Sentencing Individuals In Antitrust Cases: The Proper Balance

BY DONALD C. KLAWITER AND JENNIFER M. DRISCOLL

ENFORCEMENT AGAINST CARTELS HAS been the great success story of recent antitrust history, both in the United States and around the world. Since the advent of international cartel enforcement in 1995, penalties for such misconduct have increased dramatically and individual accountability has become the centerpiece of U.S. cartel enforcement. Five years ago, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)[1] increased the maximum penalty for corporations ten-fold ($10 million to $100 million fines) and penalties for individuals more than three-fold (from 3 years to 10 years imprisonment, and from $350,000 to $ 1 million in fines). However, because deterrence is a function of effective detection and prosecution, the harsh penalties represent a hollow threat unless there is also vigorous, timely, and successful enforcement.

In considering the future of antitrust sentencing of individuals under the higher penalties of ACPERA, it is essential to properly balance the impact of higher penalties against the importance of successful prosecution, which is primarily based on timely cooperation from the defendants themselves. These are the two elements of optimal deterrence. The proper balance lies not in the "lock them up and throw away the key" rhetoric of a few in Congress but in pragmatic negotiation by the parties, guided by the statutory mandate of 18 U.S.C. 3553(a), which provides for sentencing that is "sufficient but not greater than necessary," given, *inter alia*, the nature and circumstances of the offense and the history and characteristics of the defendant. That pragmatism is responsible for the great success of U.S. cartel enforcement and should continue to guide the enforcers and the courts under ACPERA.

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Antitrust Sentencing of Individuals— From Senator Sherman to ACPERA

Long before the passage of ACPERA in 2004, there was considerable debate about the wisdom of using prison sentences to punish and deter individuals from committing antitrust violations. Although antitrust violations were subject to criminal penalties from the enactment of the Sherman Act in 1890, for the first eighty-four years of its history, violations were a misdemeanor, punishable by a maximum of one year in jail.[2]

The first jail sentences were very short: in 1921 four individual contractors were sentenced to a total of ten months imprisonment.[3] The next prison sentences were not imposed until 1959 and consisted of ninety-day sentences for each of four individuals who fixed the prices of hand tools.[4] The trend toward relatively short sentences continued through the blockbuster electric equipment conspiracies, which resulted in seven individuals receiving sentences of between two to six months.[5]

Even after Congress made antitrust violations a felony on December 21, 1974, and increased the maximum prison sentence to three years, jail sentences were meted out sparingly and inconsistently. The Antitrust Division attempted to raise judicial consciousness of the seriousness of antitrust offenses and created its own guidelines for antitrust sentencing,[6] but the Division still had very limited success in obtaining prison sentences.[7] It was only the creation of the U.S. Sentencing Commission[8] in 1984, and the implementation of the Sentencing Guidelines in 1987,[9] that set forth a definite, transparent, and consistent process for sentencing individual offenders and increased the number and duration of antitrust prison sentences significantly. This represented a turning point in antitrust enforcement. Yet, even with the new Guidelines, only 37 percent of antitrust defendants served jail time, for an average of eight months, in the 1990s.[10] In 2004, ACPERA took effect, and with it came the advent of today's antitrust enforcement.

The Movement for Stricter Sentences. The momentum for harsher antitrust sentences had been growing for years. For antitrust enforcers and practitioners, the late 1990s was an era of blockbuster international cartels, such as the massive vitamins conspiracy that resulted in over twenty prosecutions and the highest corporate antitrust fines of all time. Following on the heels of these blockbuster cartels, a new epoch of corporate lawlessness descended—typified by the scandals engulfing Enron, World Com, and Tyco. In response to these alarming instances of corporate malfeasance, the Sarbanes-Oxley Act passed in 2002,[11] substantially increasing penalties for fraud, obstruction of justice, and other white collar offenses. Although the lack of hearings and sparse legislative history for ACPERA makes it difficult to ascertain Congressional intent, the consensus is that ACPERA was intended to bring antitrust penalties in line with other white collar offenses and promote deterrence with the threat of big fines and long prison sentences.[12] The high penalties signaled that executives would no longer receive a slap on the wrist while shareholders and consumers suffered the consequences of the executives' misconduct. White-collar defendants would be treated like "real criminals" and serve serious jail sentences rather than home detention or probation.

