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# Comments to the U.S. Sentencing Commission Concerning Antitrust Fines

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The American Antitrust Institute

July 18, 2014

United States Sentencing Commission  
One Columbus Circle, NE,  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

*Attention Public Affairs - Priorities Comment*

Dear U.S. Sentencing Commission:

We are writing pursuant to the Commission's Federal Register Notice of Proposed Priorities and Request for Public Comment, June 2, 2014, in which the Commission is seeking public comment on proposed priority policy issues for the amendment cycle ending May 1, 2015.<sup>1</sup> The Commission identified as being among its tentative priorities: "2) Continuation of its work on economic crimes, including... (C) a study of antitrust offenses, including examination of the fine provisions in §2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors); and (D) consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such studies."

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Our mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. We promote the vigorous use of antitrust as a vital component of national and international competition policy.<sup>2</sup>

We are delighted the Commission is considering a study of the Guidelines' antitrust fine provisions. Specifically, we urge the Commission to reconsider a crucial empirical finding it made in 1987 that has become a lynchpin of the formula it uses to calculate fines for collusion offenses. The 2013 Guidelines Manual, Chapter Two - Offense Conduct, Part R - Antitrust Offenses, Section 2R1.1, Commentary 3, reads as follows:

"3....In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price.... The purpose for specifying a percent of the volume

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<sup>1</sup> [http://www.uscc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20140602\\_FR\\_Proposed\\_Priorities.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20140602_FR_Proposed_Priorities.pdf)

<sup>2</sup> Founded in 1998, AAI is a 501(c)(3) tax exempt Washington, D.C. corporation. For more information see <http://antitrustinstitute.org>

of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.... "<sup>3</sup>

The antitrust enforcers almost always use this 10% estimate when they negotiate cartel fines with defendants. It has effectively become a strong presumption that in practice Defendants rarely challenge and the Courts routinely accept.<sup>4</sup>

We are providing these comments to make three important points, all of which concern the Guidelines' cartel overcharge presumption. First, the evidence demonstrates there currently is significant underdeterrence of price fixing and other anticompetitive forms of collusion. Second, the general approach to calculating cartel fines embodied in the US Sentencing Commission Guidelines, under which the enforcers and ultimately the courts calculate antitrust fines based upon a very specific presumed overcharge, is sound and in the public interest. Third, the 10% cartel overcharge presumption in the Guidelines is much too low. The best evidence demonstrates that the Commission should double it, to 20%. This would conform it more closely to the median or average overcharge likely to result from collusion, yet still be a conservative resolution of the issues. Raising the 10% presumption should increase the overall level of cartel deterrence which will benefit consumers greatly.

#### The Current Level Of Cartel Sanctions Is Suboptimal

The United States imposes a diverse arsenal of sanctions against cartels.<sup>5</sup> Nevertheless, cartels probably are caught and convicted no more than 25% of the time,<sup>6</sup> and illegal collusion historically has usually resulted in large overcharges: the median of cartel overcharges has been 23% over time, and the mean of cartel overcharge over time has been 49%.<sup>7</sup>

To determine whether the current level of sanctions are optimal, Connor & Lande used the standard optimal deterrence approach.<sup>8</sup> This assumes corporations and individuals contemplating

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<sup>3</sup> See [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/2r1\\_1.htm](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/2r1_1.htm) Commentary 3 also explains why this 10 percent figure is doubled to account for a number of factors before it is included in the fine determination calculations. "The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3)." As the Guidelines note: (d) Special Instructions for Fines - Organizations (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce. We believe this doubling is warranted due to a large number of factors. Id. This Commentary also notes that in special cases a different overcharge amount can be used: "In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range. Id.

<sup>4</sup> See John M. Connor & Robert H. Lande, How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines," 80 Tulane L. Rev. 513, 524 (2005). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917657](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657) Lande is a Director of the American Antitrust Institute and Connor is a Senior Fellow.

<sup>5</sup> These include criminal fines and restitution payments for the firms involved, and prison, house arrest and fines for the corporate officials involved. Both direct and indirect victims can sue for mandatory treble damages and attorney's fees.

<sup>6</sup> See John M Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime pays," 34 Cardozo L. Rev. 427, 462-68 (2012). Their review of the literature shows a probability of 20-24%.

<sup>7</sup> Id at 427.

