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RECENT ENHANCEMENTS IN ANTITRUST CRIMINAL ENFORCEMENT: BIGGER STICKS AND SWEETER CARROTS

by Glenn Harrison and Matthew Bell***

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I. INTRODUCTION

R. Hewitt Pate, former Assistant Attorney General ("AAG") for Antitrust, has referred to criminal antitrust enforcement as "most important in the work of the Antitrust Division."[1] Integral to criminal antitrust enforcement is the Division's leniency policy, commonly called the Amnesty Program. Under this policy, qualifying corporations and individuals may avoid criminal prosecution in exchange for cooperation with antitrust prosecutors. The Amnesty Program has been called "the most effective investigative tool"[2] for anti-cartel enforcement, and is the most successful leniency program in the Department of Justice.[3] Congress recently passed legislation bolstering it.

On June 22, 2004, President Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004[4] ("the Act"), which enhances maximum penalties for criminal antitrust violations and offers financial incentives for informers—including de-trebling civil damages for cooperating corporations involved in cartel conduct. The next day, Mr. Pate declared:

> The increase in criminal penalties will bring antitrust penalties in line with those for other white collar crimes and will ensure the penalties more accurately reflect the enormous harm

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1. R. Hewitt Pate, Acting Assistant Att'y General, U.S. Dep't of Just., Anti-Cartel Enforcement: The Core Antitrust Mission, Address Before the British Institute of International and Comparative Law Third Annual Conference on International and Comparative Law 1 (May 16, 2003), http://www.justice.gov/atr/public/speeches/201199.htm.

2. Scott D. Hammond, Director of Crim. Enforcement Antitrust Div., U.S. Dep't of Just., Detecting and Deterring Cartel Activity Through An Effective Leniency Program, Presentation at the International Workshop on Cartels 10 (Nov. 21-22, 2000), http://www.usdoj.gov/atr/public/speeches/9928.pdf [hereinafter Hammond, Detecting and Deterring].

3. Scott D. Hammond, Director of Crim. Enforcement Antitrust Div., U.S Dep't of Just., A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Presentation at the New York State Bar Association 5 (Jan. 23, 2003), http://www.justice.gov/atr/public/speeches/200686.htm [hereinafter Hammond, Summary Overview].

4. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 665-69.

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> inflicted by cartels in today's marketplace. The de-trebling provision of the Act removes a major disincentive for submitting amnesty applications, encouraging the exposure of more cartels, and making the Division's Corporate Leniency Program even more effective.[5]

Mere passage of the 2004 Act, however, did not automatically hand prosecutors bigger sticks. While the Act provided for tougher sentences when warranted - up to ten years incarceration, corporate fines of up to $100 million, and individual fines of $1 million[6] - these new provisions lacked the "teeth" needed to effectuate the will of Congress. This stemmed from the United States Sentencing Guidelines, specifically § 2R1.1, which did not provide sentencing ranges encompassing the increased terms of incarceration envisioned by the Act. On April 12, 2005, however, Scott D. Hammond, Deputy Assistant Attorney General ("DAAG"), Antitrust Division, testified before the United States Sentencing Commission concerning the Division's proposal to correct this imperfection. Hammond told the Commission:

> 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. * * * 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. * * * Congress has now also determined that prison

5. Press Release, U.S. Dep't of Justice., Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004), http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm.

6. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.). These maximums will apply only to offenses committed after June 22, 2004.

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> 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.[7]

Passage of the 2004 Act and the Antitrust Division's subsequent proposal to amend § 2R1.1 are not the only recent events bearing upon antitrust criminal enforcement. Following adoption of the Act, the Supreme Court handed down its decision in *United States v. Booker*[8] regarding the constitutionality of the Sentencing Guidelines. Essentially, this decision rendered the Guidelines advisory rather than mandatory. But what does this mean for Congress' intent, as expressed in the 2004 Act, to enhance the punishments for antitrust violations? Testifying after *Booker*, DAAG Hammond put forward the Division's position on the decision's impact:

> [A]s 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.[9]

While the Guidelines are now advisory, the Division considers them sound and the proposal to amend them to reflect the 2004 Act has gone forward. Yet, the decision in *Booker* raised issues. Following a brief review of criminal antitrust enforcement, this article examines the 2004 Act and the proposal to amend § 2R1.1, each in light of *Booker*, and discusses some of the uncertainties surrounding criminal antitrust sentencing.

II. CRIMINAL ENFORCEMENT

In testimony before the House Judiciary Committee on July 24, 2003, AAG Hew Pate said: "Criminal enforcement remains a core priority, and we are continuing to move forcefully against

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7. Scott D. Hammond, Deputy Assistant Att'y General Antitrust Div., U.S. Dep't of Just., Prepared Testimony Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to § 2R1.1 1, 2 (Apr. 12, 2005), http://www.ussc.gov/hearings/04_12_05/Hammond.pdf [hereinafter Hammond, Testimony].

8. U.S. v. Booker, 543 U.S. 220 (2005).

9. Hammond, Testimony, *supra* note 7, at 3.

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hard-core antitrust violations such as price-fixing, bid-rigging, and market allocation. Cartel activity essentially robs U.S. consumers and businesses of many hundreds of millions of dollars annually."[10]

Sections 1, 2, and 3 of the Sherman Act[11] allow for criminal and civil penalties. Following case law and policy, the Antitrust Division decides whether to treat a matter as criminal or civil and only brings criminal prosecutions where the activity in question falls into the *per se* category of offenses.[12] Using federal criminal enforcement to punish and deter anticompetitive behavior can be traced back to passage of the Sherman Act in 1890, where a fine of five thousand dollars and imprisonment for one year were set as the maximum penalties for each violation. Over time, Congress has strengthened the criminal provisions of the Sherman Act. In 1955, Congress raised the maximum fine to fifty thousand for each violation. The Antitrust Procedures and Penalties Act of 1974[13] made violations of the Sherman Act felonies, increased the maximum fine to $1 million for corporations and $100 thousand for individuals, and increased the maximum incarceration term to three years. Ten years later came the Criminal Fine Enforcement Act[14] which increased maximum fines for individuals convicted of a felony to $250 thousand. Next came the Sentencing Reform Act of 1984 ("SRA") together with the Sentencing Guidelines it spawned[15], which was followed by the Criminal Fines Improvement Act of 1987. The 1987 Act statutorily re-authorized the alternative sentencing provision codified as Title 18 U.S.C. § 3571(d):

> **(d) Alternative Fine Based on Gain or Loss.** If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly

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10. *Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission*, 108th Cong. 9 (2003) (statement of Hew Pate, Assistant Attorney General for the Antitrust Division of the Department of Justice).

11. 15 U.S.C.A. §§ 1-3 (West 1997 & Supp. 2005).

12. *Per se* offenses include price fixing, bid rigging, and horizontal customer or market allocation. *See* U.S. v. Heffernan, 43 F.3d 1144, 1145-46 (7th Cir. 1994).

13. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974).

14. Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134, 3137 (repealed in 1987).