At the same time, there was a backlash from academics and practitioners who feared that the higher penalties would dissuade competition regimes that imposed lesser penalties, if any, from cooperating with the U.S. authorities.[13] Some commentators went even further, and argued that jail time for the non-violent corporate criminal was a waste of taxpayer money. In lieu of jail time, the adherents of this school of thought suggested that optimal deterrence for antitrust and other white collar offenders would best be achieved by very high fines, which would also be cheaper to administer and socially preferable.[14]

ACPERA, the Sentencing Commission, and the New Antitrust Guideline. Once ACPERA became law,[15] the Antitrust Sentencing Guideline[16] needed to be revised, leading to a seminal hearing before the U.S. Sentencing Commission. The Commission's Federal Register Notice[17] initially proposed that the base offense level for individuals should increase significantly from 10 to 14, which would raise base sentences from 6–12 months to 15–21 months before any other factors were considered.[18] The U.S. Department of Justice Antitrust Division responded to the Sentencing Commission's notice by proposing that (1) the base offense level for an antitrust violation increase from 10 to 13; and (2) the volume of commerce table used to adjust individual sentences be expanded significantly so that ten-year sentences could be achieved in the most serious cases.[19] The Antitrust Division argued forcefully that Congress had two purposes in drastically increasing the penalties: "to recognize that criminal antitrust violations are serious white-collar crimes meriting punishment more commensurate with other serious white collar crimes" and "to provide additional deterrence to large-scale cartel violations of the type the Department continues to uncover"[20]—a forceful position given ACPERA's meager legislative history.[21]

The other parties commenting and testifying raised a host of issues for the Commission to consider. Citing 18 U.S.C. § 3553(a), which sets out the factors to weigh when deciding upon a reasonable sentence, witnesses argued for sentences that were "sufficient, but not greater than necessary" to comply with the purposes of the Sherman Act.[22] The Commission entertained a lengthy discussion of whether higher sentences would in fact increase deterrence or whether they would inadvertently decrease it by making it less likely that individuals would cooperate, delay new cases for lack of proof, and force more cases to trial on weaker evidence.[23] One witness provided data that under the existing three-year maximum sentence, only 3 out of 166 sentences were within the top half of the sentencing range. Thus, there was ample room to impose tougher sentences even if the three-year ceiling remained in place.[24] In the end, the Sentencing Commission forged a moderate path. The Commission raised the base offense level by two levels to twelve, but reconfigured and expanded the volume of commerce levels, albeit somewhat differently from what the Division proposed.[25] The result was a structure that would raise most sentences only modestly, but contemplated severe sentences for offenses that had the greatest impact on consumers, i.e., the highest volumes of commerce.

The moderate approach to the Antitrust Sentencing Guidelines was still a clear shift from the Commission's initial position on antitrust prison terms. Although from the inception of the Antitrust Guideline in 1987 the Application Notes stated that "the most effective method to deter individuals from committing this crime is through the imposition of short sentences coupled with large fines,"[26] that language was removed by the Sentencing Commission in 2005. The new Background Statement to the 2005 Application Notes urged that "prison sentences for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice."[27] The Commission also instructed that "[a]bsent adjustments, the guidelines require some period of confinement in the great majority of the cases that are prosecuted, including all bid-rigging cases."[28] Even here, however, the Commission adopted a pragmatic approach by shunning the far stronger commentary advocated by Congressman Sensenbrenner that was cited by the Antitrust Division in its statements and testimony.[29] In doing so, the Commission took into account what it considered at its hearing: cooperation from defendants and plea negotiations for the vast majority of antitrust cases would achieve the appropriate level of enforcement and deterrence.