<sup>8</sup> Id. at 431-47. This study also employed a behavioral approach which reached the same conclusions. Id.

illegal collusion will be deterred only if expected rewards are less than expected costs, adjusted by the probability the illegal activity will be detected and sanctioned. To undertake this analysis they first calculate the expected rewards from cartelization using a new and unique database containing information on 75 cartel cases. They surveyed the literature to ascertain the probability cartels are detected and the probability detected cartels are sanctioned. They calculated the size of the sanctions involved for each case.<sup>9</sup>

Their analysis shows that, overall, United States' cartel sanctions are probably only 9% to 21% as large as they should be to protect potential victims of cartelization optimally.<sup>10</sup> This means that, despite the existing sanctions, collusion remains a rational business strategy. Cartelization is a crime that on average pays. In fact, it pays very well. Significantly higher cartel sanctions should be imposed, and this should save consumers many billions of dollars each year.

#### The Guidelines' Use of A Specific Overcharge Presumption To Calculate Fines Has Been Wise

The antitrust Sentencing Guidelines have, since their inception, employed a presumption as to the size of cartel overcharges, and have used this as the lynchpin of its fine calculations. This approach has proven to be extremely successful. It also is highly desirable from a policy perspective because it is more predictable and thus the best way to optimize the general deterrence of anticompetitive collusion, and also because it is much less expensive for the taxpayer and allows more cartels to be sanctioned.

The current approach is relatively predictable: prospective cartelists know their fine will be based upon the presumption that they overcharged by 10%. The presumptive approach sends a clear and easy to understand signal to would-be price fixers: if you fix prices and are caught, you usually will be subject to a fine based upon 10% of the affected volume of commerce.

This enhanced predictability helps to further the primary purpose of the antitrust Sentencing Guidelines: the general deterrence of anticompetitive collusion. The Guidelines should not simply incentivize those specific cartel members that have been caught to not do it again. Rather, the fines should deter would-be cartelists generally. The goal of general deterrence is especially important for a crime like price fixing which is extremely difficult to detect and prove.<sup>11</sup> It is much more important to prevent future price fixing throughout our economy than to calculate the "correct" penalty for past crimes. After all, the past can never truly be corrected through fines (indeed, that is what private actions are for). The best way to promote general deterrence is through the Guideline's current overcharge presumption method.

One might believe that instead the Guidelines should employ a case-by-case approach, requiring the prosecutors to calculate the precise size of the overcharges in every case and having fines

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<sup>9</sup> These include corporate fines, individual fines, payouts in private damage actions, and the equivalent value (or disvalue) of imprisonment or house arrest for the individuals convicted.

<sup>10</sup> Id. at 474-84.

<sup>11</sup> Id. at 462-68.

reflect these overcharges. This approach would appear to be "fair" to each defendant - penalizing price fixers according to the amount by which they raised prices.

Case-by-case overcharge calculations would, however, have many disadvantages. Predictability for business - the relatively clear signal embodied in the current Guidelines as to the consequences of price fixing - would decrease, and the deterrent effects of the Guidelines would be significantly undermined. This is especially true because, ex ante, what is crucial is the belief of potential cartelists as to how high they are likely to raise prices, how much they are likely to be fined, etc. These beliefs guide their decision as to whether they will attempt to form a cartel. The actual amount by which they raised prices or are fined- difficult and oftentimes controversial calculations that often only can be made years later - are much less important from a public policy perspective.

Case by case calculations also would be much more expensive for taxpayers (and for defendants) than the current system. It is impossible to determine how much litigation costs would increase if overcharges were ascertained in every case, but it surely would be substantial. It is often difficult to determine whether a group of firms conspired to fix prices. The ease of answering this question pales, however, compared to the costs of ascertaining how much prices rose as a result of a cartel.

Under the current fining approach the Department of Justice only needs to prove that collusion occurred and to show the amount of commerce involved. But it is not necessary for them to define the relevant market or markets that were affected, demonstrate that the defendants had the power to affect prices, or demonstrate that barriers to new competition enabled the cartel to keep its prices high<sup>12</sup> - tasks that are extremely formidable.<sup>13</sup> Nor are the prosecutors required to demonstrate how high prices in these markets had been elevated, or for how long. If the government were also required to demonstrate how high prices rose as a result of the cartel, its burden could increase substantially. Although it is impossible to know whether the amount of prosecutorial resources required to successfully prosecute a cartel would double or sextuple, it is clear that the increase would be significant. So would the amount of time required to complete the case.<sup>14</sup>

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<sup>12</sup> Price fixing is illegal regardless whether, or the extent to which, defendant affected prices, because the agreement to fix prices is illegal. For this reason the amount that prices changed, or even whether prices were affected at all, is not normally calculated in a criminal antitrust case. See sources cited in Connor & Lande, supra note 4, at 6, at 551-55.