15. To effect this, Congress passed Pub. L No. 98-473, 98 Stat. 1995 (1984).

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complicate or prolong the sentencing process.[16]

In 1990, Congress again toughened antitrust criminal penalties by raising the maximum Sherman Act fine for a convicted corporation to ten million dollars and for convicted individuals to $350,000.[17] Following their adoption in 1987, prosecutors began employing the U.S. Sentencing Guidelines to calculate antitrust criminal fines. In essence, the Guidelines provide two different ways to calculate antitrust criminal fines for organizations.[18] In the first method, a company's base fine, and ultimately its Guidelines fine, is determined using its § 2R1.1 offense level. The second of these methods provides for calculating the potential fine based on the company's volume of affected commerce, which can result in fine calculations that exceed the Sherman Act maximum.[19]

Between 1991 and passage of the 2004 Act, three developments in criminal antitrust enforcement culminated in passage of the Antitrust Criminal Penalties Enhancement and Reform Act of 2004. First, the Division began negotiating corporate fines above the statutory maximums of the Sherman

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16. Criminal Fines Improvement Act of 1987, Pub. L. 100-185, 100 Stat. 1280 (codified as amended in 18 U.S.C. § 3571).

17. Antitrust Amendments of 1990, Pub. L .No. 101-588, 101 Stat. 2880 (codified at 15 U.S.C. § 1 (2000)).

18. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(9)(C) (2004) (amended 2005). Under § 8C2.4(a), the base fine for organizations is the greater of three alternatives:

> (1) the amount derived from the table in § 8C2.4(d) corresponding to the offense level determined under § 8C2.3; (2) the pecuniary gain to the organization; or (3) the pecuniary loss from the offense caused by the organization to the extent the loss was caused intentionally, knowingly, or recklessly.
>
> *Id.*

For alternative (1), the base offense level under Chapter Two at §2R1.1. is first determined ("12" for Antitrust offenses) and then adjusted (upward if necessary for bid-rigging and/or according to increases in the amount of commerce attributable to the defendant); the offense level is then used to calculate the base fine according to the table found in § 8C2.4(d); multipliers are derived from a culpability score which is determined according to § 8C2.5; applying the multipliers to the base fine produces the guideline fine range; or, for alternatives (2) and (3) the base fine is determined as the pecuniary gain to the defendant or the pecuniary loss to any person other than the defendant (§ 8C2.4(a)(2) or (3)); and multipliers are derived from the culpability score which is determined according to § 8C2.5, and applying the multipliers to the base fine produces the guideline fine range. *Id.*

19. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.4 (2004) (amended 2005) (providing that *pecuniary loss* may be used as the base fine for organizations). Section 2R1.1(d)(1),(2), provides that for antitrust offenses, in lieu of pecuniary loss, an amount equal to twenty percent of the volume of commerce affected by the offense may be used for the base fine. *Id.* Depending on the defendant's culpability score, this base fine may be reduced by as much as twenty-five percent (when the minimum antitrust multiplier of 0.75 is used) or raised by as much as a factor of four in calculating the maximum fine. *Id.*

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Act using the alternative fine provision of 18 U.S.C. § 3571(d).[20] Second, a revised version of the Antitrust Division's Corporate Leniency Policy was introduced in 1993. And third, as part of its policy initiative, the Antitrust Division began discussing the need for further increases in maximum criminal penalties.[21]

A. *Corporate fines exceeding $10 million*

Since 1987, the Antitrust Division has relied on § 3571(d) to negotiate fines well in excess of ten million dollars - the pre-2004 maximum under the Sherman Act. In fact, the Antitrust Division has obtained several fines in excess of $100 million, including a Department of Justice record $500 million criminal fine against F. Hoffman-La Roche in the Division's highly successful vitamins investigation. While the Division's use of the alternative sentencing provision, 18 U.S.C. § 3571(d), has produced fines which exceeded the Sherman Act maximum, employment of this ability has been confined to cases where sentencing is the result of a plea agreement. Such pleas usually stem from the Division's amnesty program.

B. *Amnesty*

The Antitrust Division's "amnesty" program, or corporate leniency policy, dates from 1978.[22] The pre-1993 policy provided

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20. *See* 18 U.S.C. § 3571(d) (2000). Under this provision, courts are not required to calculate pecuniary loss or pecuniary gain if making such a determination would unduly complicate or prolong the sentencing process. *Id.* Nevertheless, parties negotiating sentences may need to approximate loss in order to determine their potential maximum fine under § 3571(d). *Id.* Section 2R1.1(d)(1) provides that twenty percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3) when calculating a guidelines fine. *See* U.S. SENTENCING GUIDELINES MANUAL (2004) (amended 2005). Use of § 2R1.1(d)(1) to estimate pecuniary loss in negotiating sentences under 18 U.S.C. § 3571(d) has become commonplace.

21. *See, e.g.*, Gary R. Spratling, Deputy Assistant Att'y General, U.S. Dep't of Just., The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game—A Presentation at the American Bar Association's Criminal Justice Section's Eleventh Annual National Institute on White Collar Crime (Mar. 7, 1997), http://www.usdoj.gov/atr/public/speeches/4011.pdf. [hereinafter Spratling, Trend]; *see also* Gary R. Spratling, Deputy Assistant Att'y General, U.S. Dept. of Just., Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?—A Presentation at the American Bar Association's Criminal Justice Section's Twelfth Annual National Institute on White Collar Crime (Mar. 6, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/212581.pdf.

22. *See* Robert E. Bloch, The Antitrust Division's Amnesty Program—A Presentation at the American Bar Association's Section of Antitrust Law's Criminal Antitrust Law and Procedure Workshop (Feb. 23-24, 1995), http://www.mayerbrownrowe.com/publications/article.asp?id=841&nid=6. From 1978 until 1993, seventeen corporations applied for corporate amnesty and ten qualified, with four of those ten granted between 1978-87; six applications were denied and one was

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that the first corporation to come forward and advise the Division of an antitrust offense was permitted to avoid prosecution, providing several criteria were met. The corporation seeking amnesty was eligible only if it came forward before the Division had knowledge of the illegal activity or before any investigation. The pre-1993 policy did not address leniency as to corporate officers, directors, and employees.

A revised version of the policy was introduced in 1993, which included major changes. First, the new policy grants amnesty automatically (known as "Part A" amnesty) to any corporation which reports illegal antitrust activity before an investigation has begun provided six conditions are met: (1) the Division has not received information about the illegal activity from any other source; (2) once discovered, the corporation acted promptly and effectively to end its participation in the activity; (3) the corporation is candid and complete in reporting and cooperates fully with the investigation; (4) the confession is truly a corporate act, not isolated confessions from individuals; (5) where possible, the corporation makes restitution to injured parties; and (6) the corporation did not coerce another party to participate in the illegal activity and was not the leader, or originator of the activity.

Secondly, the revised policy provides that if a corporation comes in after an investigation has begun, it can still obtain amnesty (known as "Part B" amnesty) if the Division had not yet uncovered evidence "likely to result in a sustainable conviction." So corporations failing to qualify automatically because the Division has an existing investigation may still qualify under Part B (also called Discretionary Amnesty). Part B has seven conditions: (1) the corporation is first to come forward and qualify; (2) at the time of reporting, the Division does not yet have evidence against the corporation likely to result in a sustainable conviction; (3) once discovered, the corporation acted promptly and effectively to end its participation in the activity; (4) the corporation is candid and complete in reporting and cooperates fully with the investigation; (5) the confession is truly a corporate act, not isolated confessions from individuals; (6) where possible, the corporation makes restitution to injured parties; (7) the division determines that granting leniency would not be unfair to others considering the nature of the illegal activity, the reporting corporation's role in it, and when the corporation comes forward.