While the new Guidelines have been in effect since November 2005, they remain largely untested given the relatively few cases brought thus far under ACPERA,[30] and we have yet to see prison sentences in the top half of the new sentencing range. As the Obama Administration, which has pledged more vigorous enforcement of antitrust laws, takes the helm of the Division, it is appropriate to reflect on how the Antitrust Division should use sentencing to achieve optimal levels of detection and prosecution.

What Is the Right Sentencing Balance for Individual Offenders?

Many discussions of deterrence and sentencing focus on the economic impact of punishment.[31] While that is an important basis for study, the risks and probabilities that a putative wrongdoer assigns to his decisions also shed considerable light on the issue. Then, once the wrongdoer becomes a target of an investigation, a new calculus unfolds as he struggles with unique concerns ranging from the practical—e.g., the decision to cooperate or contest the charges—to the intangible—e.g., emotional distress.

On the other hand, in the absence of recorded evidence, enforcers grapple with how to prove beyond a reasonable

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doubt that ambiguous statements or conduct amount to unlawful collusion. If sentencing depends on sloughing through too-close-to call scenarios and difficult trials rather than the more streamlined plea process afforded by Federal Rule of Criminal Procedure 11(e)(1)(b)–(c), no one benefits. Nonetheless, tilting the negotiation balance too far in either direction can have grave consequences. The passage of ACPERA raised serious concerns that the balance was being shifted too far in favor of the prosecution by the requirement of much harsher sentences, but, in reality, the sentences under ACPERA thus far have achieved the sought-after balance. This is so because the vast majority of individual defendants are able to negotiate a resolution they can tolerate and very few defendants are forced to proceed to trial.

In looking to effective sentencing under ACPERA, the following principles can be distilled from recent cartel enforcement history.

There Is General Consensus in the United States that Jail Sentences Are Warranted and Effective. While there is still spirited international debate on the propriety of prison sentences and whether they deter antitrust violations, there is general consensus in the U.S. antitrust community that most executives who violate the antitrust laws by fixing prices, rigging bids, and allocating market shares, markets, or territories should serve prison sentences.[32] Because of the Sentencing Guidelines and the unwavering determination of the Antitrust Division, the U.S. antitrust defendant almost always understands that the question is not whether he will go to prison, but for how long.[33] The Antitrust Division has been enormously successful at persuading defendants to plead guilty and cooperate in exchange for some reduction in sentences. That has worked so long as the sentences remain in a reasonable time range.

Over the Past Decade, the Impact of a Jail Term on an Executive Has Changed Dramatically. It is not only the length of an antitrust prison sentence that has changed dramatically in the past fifteen years. While imprisonment might have been viewed as humiliating for the defendant and his family, the sixty or ninety-day sentences of the pre-1995 case were usually treated by executives and companies alike as a brief career diversion or leave of absence. Corporate ethics, compliance, and governance are markedly different today, and the repercussions imposed on the individual reflect this reality. Today, the stigma attached to an antitrust felon going to prison makes it impossible for the individual to continue in his job or profession, even if the executive owns or controls the company. The consequences are even more dire at a public company, which is unlikely to assume the risk of running afoul of the Sarbanes-Oxley Act by retaining, rehiring, or supporting the tainted executive—no matter how important he was before the investigation.[34] Because the impact of incarceration has a multiplier effect on the antitrust violator, the time served, although traumatic in its own right, is far less relevant than the fact that he was in prison and the circumstances the executive confronts upon leaving prison.

The Incentives to Cooperate Have Made Antitrust Cartel Enforcement Extremely Successful. The Antitrust Division has also been enormously successful at persuading antitrust defendants to cooperate and forgo their right to contest evidence at trial in return for shorter jail sentences. A jail sentence can be reduced substantially through a downward departure if an executive accepts responsibility for his misconduct and provides evidence to the government.[35] Significantly, over 56 percent of antitrust defendants have received downward departures in the pre-2005 sentencing statistics.[36] However daunting self-incrimination seems, cooperation becomes a very rational decision when doing so can substantially trim a sentence to a tolerable range—and that can be served in major part before a trial would even begin.

