes, Markman & Felman, P.A.
Tampa, Florida

ON BEHALF OF
THE PRACTITIONERS' ADVISORY GROUP
TO THE UNITED STATES SENTENCING COMMISSION

APRIL 12, 2005
PUBLIC HEARING
REGARDING PROPOSED AMENDMENTS

On behalf of the Practitioners' Advisory Group, it is my pleasure to appear before the Commission to offer testimony regarding the proposed amendments to the guideline governing antitrust offenses. Part I of this testimony discusses proposed changes to the base offense level. Part II addresses proposed changes to the volume of commerce table. Part III discusses more generally guideline amendments in the post-*Booker* era and the Commission's consideration of the §3553(a) factors. This testimony is substantially identical to the comments submitted by PAG in response to the Commission's request for public comment on this amendment

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, 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.

2: 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 as to those fraud statutes that, 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.[1] 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

[1]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.

antitrust violation may tend to decline with the volume of commerce involved." *See* Amd. 377.

3: 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. 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 PAG's 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 website 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 publicly 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[2]	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.

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, I believe consideration of the § 3553(a) factors weights heavily against any increase in overall severity levels for antitrust offenses. Indeed,

[2]The "other" downward departure rate that year for antitrust offenses was 45.5%.

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.

As always, I appreciate this opportunity to assist the Commission's deliberations on these important issues. I will be pleased to answer any questions the Commission might have in the course of my testimony or, if necessary, in a subsequent written submission.