In those situations where a corporation is under

pending on August 10, 1993. *Id.*

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investigation for participation in an illegal antitrust conspiracy (therefore ineligible for amnesty under Part A) and otherwise ineligible under Part B, and that corporation discovers the participation of its officers or employees in a *different* illegal antitrust conspiracy of which the Division is unaware, the corporation may be eligible for what has been called "amnesty plus." In short, if the corporation qualifies for amnesty and cooperates in the new, different investigation of which the Division is unaware, the Division will give full amnesty to the requesting corporation in the new investigation *and* will give the requesting corporation an additional benefit (e.g., fine reduction) in the calculation of its fine within the plea agreement resolving criminal liability as to the original investigation. This double benefit appears to have been an effective incentive to companies to self-report illegal antitrust conspiracies.

On August 10, 1994, one year after adopting the revised Corporate Leniency Policy, the Division announced a companion policy for individuals. This policy applies to all individuals who approach the Division on their own behalf, and not as part of a corporate confession or proffer.[23] To qualify, the individual must report illegal antitrust conduct not previously disclosed to the Division and he must be totally candid and provide full and continuing cooperation throughout an investigation. Further, the individual must not have been the originator or leader of the illegal conduct nor have coerced another party to participate.

The 1993 revisions provide access to amnesty to reporting companies *before and after* an investigation has begun, and enhance the benefits of reporting by including in the amnesty corporate officers and employees who fully confess and cooperate.[24] The results have been dramatic. Under the revised policy, the number of applications rose to a reported rate in 1998 of two per month, where it is today.[25] Amnesty works because it targets the fragile trust between criminal conspirators.

A successful cartel relies on trust. The Amnesty Policy is

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23. *See* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1994), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm. The 1993 Corporate Leniency Policy sets out conditions for leniency for directors, officers, and employees who come forward as part of a corporate proffer or confession. *Id.*

24. *See* Bruce H. Kobayashi, *Antitrust Agency & Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 729-30 (2001) (providing a table listing the factors considered under the 1978 policy, compared to the conditions for leniency under Parts A & B of the 1993 policy).

25. *See* Hammond, Summary Overview, *supra* note 3, at 5; As recently as the first quarter of 2003, however, amnesty applications at the Division have been received at a rate of more than four per month. *Id.*

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effective because it creates a "prisoner's dilemma." In game theory, a prisoner's dilemma is a strategic aim in which unilateral incentives to defect from the preferred solution result in participants receiving an inferior payoff. For example, suppose two accused prisoners are held incommunicado. Each is told that if he confesses and helps convict the other, he will go free and receive a reward. If he does not confess and is convicted by testimony from the other prisoner, he will receive the maximum sentence (e.g., ten years). If he confesses, but the other also confesses at the same time, both prisoners will receive a lesser sentence (e.g., four years). The options are:

(1) If *neither* prisoner confesses, *both* go free;
(2) If one (prisoner A) confesses first and testifies, prisoner A gets amnesty and B gets ten years;
(3) If both come forward at the same time, each gets 4 years.

This dilemma purposely undermines the trust between the prisoners. Hypothetically, game theory holds that because both prisoners have an equal incentive to confess, both will do so and receive the lesser sentence.[26] It is more often the case that one or another prisoner will lose trust[27] first and defect from the preferred solution by coming forward. In the same manner, the Amnesty policy seeks to undermine the trust among cartel members, encouraging defection.

Since 1993, the Division's Amnesty program has succeeded on several fronts. First, the Division witnessed an increase in the number of requesting companies. More importantly, the increase in organizational fines resulting from reported cartels skyrocketed dramatically.[28] Cartel investigations since 1997

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26. The dilemma resides in the fact that each prisoner has a choice between only two options, but cannot make a good decision without knowing what the other will do. If both prisoners are rational, they will never refuse to confess. Rational decision-making means that you make the decision which is best for you whatever the other actor chooses. Suppose prisoner A decides to confess, then it is rational for prisoner B to confess, too: neither A nor B prisoner gains much, but choosing not to confess would mean prisoner B is stuck with a ten year sentence. Suppose prisoner A decides to remain silent. Then it is rational for prisoner B to confess; prisoner B will gain anyway from A's silence, and will gain more by confessing; here, too, the rational choice is to defect. So, if both actors are rational, both will decide to defect. This seeming paradox can be formulated more explicitly through the principle of suboptimization. *See*, Francis Heylighen, *The Problem of Suboptimization*, http://pespmc1.vub.ac.be/SUBOPTIM.html (last visited Feb. 26, 2006).

27. Giving new and important meaning to the term "trust buster."

28. Gary R. Spratling, Deputy Assistant Att'y General Antitrust Div., U.S. Dep't of Just., Making Companies An Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy - An Update, Presentation at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust 3 (Feb. 16,

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have involved a variety of products and industries, with anticompetitive acts affecting more than ten billion dollars in U.S. commerce.[29] Prior to 1997, the Division averaged roughly $29 million in criminal fines collected annually.[30] In 1997 and 1998, the Division collected in excess of $200 million in fines each year.[31] Then, in 1999 (fiscal year) the Division secured a whopping $1.1 billion in criminal penalties, including the single largest criminal fine in U.S. history – $500 million against F. Hoffmann-La Roche in the international vitamins price-fixing cartel. F. Hoffman-La Roche's co-conspirator, BASF, is number two, having paid $225 million that same year. The prosecution of the graphite electrodes cartel alone resulted in three defendants paying nine-figure fines.[32] It is estimated that since 1997, the Amnesty Program has brought in a total of more than two billion dollars in criminal fines.[33] With staggering results like this, it is easy to understand why Antitrust officials refer to the Amnesty Program as "the most effective tool for cracking cartel activity."[34]

In his 2003 statement to the House Judiciary Committee, AAG R. Hewitt Pate highlighted the program with these words:

> This policy, while allowing leniency for one participant in the cartel, has tremendous benefits to enforcers and consumers. First, the mere possibility that one of the cartel members will get leniency if it is the first to come in to the Division works to prevent cartels from forming in the first place, because businesses have an increased risk they will be targeted for prosecution as a result of a fellow cartel member reporting on their illegal activities subjecting them to heavy criminal fines and incarceration of their culpable executives. Second, even if a cartel does form, the benefits associated with the leniency policy lead to destabilization of the cartel by creating a powerful incentive for a company to report the cartel to antitrust authorities. Third, having a member of the cartel provide evidence to authorities helps

1999), http://www.usdoj.gov/atr/public/speeches/2247.pdf.

29. Hammond, Summary Overview, *supra* note 3, at 1.

30. *Id.* at 4.

31. *Id.*

32. *Id.*

33. Anthony V. Nanni & Franklin M. Rubinstein, *It's Time to Confess: New statute and case law boost DOJ's efforts to encourage cooperation*, LEGAL TIMES, July 12, 2004, at 24.

34. Hammond, Detecting and Deterring, *supra* note 2, at 10.

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> ensure that prosecutions of the cartel are likely to be more successful than without such cooperation. Fourth, companies targeted for prosecution as a result of a particular grant of leniency not infrequently seek to negotiate a plea agreement and seek to obtain more lenient treatment than otherwise by reporting on activity of an unrelated cartel.[35]

C. *Legislative Efforts to Enhance Penalties*

In 2003, R. Hewitt Pate acknowledged the large fines achieved in recent years yet connected the importance of increasing all criminal penalties to the Division's priority of criminal antitrust enforcement:

> While the increasing jail sentences and huge multi-million dollar fines that have characterized international cartel prosecutions are vitally important, the Antitrust Division does not limit its enforcement to those cases; we also prosecute multiple cases that, while seemingly small, are significant to the victims and to our overall efforts at deterrence. We are determined to bring antitrust violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those in our country and around the world who would victimize American consumers and the American marketplace. For that reason, I believe it is time to consider whether it is appropriate to increase the penalties associated with criminal antitrust violations. I look forward to working with this Committee on that issue.[36]

Mr. Pate's call for stiffer penalties did not go unanswered. That same year, Congress began considering bills to enhance penalties for antitrust violators.