If the Recommended Sentences Are Too Extreme, There Will Be Adverse Unintended Consequences for the Enforcers. If the sentences recommended by the Division are too harsh, antitrust defendants are more likely to roll the dice and go to trial, diverting valuable Division resources to trial preparation when they could be used to detect new cartels. Therefore, the Antitrust Division must balance its antipathy for the underlying offense with a measure of pragmatism when calculating sentences for defendants, particularly when determining the volume of commerce and level of culpability attributed to the individual, which can ratchet up a sentence substantially.

Large international cartels are surprisingly difficult for the Division to prove because the parties are often sophisticated and evidence is usually scattered around the globe. In these cases, the Division needs not one but multiple witnesses from more than one company to build a solid and successful case for trial. If fewer targets cooperate and instead go to trial, the Division faces two difficulties: first, it will take them much longer to collect the evidence needed to charge the non-cooperating targets; and, second, the Division will be forced to try, and possibly lose, important and highly publicized cases. Quite simply, if the Division cannot obtain sufficient evidence from cooperating witnesses, it will not bring a case, even if prosecution is warranted.

When the Division is taken to trial with less than optimal proof, the stakes in a headline case soar higher. If the Division ultimately wins the case, it does so at great cost: while it is preparing for and trying the case, its scarce resources are not investigating additional violations. This sacrifices detection, which is a major component of the deterrence equation. If it loses the case in an important matter, it emboldens defendants to take their cases to trial and weakens the deterrence equation.

None of this suggests that the Division should fear trials or compromise on effective sentencing. It simply means that the Division should carefully balance the length of its desired sentences against its ultimate goal of detecting and convicting a greater number of serious violators.

Decisions to Go to Trial Weigh Down the Justice System. The defendant's decision changes dramatically when the Antitrust Division proposes a sentence of five years or more as the deal for cooperation. The prospect of five years out of society and away from the family, especially for an executive in his fifties or sixties, means a significant portion of his life will be given up. The incentive to take your chances, even if there is the prospect of a higher sentence if you are unsuccessful, is not as great a risk for the defendant if the sentence is already significant. In the end, the uncertainties of trial are great for both parties in that setting.

The further complication develops if *several* key defendants opt for trial, opening up the prospect of a one witness or one company prosecution, discussed above. This places the Antitrust Division in a very difficult position of trying more cases with less evidence. If the Division loses some of these highly publicized, high volume of commerce cases, it further increases the odds that more of these defendants will risk the stress and uncertainty of trial and put the Division to its proof.

Having represented numerous executives who had to choose between the twelve to eighteen-month deal and taking the case to trial, we can attest that the natural tendency of these executives—and certainly of their families—is to take the case to trial to clear their name and to return to their employment. The attractiveness of the deal needs to overcome their natural desire to fight the charges. If the deal is not attractive enough, and they believe they have no choice, senior corporate executives with the mental toughness and financial means to do so will put the Antitrust Division to its proof much more regularly. The ADM defendants in the lysine case are a case in point. Knowing they were facing sentences approaching the then three-year maximum regardless of what they did, two individuals proceeded to trial and appeal in the face of videotape evidence against them in the hope that something would happen with the judge or jury to make their situation better. There, it did not, but the Division was forced to put in the time and enormous expense of a long trial and appeal.

Even at the 2005 Sentencing Commission hearing, an Antitrust Division official conceded that the Division's quest for much higher sentences could force more cases to trial and alter the careful balance that has made cartel enforcement such a great success.[37] It will ultimately be their decision.