<sup>13</sup> For some of the issues and complexities involved in calculating actual damages in overcharge cases see [Robert C. Marshall, Leslie M. Marx, The Economic of Collusion Cartels and Bidding Rings \(MIT Press 2012\)](#), Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules April 2006: Claire M. Korenblit, Quantifying Antitrust Damages- Convergence of Methods Recognized by U.S. Courts and the European Commission, CPI Antitrust Chronicle, march 2012(1); Kwoka & White, The Antitrust Revolution (6th Edition), CASE 11: Global Cartels Redux: The Lysine Antitrust Litigation (1996).

<sup>14</sup> See generally the sources id.

Indeed, the case-by-case approach to calculating cartel damages - under the pressures of a litigation setting - is so difficult, risky, expensive, controversial, uncertain, and lengthy that it has rarely been done even in private damages cases. Although thousands of private damage actions have been filed in cartel cases, due to these factors almost every private cartel damages suit settles or is dismissed before an overcharge can be calculated by a neutral observer and made part of the public record of the case.<sup>15</sup> Connor & Lande tried to find every final litigated cartel overcharge case in history but - perhaps surprisingly - were only able to find 25.<sup>16</sup> Although all parties in private cases attempt, to varying degrees before the case is settled or dismissed, to prove overcharges,<sup>17</sup> in reality this rarely has been done.

As a practical matter, if the Antitrust Division had to prove the size of the overcharges in each case it would be able to bring far fewer cases. This would lead to less cartel deterrence and would harm consumers and the economy generally. The only ones who would benefit would be cartelists and their attorneys.

Another advantage of the Guidelines' current presumption-based approach is that defendants can, if they wish, contest it. As the Guidelines' Commentary notes, in special cases a different overcharge amount can be used: "In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range."<sup>18</sup> Because, as the next section will demonstrate, the overwhelming majority of cartel overcharges greatly exceed 10%, it is not surprising defendants rarely challenge its use. But the possibility that defendants can contest it in appropriate cases is another reason to retain it.

#### The Guidelines' Presumption That Price Fixing Raises Prices by 10% Should Be Doubled

This 10% presumption has been in the Sentencing Guidelines since their inception,<sup>19</sup> and to our knowledge the Commission has never seriously re-examined this issue. Although we do not know how the Commission arrived at 10%, it may be significant that when the Commission was in the process of formulating these Guidelines the then-Assistant Attorney General for Antitrust, Douglas Ginsburg, stated in a Hearing before the Sentencing Commission that "price fixing typically results in price increases, that has harmed the consumers in a range of 10 percent of the price...."<sup>20</sup> We know of no other estimates presented to the Commission at that time, and the Commission might well have accepted and used AAG Ginsburg's estimate.

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<sup>15</sup> Of course, many private cartel cases are dismissed because they lack merit. For a discussion of settlement in this context, and why settlement amounts are likely to be an extremely unreliable guide as to the size of the underlying cases' overcharges see *id.*

<sup>16</sup> See Connor & Lande, *supra* note 6, at 556.

<sup>17</sup> The only exceptions are in those cases that are dismissed early.

<sup>18</sup> See [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/2r1\\_1.htm](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/2r1_1.htm) Commentary 3

<sup>19</sup> For the history of the presumption see Connor & Lande, *supra* note 6, at 524-26.

<sup>20</sup> See Sentencing Options: Hearing Before the United States Sentencing Commission (July 15, 1986), in United States Sentencing Commission: Unpublished Public Hearings 1986, at 15 (1988).

In recent years a number of individual and large-scale empirical studies have re-examined this issue. These studies have shown that price fixing usually raises prices by significantly more than 10%.

The most comprehensive of these analyses has been the recent study by Professor John Connor.<sup>21</sup> This surveyed more than 700 published economic studies that contain 2,041 quantitative estimates of the overcharges by hard-core cartels. His primary findings are that the *median* long-run overcharge for all types of cartels over all time periods has been 23%, and that the *mean* overcharge has been 49%.<sup>22</sup> There was no significant trend in cartel markups in recent years. Indeed, the median for price-fixing episodes ending since 2000 was virtually the same as the long term figure: 22.5%.<sup>23</sup> The mean of the average overcharge figures, 49%, is much higher than the median figure due to the presence of a number of extremely large overcharges in the sample.<sup>24</sup> Perhaps the most striking result is that 79% of cartel overcharges have been above the Guideline's 10% presumption, and 56% have been above 20%.<sup>25</sup>

