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BEFORE THE
UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED 2005 AMENDMENTS TO §2R1.1

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Mr. Chairman and members of the Sentencing Commission:

I am pleased to be here today to discuss the Department of Justice's proposal to amend §2R1.1 of the Sentencing Guidelines. Our proposal would implement the increased Sherman Act maximum term of imprisonment enacted as part of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("2004 Act"). Congress determined that existing penalties do not do justice to the serious harm that antitrust violations cause the U.S. economy, and that prison sentences for antitrust defendants need to be increased. As Chairman Sensenbrenner of the House Judiciary Committee stated at the time of final House passage of the 2004 Act, the increased penalty provisions "send an unmistakable message to those who consider violating the antitrust laws that if they are caught they will spend much more time considering the consequences of their actions within the confinement of their prison cells." 150 Cong. Rec. H3657 (daily ed. June 2, 2004). Adopting the changes proposed by the Department will not only carry out Congress's intent in passing the 2004 Act, it will strengthen the Department's ability effectively to enforce the antitrust laws and deter these serious white-collar crimes.

Increases to the antitrust guideline's base offense level and volume of commerce table are necessary in light of the 2004 Act. Section 215 of that Act increased the maximum term of imprisonment for violations of Sherman Act §§ 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. Congress had two purposes for these substantial increases. 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.

Before turning to our specific proposal, I would like to comment briefly on why we believe that it is appropriate for the Commission to amend the antitrust guideline this year. The Guidelines methodology for calculating antitrust sentences has stood the test of time. With respect to criminal fines, Congress has twice passed tenfold increases in the Sherman Act maximum corporate fine–from $1 million to $10 million in 1990 and from $10 million to $100 million last year–in order to enable the Department to actually obtain the substantial fines provided by the Sentencing Guidelines. The legislative history of the 2004 Act explicitly endorses the existing fine methodology of the Guidelines in antitrust cases.

Congress has now also determined that prison sentences for antitrust violations need to be increased, and it is looking to the Sentencing Commission to turn the new statutory maximum into sentencing reality. Congress expressed no reservations concerning how offense levels are currently being calculated for antitrust violations under the Guidelines. Quite to the contrary, the legislative history of the 2004 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." 150 Cong. Rec. H3658 (daily ed. June 2, 2004). Failure to do so promptly would be a repudiation of the congressional intention that the antitrust guideline implement the enhanced punishment for antitrust violations provided in the 2004 Act. And as to any suggestion that Congress never would have expressed such an intent had it been able to foresee the outcome in *Booker*, we flatly disagree. *Booker* certainly has raised a number of issues concerning the federal sentencing process and the Sentencing Guidelines, but questioning the fundamental soundness of the Guidelines themselves or the Commission's practices regarding promulgating and amending the Guidelines are not among them.

Turning now to our specific proposal, 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. Both changes are necessary to bring antitrust sentences more into line with other white-collar offenses carrying similar statutory penalties and to acknowledge the higher volumes of affected commerce that the Department has encountered in antitrust cases since §2R1.1 was last amended in 1991.

In the Commission's notice of proposed 2005 Guidelines amendments, comments were specifically solicited concerning increasing the base offense level in §2R1.1. Our proposal would increase the base offense level to 13. We believe that this is a necessary

first step to reflect the serious nature of antitrust violations and the harm caused by them, to punish antitrust offenses proportionally to other sophisticated white-collar offenses, and to deter others from committing antitrust offenses.

However, a modest increase to the base offense level is insufficient to reflect the more than tripling of the Sherman Act statutory maximum or the reasons for that change. Increasing the volume of commerce table, 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 $1.05 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.

The Department's written comments submitted March 25th contained our specific proposal for amending §2R1.1, and I have included a copy of that proposal at the end of my written statement. To summarize, in addition to increasing the base offense level to 13, we suggest amending the volume of commerce table to cumulatively add one additional offense level for antitrust violations that affect more than $1 million, $5 million, $10 million, $20 million and $40 million in commerce, and by two offense levels for violations that affect more than $80 million, $160 million, $320 million, $640 million and $1 billion in commerce.

At the low end of the table, our proposal eliminates existing adjustments for "more

than $400,000" and “more than $2,500,000" in affected commerce. This is principally a reflection of the passage of time since 1991 when the current volume of commerce table was adopted. We believe that an offense affecting $1 million in commerce today is similar in impact to an offense affecting $400,000 in 1991, and that the interval between $1 million and $2.5 million no longer captures the significant increase in harm that it did 14 years ago.

We believe these suggested amendments appropriately implement 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. That is why 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. In other words, 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 beginning with violations affecting commerce greater than $80 million. In addition, our proposal acknowledges the greater absolute amounts of harm caused by the larger violations.

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 proposal, 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, went to trial and 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, since the other major reason that Congress increased the Sherman Act maximum was to obtain greater comparability in sentences between these similar white-collar crimes. As the legislative history of the 2004 Act notes, the increased penalties "reflect Congress' belief that criminal antitrust violations are serious white collar crimes that should be punished in

a manner commensurate with other felonies." 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

Before a comparison between §2R1.1 and §2B1.1 can be made, some conversion factor needs to be applied to the volume of commerce table in §2R1.1 so that it can be compared to the loss table in §2B1.1. 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. Congress endorsed this 20 percent conversion factor in the legislative history of the 2004 Act, stating that ". . . Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. This presumption is sufficiently precise to satisfy the interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations." 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

Once again, our March 25th letter contains a table showing how §2R1.1 as amended by our proposal compares to current §2B1.1, and I have included that table at the end of my statement. What that table shows is that our proposal would bring antitrust offenses more in line with fraud offenses.

The base offense level for fraud offenses is 6, and applies to violations that cause a loss of $5,000 or less. However, the Department's proposal does not contain a comparably low base offense level for antitrust offenses affecting less than $25,000 in

commerce ($5,000 is 20 percent of $25,000). Any antitrust violation involving that small an amount of commerce would undoubtedly be local in nature and, as a matter of prosecutorial discretion and to preserve limited enforcement resources, would be referred for prosecution to a State attorney general's office. Fraud offense levels increase rapidly with loss and reach level 14, which is above our proposed base offense level of 13 for antitrust violations, for offenses causing loss greater than $70,000. This is equivalent to an antitrust violation affecting $350,000 in commerce. Again, as a matter of prosecutorial discretion the Department almost always refers to the States antitrust matters involving less than $1 million in commerce, so very few defendants with volumes of commerce this low are sentenced under §2R1.1. By the time an antitrust violation has reached the $1 million volume-of-commerce threshold, 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.

I would also like to point out that the increased Sherman Act statutory maximums provided in Section 215 of the 2004 Act 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 fully agree with 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.

Nor do we anticipate that increasing the offense levels in the antitrust guideline to implement the new Sherman Act maximum penalties will interfere with our international enforcement efforts. There is a very strong and continually growing international consensus that cartel behavior is harmful and should be stopped. Our cooperative efforts with foreign enforcement authorities continue to improve, as does our ability to find ways to encourage foreign defendants to submit to U.S. jurisdiction and accept appropriate punishment under U.S. law. The fact that some nations only punish cartel behavior through civil remedies–and the number that do is smaller today than it was a few years

ago–has not proven to be an abiding obstacle to international cooperation, nor would increasing the level of punishment available under the Sentencing Guidelines.

Mr. Chairman, that concludes my prepared remarks. I will be happy to answer any questions that you and the other members of the Commission have for me.

PROPOSED AMENDMENT TO §2R1.1

(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.”

COMPARISON OF AMENDED §2R1.1 AND CURRENT §2B1.1

§ 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