The Impact on Cooperation to Non-U.S. Citizens. ACPERA's higher sentences will affect cooperation by executives located outside the United States and jurisdictions that are the Division's partners in anti-cartel enforcement. The vast majority of corporate defendants in major cartel cases are corporations headquartered outside the United States. Of the sixty-five corporations that have been fined $10 million or more over the past decade, only eight are U.S. headquartered operations.[38] Non-U.S. executives are thus involved heavily in the actions of their employers and have provided many of the major cooperating witnesses in international cartel cases over the past decade.

It took many years for most of the international enforcement community to support serious enforcement of cartel violations and to cooperate fully with the United States. From the mid-1990s, cooperation developed step-by-step to the point where multiple jurisdictions have coordinated the initiation of their public investigations simultaneously with the United States, as is the case in the air cargo and marine hose investigations. While serious disagreement with the U.S. enforcement policy to imprison executives for antitrust violations remains, a peaceful coexistence has developed so long as non-U.S. citizens are treated less harshly than U.S. citizens.

When the international cartel cases started in earnest in the mid-1990s, U.S. enforcers were careful not to recommend prison sentences for citizens of other jurisdictions with which it did not have extradition arrangements. To obtain their valuable cooperation, non-U.S. citizens who surrendered to U.S. jurisdiction were assured that they would not serve jail time and, at the same time, would be allowed to travel freely to the United States after conviction. The "no jail" policy primed the pump in early international cases, such as citric acid and graphite electrodes, by developing substantial proof when leniency was not the major factor in the case. This policy changed in 1999 to assure fairness to the U.S. executives who were being sentenced to prison while their non-U.S. counterparts—and often leaders and organizers of the criminal conspiracies—were neither imprisoned nor forfeiting their jobs. Under the policy shift beginning with the vitamins cases, non-U.S. executives became subject to short custodial sentences in exchange for their surrender to U.S. jurisdiction and their valuable cooperation. The shorter sentences for non-U.S. citizens have increased gradually from three to four months to eight or nine months.

The key questions are whether the sentences for non-U.S. citizens surrendering to U.S. jurisdiction from their home countries will be increased substantially to reflect ACPERA and what impact that will have on the substantial cooperation of non-U.S. executives. Non-U.S. executives, weighing the cost of a longer incarceration in the United States against restrictions on their ability to travel freely, may well opt to stay home and avoid U.S. jurisdiction. Many defendants have already done exactly that rather than spend even a short time in a U.S. prison. While it limits them as international business executives, it keeps them out of U.S. jails. If the decision is made to increase the sentences of these individuals to apply ACPERA proportionately, the potential cooperation of many non-U.S. executives may disappear, further hampering the development of strong triable cases. This would be a serious blow to U.S. enforcement.

The Appropriate Balance

Despite the "lock them up and throw away the key" rhetoric of then-Congressman Sensenbrenner[39] and a few of his fellow ACPERA sponsors, the sentencing process for antitrust offenses needs to be administered pragmatically so that enforcers can encourage and obtain the cooperation that is the key to detection and prosecutorial efficiency and success. The enormous success of the sentencing process in antitrust cases over the past decade strongly suggests that the Antitrust Division should continue to bargain as it has traditionally. Any attempt to ratchet up sentences through a broad, inclusive interpretation of affected commerce should be tempered by also rewarding cooperating defendants with significant downward departures for helpful witnesses and reduced sentences for non-U.S. defendants who willingly submit to U.S. jurisdiction. To maintain the balance that results in more convictions in shorter investigation time resulting in greater deterrence, we respectfully offer four principles on sentencing practice and policy to the new Administration.

First, do not fall prey to the numbers game. Despite the attraction of high workload statistics and being able to boast that the length of this year's sentences far surpasses last year's, sentences should, under the mandate of 18 U.S.C. § 3553(a), be "sufficient, but not greater than necessary." While an antitrust offender is a potential danger to the business community and, thus, to the economic welfare of the nation, he does not pose a physical threat to society. The duration of a prison sentence should be proportionate to the severity of the offense, bearing in mind that most executives will be punished for the rest of their lives through collateral effects, such as unemployment, financial hardship, and disqualification from participating in the economic affairs of the nation.