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35. R. Hewitt Pate, Assistant Att'y General, Antitrust Div., Antitrust Enforcement Oversight, Statement before the Committee on the Judiciary, United States House of Representatives 9 (July 24, 2003), www.usdoj.gov/atr/public/testimony/201190.pdf.

36. *Id* .at 7.

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III. THE 2004 ACT

A. *Legislative History*

The bill which included the Antitrust Criminal Penalties Enforcement and Reform Act of 2004, House Bill 1086, did not initially address antitrust criminal penalties. Introduced on March 5, 2003 by F. James Sensenbrenner (R-WI 5th), together with seventeen co-sponsors (eight Democrats, nine Republicans), House Bill 1086 was titled the "Standards Development Organization Advancement Act of 2003."[37] The bill was received, read twice and referred to the Committee on the Judiciary of the U.S. Senate.[38] On May 19, 2003, Senator Orrin Hatch (R-UT) and Senator Patrick Leahy (D-VT) introduced Senate Bill 1080, entitled the "Antitrust Improvement Act of 2003" which proposed raising the maximum term of imprisonment for an individual who criminally violates the antitrust laws from three years to ten years and raising the maximum fine for a corporation from ten million dollars to $100 million. Senate Bill 1080 was thereafter referred to the Senate Judiciary Committee. On October 29, 2003, Senator Michael DeWine (R-OH) introduced Senate Bill 1797, entitled the "Antitrust Criminal Penalty Enhancement and Reform Act of 2003."[39] Senate Bill 1797 addressed the Leniency Program, proposed increasing penalties for criminal antitrust violations and proposed amending the Tunney Act.[40]

Senate Bill 1797 proposed two modifications: first, it increased criminal penalties for violating the Sherman Act by

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37. H.R. 1086, 108th Cong. § 1 (2003). This bill was Congress' attempt to promote and facilitate the standard setting process and amend the National Cooperative Research and Production Act (NCRPA). This bill was reported by voice vote on May 7, 2003. Thereafter, the House of Representatives passed House Bill 1086 on June 10, 2003, by voice vote. 149 CONG. REC. H5104 (June 10, 2003).

38. S. 1799, 108th Cong. (2003). Senate Bill 1799 was introduced on October 30, 2003 by Senator Patrick Leahy (D-VT) with one co-sponsor, Senator Hatch (R-UT). This bill was entitled the "Standards Development Organization Advancement Act of 2003," had the same wording as House Bill 1086, and was introduced by Leahy and Hatch to be a companion to House Bill 1086.

39. Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong.

40. The Tunney Act is section 5 of the Clayton Act, as amended, and is codified at 15 U.S.C.A. § 16 (West 1997 & Supp. 2005). S. 1797 § 201 proposed amending the Tunney Act to require that "The Court shall not enter any consent judgment proposed by the United States under this section unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest." S. 1797 § 201, 108th Cong. (2003). This article only addresses those provisions of S. 1797 relating to *criminal* antitrust enforcement and does not address reforms to the Tunney Act within S. 1797 or within House Bill 1086 as passed.

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incorporating the same increased penalties found in Senate Bill 1080, with one exception.[41] Second, Senate Bill 1797 proposed de-trebling civil damages for individuals or corporations who participate in the Division's Leniency Policy program. Addressing the leniency program provisions of the bill, Senator Herb Kohl (D-WI) said:

> The leniency program rewards the first member of a criminal antitrust conspiracy to admit its crime to the Justice Department by granting the wrongdoer criminal amnesty. This is an important tool for law enforcement officials to detect and break up cartels that fix prices and limit supply in our economy. This new provision will give the Justice Department the ability to offer those applying for leniency the additional reward of only facing actual damages in civil suits arising out of the antitrust conspiracy, rather than the treble damage liability to which they would otherwise be subject.[42]

Following its introduction, Senate Bill 1797 was referred to the Senate Judiciary Committee.[43] One difference from Senate Bill 1080 was that Senate Bill 1797 included a five-year sunset provision.[44] On November 6, 2003, House Bill 1086 was reported by Senator Hatch to the Committee on the Judiciary.[45] The bill's only amendment was essentially Senate Bill 1797.[46] On April 2, 2004, the Senate passed the modified House Bill 1086 by unanimous consent.[47] On June 2, 2004, the House concurred by voice vote with the Senate's amendments to House Bill 1086 and the resulting bill was adopted and sent to the White House.[48] On June 22, 2004, President Bush signed into law House Bill 1086, a composite bill which included the Antitrust Criminal Penalty

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41. S. 1797 § 105. The bill added another specific increase in the maximum fine for individuals, raising it from $350 thousand to $1 million.

42. 149 CONG. REC. S13517 (daily ed. Oct. 29, 2003) (statement of Sen. Kohl).

43. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong.

44. *Id.* at § 101(a).

45. H.R. 1086, 108th Cong. (1st Sess. 2003).

46. *See id.* at § 201(a).

47. 150 CONG. REC. S3610 (daily ed. Apr. 2, 2004).

48. *See* 150 CONG. REC. H3654 (daily ed. June 2, 2004). Title I of the final bill incorporated the Standards Development Act of 2003. Title II of the final bill included the Antitrust Criminal Penalty Enhancement and Reform Act of 2003 (now 2004), which contained the terms of Senate Bill 1799 and encompassed the Tunney Act Reform as Subtitle B.

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Enhancement and Reform Act.[49]

B. *Increased Criminal Penalties under the Act*

1. Bigger Sticks

Section 215 of the 2004 Act raises the stakes dramatically for those who participate in anticompetitive behavior. Prior to 2004, the Sherman Act capped criminal fines at ten million dollars for organizations and $350 thousand for individuals.[50] The 2004 Act increases ten-fold the maximum allowable corporate fine, boosting the amount to $100 million.[51] Individuals also face significantly stiffer monetary penalties of up to $1 million.[52] As noted above, these increases are the latest in a series of penalty enhancements enacted since the Sherman Act's inception on July 2, 1890.[53]

a. Organizational Fines

Since 1987, the Antitrust Division has had the ability to argue for fines larger than the Sherman Act maximum by relying on the alternative fine provision in 18 U.S.C.A. § 3571(d), which permits penalties equal to twice the pecuniary gain or loss resulting from the offense[54], and since passage of the SRA, the Sentencing Guidelines provided for fines over the Sherman Act maximums.

After *Booker*, it is likely that prosecutors will need to prove gain or loss beyond a reasonable doubt in order to obtain the higher maximums provided for by the "alternative sentencing provision" of 18 U.S.C.A. § 3571(d).[55] Fortunately, because the 2004 Act increased the statutory maximum fine, the government, in all but the very largest of cases, will be able to rely directly on

49. *See* Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661.

50. 15 U.S.C. § 1 (2000).

51. *Id.*

52. Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661. Section 215 of the 2004 Act uniformly amends Sections 1, 2, and 3 of the Sherman Act with maximum fine enhancements of $100 million and one million dollars for organizations and individuals, respectively, and with increased maximum imprisonment terms for individuals of ten years.

53. 15 U.S.C. § 1 (2000).

54. 18 U.S.C. § 3571(d) (2000). The alternative fine provision permits assessment of fines beyond statutory maximums when imposition of a lesser fine would allow the defendant to profit from its conduct or would not be commensurate with the harm inflicted.

55. *See* Apprendi v. New Jersey, 530 U.S. 466, 490-91 (2000) (holding that any fact that increases the penalty beyond the maximum allowed by statute must be proved beyond a reasonable doubt).

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the Sherman Act and avoid the calculations required by § 3571(d) for offenses continued on or after June 22, 2004.[56]

2.Individual Penalties.

Individual offenders sentenced under the 2004 Act will face prison terms of up to ten years.[57] Senator Hatch explained the need to make the punishment fit the potential enormity of antitrust crimes:

> The Sarbanes Oxley Act passed last year raised the criminal penalties for a number of white collar offenses, but did not do so for antitrust criminal violations. An antitrust price-fixer who defrauds consumers for a total of five million should be subject to a penalty which is more consistent with the penalty scheme for other white collar offenses.[58]

b. "Over-sentencing?"

It may be suggested that cartels will now be over-fined or over-punished in the aggregate. The opposite may be accurate. The fact that quite a few major cartels have been uncovered in recent years appears to prove that cartels have, in fact, been under deterred. Ample scholarly literature exists that cartels do significantly increases prices, and suggests that the ten percent price increase presumed in the U.S. Sentencing Guidelines, from which the Guidelines' twenty percent loss estimate is derived, is quite conservative.[59] As the OECD noted in its 2002 policy brief on Hard Core Cartels Harm and Effective Sanctions, cartels cause significant worldwide harm of many billions of dollars per year.[60] The brief concluded that while there is an uneven trend toward more rigorous cartel sanctions, larger sanctions are still required to achieve effective deterrence.[61] In the U.S., the recent increase in penalties should address the problem of under deterrence.

The system contains ample safeguards against "over" punishment. Already, the system allows the government to take

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56. *See* § 215, 118 Stat. at 668.

57. *Id.*

58. 149 CONG. REC. S6626-01 (May 19, 2003) (statement of Sen. Hatch).

59. *See, e.g.*, Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004).

60. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), HARD CORE CARTELS – HARM AND EFFECTIVE SANCTIONS (May 2002), http://www.oecd.org/dataoecd/30/10/2754996.pdf.

61. *Id.*

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ability to pay into account in negotiating recommended fines.[62] Also, courts take ability to pay into account in imposing sentence.[63]

2. Sweetening the Carrots: Cooperation Incentives

The Act sweetens incentives for antitrust violators to cooperate under the Antitrust Division's leniency program. Previously, a corporation that shielded itself from federal criminal liability with a leniency agreement could still be jointly and severally liable for up to three times the damages caused by every member of a cartel in private and state antitrust suits.[64] The Act, however, limits civil liability of qualifying corporations to single damages attributable to its sole share of commerce affected by the antitrust violations.[65]

a. Pre-1993 weaknesses

There were at least four risks associated with applying for corporate leniency before 1993: (1) not being first; (2) rejection; (3) civil exposure; (4) risk in other jurisdictions. First was the chance that the corporation may not have been the "first in the door" and, as shown above, there was no provision for rewarding the "second" or later applicant.[66] Under today's policy, while a corporation may come in after an investigation has begun under Part B of the policy, the corporation must still be "first in the door" in order to qualify for discretionary amnesty.[67] However, today a corporation can, under certain circumstances, qualify for "amnesty plus,"[68] which serves to ameliorate this risk to some degree.

Secondly, the corporation faced the risk that amnesty might not be granted, in that before 1993, amnesty was not automatic, but discretionary. This risk was eliminated when, following the 1993 revisions, amnesty became automatic in type A situations (before an investigation has begun) for qualifying applicants.[69]

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62. *See* U.S. SENTENCING GUIDELINES MANUAL §5E1.2(d)(2) (2004) (amended 2005).

63. *See* U.S. v. Atl. Disposal Serv., 887 F.2d 1208, 1209 (3rd Cir. 1989).

64. Antitrust Criminal Penalty Enforcement Act, *supra* note 4 at 666.

65. *Id.*

66. This is not to say that there was or is *no* consideration given to persons who agree to cooperate early in an investigation despite the fact that they don't qualify for amnesty or amnesty plus.

67. *See* Daniel J. Bennett, *Killing One Bird with Two Stones: The Effect of Empagran and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Deterring International Cartels*, 93 GEO. L. J. 1421, 1438 (2005).

68. "Amnesty plus" may apply if a corporation is involved in more than one anticompetitive cartel. *See id.* at 1439.

69. *See id.* at 1437-39.

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Third, any corporation contemplating applying for amnesty had to be aware of the fact that any immunity from criminal prosecution did not mean immunity from civil sanctions.[70] The first inkling of a federal investigation into an industry or a particular firm can trigger civil lawsuits. Persons injured by antitrust cartel behavior remained free to claim civil treble damages under the Clayton Act.[71] Nothing in the 1993 amendments to the Antitrust Division's Corporate Leniency Policy minimized this risk.

Fourth, a putative applicant for amnesty had to assess the likelihood that it would be investigated by other jurisdictions as a result of it becoming publicly known that the applicant was involved in criminal activity. This created the risk of additional penalties. Again, nothing in the Division's 1993 amendments minimized such exposure.

Of these four risks, the risk of treble damages under the Clayton Act appeared to be the greatest deterrent to applying for amnesty after 1993.[72] Treble damage actions and the existence of joint and several liability may have even served as a deterrent to organizations which have considered reporting violations to antitrust agencies outside of the United States. Clearly, cooperation anywhere might still result in civil damage suits in U.S. courts.[73] In addition, shareholder derivative suits, and possible disqualification from bidding on various contracts are

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70. 15 U.S.C. § 15 (2000).

71. *See id.*

72. Even so, after 1993 many corporations assessed the risks and opted for amnesty. *See* U.S. DEP'T OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM, *at* http://www.usdoj.gov/atr/public/criminal/8278.htm (last visited July 8, 2005). The automatic amnesty provision within the 1993 revised policy appears to have accounted for corporations' increased interest in amnesty.

73. Generally speaking, activity underlying antitrust claims in U.S. courts must be shown to have harmed domestic commerce in some way. Under § 7 of the Sherman Act, 15 U.S.C. § 6a, (the Foreign Trade Antitrust Improvements Act of 1982), the Sherman Act does not apply to conduct unless that conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce, American imports, or American exporters. On June 14, 2004, the United States Supreme Court, in F. Hoffman-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004), ruled unanimously that American antitrust laws do not apply to conduct that allegedly causes independent harm outside the United States as the sole basis of a legal claim brought in the United States. The Supreme Court declared that its decision in *Empagran* was consistent with the United States' interest in avoiding unreasonable interference with the legitimate sovereign authority of other nations. It concluded that Congress would not have intended for the Sherman Act to bring within its reach independently caused foreign injury. In so ruling, the Court vacated the judgment of the D.C. Circuit Court of Appeals, and remanded the case for additional proceedings consistent with its opinion. On remand, the D.C. Circuit Court of Appeals affirmed the district court's decision to dismiss the Sherman Act claim for lack of subject-matter jurisdiction under the Foreign Trade Antitrust Improvements Act. Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1269 (D.C. Cir. 2005).

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unaffected by acceptance into the Amnesty Program.

In a direct attempt to lessen the risks associated with the decision to apply for amnesty, Congress chose to increase the incentives for participants in illegal cartels to cooperate with antitrust prosecutors. This has been accomplished by statutorily limiting cooperating companies' civil liability to actual rather than treble damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct.