Second, remember that the Sentencing Guidelines are advisory, not mandatory. After a brief period of indecision and concern, the Antitrust Division and the courts continue to apply the Guidelines as they did before the *Booker*[40] decision. Courts have the inherent power under Booker to ask why and to invoke Section 3553(a). The parties need to be prepared to justify their arrangement.

Third, interpret the Guidelines' factors in aggravation and mitigation fairly. Attempts to expand a company's volume of commerce by counting sales tax and accessories or transactions that do not touch U.S. commerce except for, perhaps, the delivery of an invoice to headquarters in Texas should be avoided. Similarly, the Guidelines' role in the offense levels is meant to distinguish a ringleader from passive participants—not every wrongdoer can or should qualify for a 4-level increase in his sentencing score. If effective cooperation can be purchased at a slightly lower level, there is no need to overreach.

Finally, perfect deterrence is a worthy, but elusive, goal—particularly in white collar cases like antitrust, where the executive knows the risk but often believes he can "beat the system" or caves to the pressure to keep his business profitable. Unless human nature or the shareholder short-term objectives suddenly evolve, even extreme sentences will not eradicate violations of the antitrust laws.

Despite ACPERA and the rhetoric that accompanied it, the sentencing process in antitrust cases has served enforcers well, by providing cooperative witnesses and persuading defendants to settle short of trial. The transparency, proportionality, and incentives for cooperation also benefit the putative defendant. The challenge in an era of bigger, international cases is to continue to maintain the balance that has made recent U.S. cartel enforcement the most successful in antitrust history. ■

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1 Antitrust Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004), 118 Stat. 665 (2004).

2 For an excellent detailed discussion of early prison sentences in antitrust cases, see Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, Eur. Competition J. (forthcoming 2009), *available at* http://www.usdoj.gov/atr/public/articles/240611.htm.

3 *Id.*; United States v. Alexander & Reid, 280 F. 924, 927 (S.D.N.Y. 1922).

4 United States v. McDonough Co., 1960 Trade Cas. (CCH) ¶ 69,695 (S.D. Ohio, Dec. 9, 1959) (ninety-day sentence).

5 Charles A. Bane, The Electrical Equipment Conspiracies 16 (1970).

6 U.S. Dept. of Justice Antitrust Division, Guidelines for Sentencing: Recommendation in Felony Cases Under the Sherman Act (Feb. 24, 1977), *reprinted in* J. Clabault & M. Block, Sherman Act Indictments: 1955–1980 (1981).

7 Werden, *supra* note 2.

8 Sentencing Reform Act of 1984, 18 U.S.C. § 3551.

9 U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements (Apr. 13, 1987), *reprinted in* 52 Fed. Reg. 18,046 (May 13, 1987).

10 Scott D. Hammond, Deputy Assistant Att'y Gen. U.S. Dep't of Justice Antitrust Div., Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program 5–6 (Mar. 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/232716.htm.

11 Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201.

12 The Antitrust Division was very circumspect about the legislation increasing penalties; it did not appear to publicly promote the increases—but there was absolutely no doubt that the "technical assistance" it said it provided was, in fact, being the architect of the legislation.

13 Comments of the ABA Section of Antitrust Law on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Commission 23 (Mar. 24, 2005) [hereinafter ABA Comments]. *See also* Elizabeth Szockyj, *Imprisoning White Collar Criminals*, 23 S. Ill. U. L.J., 485, 502 1999); Michael Kent et al., *The Deterrent Effect of Criminal Enforcement*, 89 J. Pol. Econ. 429, 429 (1981).

14 Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 Am. Crim. L. Rev. 409, 409 (1979–80).