Senator Hatch described the situation in a news release dated April 2, 2004:

> Though this program has been successful, a major disincentive to self reporting still exists - the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy. . . This provision addresses this disincentive to self-reporting. Specifically, it amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages. In other words, the total liability of a successful leniency applicant would be limited to single damages without joint and several liability. Thus, the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy.[74]

b. Amnesty under the 2004 Act

i. Section 213(a):

Section 213(a) of the Act is the provision addressing the disincentive to self-reporting posed by civil lawsuits:

> In any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such

74. Press Release, Senator Orrin Hatch, Senate Passes Bill to Improve Antitrust Laws (Apr. 2, 2004), *available at* http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1013&Month=4&Year=2004.

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> requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.[75]

ii. The New Carrots

Section 213 of the Act "de-trebles" damages for the amnesty applicant. So, in addition to immunity from government prosecution, the successful applicant may be exempt from civil treble damage liability. Besides "de-trebling," a second incentive to cooperation is the removal of joint and several liability from the cooperating defendant in subsequent civil litigation. Coupled with de-trebling, the net effect of the Act is to substantially increase the exposure of non-cooperating conspirator defendants in the event a major conspirator self-reports and becomes eligible for the benefits of the Division's amnesty policy. For example, three corporations (A, B, and C) conspire to fix prices and the commerce affected by the conspiracy is $100 million (the "entire conspiracy amount"). Company A holds a ten percent share of the market and decides to self-report under the Amnesty Program. Assuming Company A qualifies, Companies B and C remain jointly and severally liable for the total amount of damages caused by all three companies (for example, $30 million), less actual damages attributable to Company A (for example, if $1 million of actual damages are attributable to Company A then Companies B and C remain jointly and severally liable for $30 million minus $1 million, or $29 million) in any subsequent private civil antitrust litigation.

(1)Requirements of Section 213(b)

For a participant in the Division's amnesty program to qualify for the potential civil "carrots," the antitrust leniency applicant or cooperating individual must satisfy the requirements of Section 213(b) of the Act. This section provides, essentially, that the court in which the civil action is brought must determine that the applicant or cooperating individual "has provided satisfactory cooperation to the claimant with respect to the civil action."[76] Subsections (b)(1) through (b)(4) elaborate on the term "cooperation."

Section 213(b)(1) requires that the amnesty candidate provide to the private claimant a "full account" of all facts known

75. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, at 667.

76. *Id.*

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to the applicant "that are potentially relevant to the civil action."[77] Subsection (b)(2) requires the applicant to furnish "all documents or other items potentially relevant to the civil action that are in the possession, custody, or control" of the applicant "wherever they are located."[78] With respect to cooperating individuals, subsection (b)(3)(A) requires the applicant to make "himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require"[79] and that the applicant responds

> completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action.[80]

In the case of an organizational antitrust applicant, subsection (b)(3)(B) requires that the applicant use its "best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in" subparagraph (3)(A).[81]

Clearly, the supervising judge of the civil action has the key role in determining whether the amnesty candidate has qualified for the benefits of Section 213(a) of the Act, specifically de-trebling of damages and removal of joint and several liability; and the ultimate determination as to the effectiveness of Section 213(a) appears to depend on the court's willingness to undertake the role of arbitrating inevitable disputes over the extent of an applicant's "cooperation." Further, it appears that the civil litigation plaintiff ("claimant") has a role in determining whether the applicant has cooperated enough to be eligible for de-trebling and removal from joint and several liability. Additionally, to the extent a claimant desires to hold an additional defendant fully liable, the claimant may mendaciously oppose a finding of satisfactory cooperation. Obviously, the effectiveness of section 213 will depend on the results of actual cases.

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

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3. Guidance.

The 2004 Act allows leniency applicants to limit liability to single damages and avoid joint and several liability in return for cooperating with civil plaintiffs – but the Act does not provide guidance as to when courts should make the single damage/non-joint and several liability determination. Clearly, in the majority of cases, the private plaintiff is not going to be litigating the leniency applicant's damage liability; there will have been a negotiated settlement. Therefore, the likelihood that the applicant would qualify for single damage/non-joint and several treatment if the case went to trial simply becomes a factor in arriving at the settlement amount, and the parties will negotiate over how much cooperation the applicant will provide and when it will be provided.

In the small number of cases in which there is litigation involving the leniency applicant, the Act provides that an applicant qualifies for single damage/non-joint and several treatment if the court determines that the applicant "has provided" satisfactory cooperation to the plaintiff. It would seem that judges can not make that determination until after the cooperation has been given. It is reasonable to expect that the large de-trebling benefit of the 2004 Act to potential leniency applicants will outweigh the unlikely possibility that they will end up litigating their damage liability before a judge who will apply the cooperation standard in an unreasonable manner.

4. Amnesty Terms: Section 212

Section 212 of the Act specifies various terms related to the Antitrust Division's leniency policy, including "Antitrust Leniency Agreement,"[82] "Antitrust Leniency Applicant,"[83] "Claimant,"[84] and "Cooperating Individual."[85] None of these

82. *Id.* at §212(2). "The term 'antitrust leniency agreement,' or 'agreement,' means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement."

83. *Id.* at §212(3). "The term 'antitrust leniency applicant,' or 'applicant,' means, with respect to an antitrust leniency agreement, the person that has entered into the agreement."

84. *Id.* at §212(4). "The term 'claimant' means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision."

85. *Id.* at §212(5). "The term 'cooperating individual' means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement."

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definitions appears controversial.

5. Rights and Liabilities Not Affected: Section 214(1) - (3)

Section 214 of the Act expressly addresses three issues. First, the Act continues to allow the Antitrust Division to seek stays or protective orders in civil actions preventing cooperation from impeding the Division's criminal investigation and prosecution. Second, the Act does not establish a right to challenge leniency-agreement decisions made by the Division. Third, the Act leaves intact the joint and several liability of the coconspirators other than the amnesty applicant.

C. Expectations

By increasing an individual's maximum sentence and fine, the 2004 Act creates a powerful incentive for individuals to cooperate and seek personal amnesty. Personal liability for fines of up to $1 million and potential incarceration of 120 months should give antitrust criminals reason to pause before refusing cooperation. For these reasons, the Division believes that the 2004 Act will be effective. The 2004 Act would appear to fit with the Division's broader goal of encouraging self-reporting. Moreover cartels, which are inherently unstable by nature, should be destabilized further by the 2004 Act's 'sweetening' of the carrots given to amnesty applicants.

The incentives to participate in anticompetitive cartels must be weighed against the Act's enhancement of consequences. The de-trebling provision makes self-reporting more attractive to conspirators because it affords the opportunity of reduced civil liability together with the assurance of non-prosecution. Also worthy of note is the fact that the cooperator's competitors will simultaneously suffer increased exposure to civil damages as they find themselves saddled with joint and several liability for all damages caused by the conspiracy, less only actual damages caused by the cooperating defendant to the plaintiffs.

The fact that an executive contemplating participation in an illegal cartel now faces the possibility of ten years in jail should provide a powerful deterrent to such participation.[86]

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86. Scott D. Hammond, Director of Crim. Enforcement Antitrust Div., U.S. Dep't of Just., When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag on an Individual's Freedom?, Presentation at The Fifteenth Annual National Institute on White Collar Crime 8-9 (Mar. 8, 2001), http://www.atrnet.gov/subdocs/7647.htm. As an example of courts taking a tougher stance toward white collar defendants, Bernard Ebbers, the former chairman of WorldCom, was sentenced to twenty-five years in prison for fraud. Ken Belson, *WorldCom Chief Is Given 25 Years for Huge Fraud*, N.Y. Times, July 14, 2005, at A1.