15 ACPERA became law literally days before the U.S. Supreme Court decision in *United States v. Blakely*, 542 U.S. 296 (2004), which established that federal judges should have greater discretion in sentencing than what was afforded in the U.S. Sentencing Guidelines. *United States v. Booker*, 543 U.S. 220 (2005), further clarified the Court's thinking and held that the Sentencing Guidelines were advisory. The Blakely/Booker effect became another factor that could affect sentencing policy significantly. In fact, after an initial period of concern and panic by prosecutors and lower courts, the courts have generally continued to embrace the Sentencing Guidelines, carefully

noting in each case that they are advisory, but applying them as surely as if they were mandatory.

[16] U.S. Sentencing Guidelines Manual § 1R1.1 (2005).

[17] Sentencing Guidelines for United States Courts, 70 Fed. Reg. 8868–72 (Feb. 23, 2005).

[18] The calculation of the appropriate sentence for an individual antitrust offender is set out clearly in the U.S. Sentencing Guidelines. U.S.S.G. § 2R1.1. The calculation begins with the base offense level. Added to that are a number of factors in aggravation, including the volume of commerce affected by the defendant's company, the role in the offense, whether the conduct involved bid rigging, and whether the defendant obstructed justice. Levels are added for the factors that apply to that defendant. Factors in mitigation usually involve acceptance of responsibility for the conduct. The final "score" is then applied to the sentencing table, which provides a sentencing range for the court. It is at this point that the upward or downward departures are applied, usually downward departures for exceptional cooperation.

[19] Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, U.S. Dep't of Justice Antitrust Div., Testimony Before the U.S. Sentencing Comm'n 1–2 (Apr. 12, 2005), *available at* http://www.usdoj.gov/atr/public/testimony/208546.pdf.

[20] *Id.*; *see also* 150 Cong. Rec. H3651 (daily ed. June 2, 2004) (statement of Rep. Sensenbrenner).

[21] The Justice Department has not been the lone voice in advocating substantial jail time for antitrust offenses. The ABA Section of Antitrust Law also commented to Congress and the Sentencing Commission that incarceration is the appropriate penalty for these offenses. *See* ABA Comments, *supra* note 13. Other witnesses and the Sentencing Commissioners themselves expressed a strong view that these offenses are a form of stealing and fraud and there is no economic defense to the conduct.

[22] Donald C. Klawiter, Chair-Elect of the ABA Section of Antitrust Law, Testimony Before the U.S. Sentencing Comm'n (Apr. 12, 2005), *available at* http://www.ussc.gov/hearings/04_12_05/Trans_0412.pdf.

[23] *Id.*

[24] James Felman, Practitioners Advisory Group, Testimony Before the U.S. Sentencing Comm'n (Apr. 12, 2005), *available at* http://www.ussc.gov/hearings/04_12_05/Trans_0412.pdf.

[25] U.S. Sentencing Guidelines Manual § 2R1.1 (2005).

[26] U.S.S.G. 2R1.1 comment n.8 (2004).

[27] U.S.S.G. 2R1.1 background (2005).

[28] *Id.*

[29] Hammond, *supra* note 19, at 1.

[30] The Antitrust Division would not recommend a sentence under ACPERA or the subsequent November 2005 Guidelines for any violation where the conduct did not continue beyond the operative date of ACPERA, June 22, 2004. *See* Hammond, *supra* note 10, at 2.

[31] *See supra* notes 13 and 14.

[32] ABA Comments, *supra* note 13, at 1–2.

[33] In 2007, 87 percent of antitrust defendants who were sentenced received a prison sentence, contrasted with 37 percent in the 1990s. Hammond, *supra* note 10, at 5.

[34] Donald C. Klawiter, *Please Show This to Senior Executives: Risks of Antitrust Investigations in the Courtroom and the Boardroom*, COMPETITION L. INT'L, Oct. 2006, at 32.

[35] U.S. Sentencing Guidelines Manual § 5K1.1 (2005).

[36] Felman, *supra* note 24.

[37] Hammond, *supra* note 19, at 10–11.

[38] U.S. Dep't of Justice Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.usdoj.gov/atr/public/criminal/sherman10.htm.

[39] Sensenbrenner, *supra* note 20.

[40] United States v. Booker, 543 U.S. 220 (2005).