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Also, the higher maximum prison terms have the potential to more noticeably affect managers of multinational corporations working abroad. In the event jurisdiction is obtained, these individuals face the possibility of conviction by U.S. courts and incarceration in the United States. Given this bigger "stick," the chance of obtaining individual amnesty should provide an equally attractive "carrot."

D. Potential difficulty

How the de-trebling provision will operate in practice is vague. Amnesty applicants are entitled to limit civil exposure to actual damages "attributable to the commerce done by the applicant in the goods or services affected by the violation"[87] once the court presiding over the civil suit determines "that the applicant or cooperating individual . . . has provided satisfactory cooperation to the claimant with respect to the civil action."[88] The statute goes on to list mandatory aspects of cooperation, such as divulging all known facts and furnishing all documents that are potentially relevant to the civil action. While the actual determination of satisfactory cooperation seems straightforward, an amnesty applicant's ability to take advantage of the de-trebling provision will be subject to the discretion of the trial court that, in turn, is reliant upon the plaintiff when determining whether applicant has cooperated with the plaintiff. Some potential applicants may decide that unanswered questions about what constitutes satisfactory cooperation render the de-trebling provision less enticing. For example, it is unclear whether amnesty cooperators would be required, as part of the duty to furnish all potentially relevant documents "that are in the [cooperator's] possession, custody, or control . . . wherever they are located"[89] to provide otherwise privileged documents. Additionally, the amnesty cooperator may be unable to reap the designed benefits of the 2004 Act without receiving express agreement of the civil plaintiffs as to the completeness of its cooperation efforts.

1. Recent case.

In January 2005, Judge Savage of the Eastern District of Pennsylvania decided *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553 (E.D. Pa. Jan. 14, 2005), which involved the Division's Corporate Leniency Program, and enjoined the

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87. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, at 666.

88. *Id.*

89. *Id.*

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indictment of a company and one of its employees. This was the first time that the Division sought to remove a company from the leniency program. The decision to remove Stolt was based on Division policy, announced in 1998, stating that once it is discovered that the reporting company was involved in an antitrust crime, the company was obligated to take prompt and effective action to terminate its role in the conspiracy. The Division asserted that the company in question had failed to undertake such action and had provided the Division with false and misleading information. The District Court disagreed. This has not altered Division policy: neither the conditions for eligibility into the leniency program, how the Division implements the program, nor the conditions under which the Division will revoke conditional leniency have been amended. The district court's decision in this case has been appealed.

E. Sunset provision

Experimental in nature, the de-trebling provision of the 2004 Act is subject to a five-year sunset clause. Renewal of the recovery limitations would be expected if de-trebling proves itself an effective incentive for cartel conspirators. Should the experiment fail and the de-trebling provision lapse, however, the enhanced fines and imprisonment terms would remain.

IV. AMENDING § 2R1.1

A. *Proposed Amendments to § 2R1.1*

The 2004 Act's increase of allowable prison terms lacked corresponding amendments to guideline 2R1.1; unadjusted, the guideline only produced sentencing ranges reflecting the previous three-year maximum under the Sherman Act.[90] It is clear that Congress sought to rectify the disparity of potential sentences for antitrust crimes when compared to similarly serious white-collar offenses such as wire and mail fraud.[91] Therefore amendments within § 2R1.1 raising the offense level and volume of commerce adjustments became necessary after June 22, 2004 in order for courts to sentence individuals convicted of antitrust offenses to incarceration terms at or near the ten year maximum when warranted.

90. Presently, § 2R1.1 provides a Base Offense Level of twelve for antitrust violations, and adjustments based upon volume of commerce permit up to a seven-level increase. Absent amendments, the Act's stiffer penalties will not be realized. *See supra* text accompanying note 48

91. *See supra* text accompanying note 48.

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In testimony before the Sentencing Commission, the Division supported amending § 2R1.1, by increasing the base offense level in § 2R1.1(a) and by adjusting the volume of commerce table in § 2R1.1(b)(2) upward. With respect to the base offense level, the Division proposed an increase in the level to thirteen. In addition, because the existing volume of commerce table in the Guidelines (2R1.1(b)(2)) did not provide for effective punishment of violations affecting greater than $100 million in commerce (which has been the existing highest volume of commerce adjustment under 2R1.1(b)(2)(G) since 1991), the Division proposed adjusting the table in 2R1.1(b)(2) upward[92] and presented a revised table[93] to the Commission. With regard to increasing the base offense level to thirteen, DAAG Hammond testified:

> 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.[94]

Hammond compared the offense levels for an amended § 2R1.1 with the offense levels provided in the existing § 2B1.1 for wire and mail fraud offenses which carry twenty year statutory maximum terms of incarceration, because one of the reasons 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.

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92. Hammond, Testimony, *supra* note 7, at 3 (the Department's written comments submitted March 25, 2005 contained specific proposals for amending § 2R1.1). In addition to increasing the base offense level to thirteen, the proposal suggested 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 $50 million.

93. *See* center column *infra* Table 1.

94. Hammond, Testimony, *supra* note 7, at 4.

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H3658 (daily ed. June 2, 2004).[95]

Comparing the offense of fraud with criminal antitrust offenses, Hammond showed the increasing disparity between fraud sentences under the current Guidelines and antitrust criminal offenses, wherein the sentences for fraud become much more severe:

> 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 thousand. This is equivalent to an antitrust violation affecting $350,000 in commerce. * * * [U]nder 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.[96]

Hammond stated that Congress' intent behind the 2004 Act was to more severely punish cartel violations with very high volumes of commerce - higher than the current § 2R1.1(b) top adjustment at $100 million:

> 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

95. *Id.* at 8-9.
96. *Id.* at 10.

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> 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.[97]

Illustrating individual sentencings under the 2004 Act and § 2R1.1, Hammond provided an example implementing the 10-year maximum penalty provided by Congress for antitrust violations and showing that under the proposal the most serious offenders are sentenced toward the higher end of the spectrum:

> [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.[98]

Generally speaking, the proposed table was intended to reflect the new realities in antitrust criminal enforcement. Since 1991, the Antitrust Division has prosecuted a number of antitrust violations affecting more than $100 million – and even more than $1 billion – in commerce. Hammond asserted that the volume of commerce table should be amended to reflect this new reality. Beginning with the year 1996, Hammond recited a list of cases involving defendants where the volume of commerce affected by their activity exceeded $100 million: ADM, $150 million and $350 million; Ajinomoto Co., $122 million; Haarmann & Reimer Corp., $400 million; UCAR International, Inc., $713 million; SGL Carbon AG, $485 million; Showa Denko Carbon, Inc., $325 million; Mitsubishi Corp., $175 million; F. Hoffmann-La Roche Ltd., $3.280 billion; BASF, $1.460 billion; Takeda Chemicals Industries, Ltd., $361 million; Eisai Co., Ltd., $194

97. *Id.* at 7

98. *Id.* at 8.

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million.

> 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. . . . Clearly, this history justifies adding additional adjustments for volume of commerce between the current $100 million top and $1 billion.[99]

At the low end of the table, the Department's proposal eliminated existing adjustments for "more than $400 thousand" and "more than $2.5 million" in affected commerce. In essence, the Division took the position that an offense affecting $1 million in commerce today is similar in impact to an offense affecting $400 thousand in 1991, and that the interval between $1 million and $2.5 million no longer captures the significant increase in harm that it did fourteen years ago.

Describing the interaction between the proposed § 2R1.1, the 2004 Act and the Division's Amnesty policy, Hammond told the Commission:

> 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

99. *Id.* at 5-6.

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> 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.[100]

B. *Actual Amendments to § 2R1.1*

Although not amended exactly as proposed by the Antitrust Division, the Commission's adopted version of section 2R1.1 differed only slightly from the Division's proposed version.[101] The first difference between the Division's proposed amended version of § 2R1.1 and the version that the Commission actually adopted was that the Commission chose to use a base offense level of twelve rather than thirteen.[102] This decision appears to have been made because the base offense level for a fraud involving sophisticated means is twelve,[103] and amending § 2R1.1 to also have a base offense level of twelve provides for penalties proportionate to and coextensive with those for violations of § 2B1.1. In its commentary, the Commission wrote that the amendment "responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds sentenced under § 2B1.1." The Commission added that the "higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under § 2B1.1."[104]

The second difference between the Division's proposed version section § 2R1.1 and the Commission's adopted version of § 2R1.1 is that the Commission added an additional volume of commerce adjustment at the top end.[105] This meant that the adopted version added two units to the offense level when the volume of commerce exceeded $1.5 billion, making it an offense

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100. *Id.* at 11.

101. *See* center and right columns *infra* Table 1.

102. *See* U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (2004) (amended 2005); *see also* Hammond, Testimony, *supra* note 7.

103. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2B1.1(b)(9)(C) (2004) (amended 2005).

104. *Id.*

105. *See* § 2R1.1; *see also* Hammond, Testimony, *supra* note 7.

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level of twenty-eight.[106] The proposed version had an offense level of twenty-eight for a volume of commerce exceeding $1 billion.[107] This additional volume of commerce adjustment at the top end was put in place by the Commission to provide "greater deterrence of large scale price-fixing crimes."[108] Even with the additional volume of commerce adjustment in the adopted version of § 2R1.1, its adjustment levels and the corresponding volumes of commerce still track very closely with those of the proposed version of § 2R1.1.[109]

V. *BOOKER*.

The Supreme Court's decision in *Booker* has raised several issues which may impact implementation of the 2004 Act and the amendments to § 2R1.1. As of March 30, 2005, the Division has had nine post-*Booker* sentencings.[110] In eight of the nine, the court sentenced according to the Guidelines (although every sentence was not a Guideline range sentence because of reductions for substantial assistance or ability to pay downward departures).[111] These sentences included an $84 million fine and $10.5 million fine imposed under the alternative fine statute (the synthetic rubber cases—DuPont Dow Elastomers and Zeon Chemicals) and a thirty month jail sentence for an individual convicted at trial (Dan Rose).[112]

A. *The Burden of Proof after* Booker.

Regarding fines greater than $100 million under the alternative fine provisions, there appears to be an issue regarding the appropriate burden of proof of the amount of gain or loss attributable to the defendant. In litigated cases where a fine above the Sherman Act maximum (now $100 million) is sought, the Division will allege the amount of gain or loss in the indictment and will be prepared to prove that amount to a jury beyond a reasonable doubt.[113] Strong incentives would still exist,

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106. *See* §2R1.1.

107. Hammond, Testimony, *supra* note 7.

108. § 2R1.1(a), cmt. n.2, *supra* note 102.

109. *See infra* Table 1.

110. Scott D. Hammond, Deputy Assistant Att'y General for Crim. Enforcement Antitrust Div., U.S. Dep't of Just., Antitrust Sentencing In The Post-Booker Era: Risks Remain High For Non Cooperating Defendants, Presentation Before the American Bar Association Antitrust Section Spring Meeting 1 (Mar. 30, 2005), http://www.usdoj.gov/atr/public/speeches/208354.htm.

111. *Id.*

112. *Id.*

113. *Id.*

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however, for corporations to agree to specific fines under the alternative fine statute, 18 U.S.C. § 3571(d), in plea agreements, including: (1) the certainty of an agreed-upon fine, (2) substantial assistance fine reductions, (3) non-prosecution coverage for some executives, (4) favorable plea agreements for other executives, (5) possible limitations in the scope of the offense charged or attributable commerce where the company reveals conduct the Division has not yet uncovered, and (6) the opportunity for amnesty plus for revealing an additional cartel.

In the event a corporate case goes to trial where the Division seeks a fine above the Sherman Act maximum, it can be expected that there will be dueling experts regarding gain or loss. The plain language of the statute indicates that the gain or loss referred to in section 3571 refers to the *gain or loss attributable to the entire cartel*, not just gain or loss attributable to the defendant.[114] This should lessen the burden in proving gain or loss.

B. *The twenty percent presumption after* Booker.

Since *Booker* rendered the Sentencing Guidelines advisory, all of the sentencing factors set out in the Guidelines for calculating an appropriate sentence can still be determined by the judge.[115] While judges no longer are obliged to sentence according to the Guidelines, the *Booker* Court noted that district courts "must consult those Guidelines and take them into account when sentencing."[116] In any event, the twenty percent presumption is not a fact that increases a defendant's sentence but a determination by the Commission that the relevant sentencing fact for computing antitrust fines for organizations is the "volume of affected commerce" rather than "loss."

C. *Certainty in Criminal Enforcement after* Booker.

Although the Guidelines are now advisory rather than mandatory, the Division will continue to seek Guidelines sentences. The Guidelines have promoted consistency in sentencing, and in almost all of the Division's post-*Booker* sentencings, courts have continued to impose sentences consistent with the Guidelines. While most commentators and

114. *See* Spratling, Trend, *supra* note 21, at 5.

115. *See* United States v. Miller, 417 F.3d 358, 362 (3d Cir. 2005) (holding that a district judge may make sentencing findings pertinent to the guidelines by a preponderance of the evidence).

116. United States v. Booker, 543 U.S. 220, 264 (2005).

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defense attorneys have focused on the greater ability of judges under *Booker* to sentence below Guidelines ranges, defendants should be reminded that *Booker* gives judges a concomitant ability to sentence *above* Guidelines ranges.

VI. CONCLUSIONS

Awarding a more enticing first-place prize and magnifying the penalties for all other participants, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 makes winning the "race to the prosecutor" more critical than ever. This remains true even after the *Booker* decision. Ironically, it can be said that today the question facing those who conspire to avoid competition in the marketplace is whether or not to win the contest for amnesty.

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Table 1.

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

Current § 2B1.1		**§ 2R1.1 as Proposed**		**§ 2R1.1 as Amended**	
Loss	Offense Level	Volume of Commerce	Offense Level	Volume of Commerce	Offense Level
Base	6	Base	13	Base	12
More than $200,000	18	More than $1,000,000	14	More than $1,000,000	14
More than $1,000,000	22	More than $5,000,000	15	More than $10,000,000	16
More than $1,000,000	22	More than $10,000,000	16	More than $40,000,000	18
More than $2,500,000	24	More than $20,000,000	17	More than $100,000,000	20
More than $7,000,000	26	More than $40,000,000	18	More than $250,000,000	22
More than $7,000,000	26	More than $80,000,000	20	More than $500,000,000	24
More than $20,000,000	28	More than $160,000,000	22	More than $1,000,000,000	26
More than $50,000,000	30	More than $320,000,000	24	More than $1,500,000,000	28
More than $100,000,000	32	More than $640,000,000	26		
More than $200,000,000	34	More than $1,000,000,000	28		