Connor & Lande also used a very different method to calculate average and median cartel overcharges, one based upon final verdicts in litigated United States cartel cases. Because government enforcers are not usually required to calculate the actual overcharges in their cartel cases (as noted earlier, the Department of Justice usually instead relies on the Sentencing Guidelines' 10% presumption) and because almost every private antitrust suit for damages settles or is dismissed before an overcharge can be calculated by a neutral observer and made part of the public record of the case,<sup>26</sup> there have been only a very small number of litigated cartel verdicts. The authors were only able to find 25 litigated final cartel verdicts to analyze. The cartels in these cases were found to have had median overcharges of 22% and average overcharges of 31 percent.<sup>27</sup>

Thus, the two approaches (economic studies and cartel verdicts) produced very similar median cartel overcharges, of 23% and 22% overall. The average overcharge results were 49% for the economic studies and 31% for the verdicts.

## Conclusions

When the Commission formulated its estimate that price fixing on average raises prices by 10% it did so on the basis of the best evidence available in 1987.<sup>28</sup> But the evidence that has accumulated during the past 27 years strongly suggests that this estimate is significantly low. The 10% presumption is of course a crucial underpinning of antitrust fine calculations. Raising

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<sup>21</sup> See John M. Connor, "Cartel Overcharges," Research In Law & Economics, Nov. 12, 3013.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \_\_\_

<sup>24</sup> *Id.* This table was taken from Connor, note \_\_\_ *supra*.

<sup>25</sup> For additional results see Appendix 1, which is Table 6 in John M. Connor, "Cartel Overcharges," Research In Law & Economics, Nov. 12, 3013.

<sup>26</sup> See Connor & Lande, *supra* note 6, at 551-55. For a discussion of settlement in this context, and why settlement amounts are likely to be an extremely unreliable guide as to the size of the underlying cases' overcharges see *id.*

<sup>27</sup> *Id.* at 556.

<sup>28</sup> There is evidence that the post World-War-II years up to the mid 1970s were years during which overcharges were at historic lows – 40% below average (See Connor & Lande, *supra* note 6, at 513 at Table 4, row 4). Therefore, the 10% average overcharges calculated by the DOJ in the 1980s could have been accurate for the time, but the period observed was atypical.

it to 20% would double the amounts in the recommended antitrust fine range. In total, corporate antitrust fines have been between \$272 million and \$1.472 billion each year since 2005.<sup>29</sup> Doubling the 10% presumption would result in a considerable increase in the funds available to the Crime Victim's fund, for compensating victims of violent crimes, as well as lead to more nearly optimal deterrence of price fixing and other cartel behavior.<sup>30</sup>

For all these reasons, the American Antitrust Institute requests the U.S. Sentencing Commission to retain the general approach of employing a specific overcharge presumption when it calculates fines for price fixing, but to double the 10% overcharge presumption contained in Section 2R1.1 of the Guidelines.<sup>31</sup>

Respectfully submitted,



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<sup>29</sup> See U.S. Department of Justice, Antitrust Division Workload Statistics FY 2004-2013, available at <http://www.justice.gov/atr/public/workload-statistics.html>

<sup>30</sup> For a more detailed analysis of the issue of the optimal deterrence of cartels see Connor & Lande, *supra* note 6, *passim*.

<sup>31</sup> The Guidelines currently presume the "average" gain from price fixing is 10%, and the corresponding "average" overcharges computed in the two samples we cite (economic studies and verdicts in cases) are 31% and 49%. Accordingly, our recommendation that the Commission double the 10% presumption is very conservative.

## Appendix 1

<b>Mean Average Episodic Overcharges by Size Category</b>				
Percentage Range <sup>a</sup>	Number of Observations	Mean Average	Distribution of Observations	
			Total	Non-Zero
	<i>Number</i>		<i>Percent</i>	
Zero or less <sup>b</sup>	92	0	6.0	0
0.1-9.9 <sup>c</sup>	239	5.4	15.5	16.5
10.0-19.9	345	14.5	22.4	23.8
20.0-29.9	250	24.4	16.2	17.3
30.0-39.9	181	34.2	11.8	12.5
40.0-59.9	192	48.4	12.5	13.3
60.0-79.9	81	67.9	5.3	5.6
80.0-99.9	27	88.8	1.8	1.9
100.0-199.9	72	136.6	4.7	5.0
200 plus	50	563.9	3.3	3.5
<b>Total</b>	<b>1540</b>	<b>48.7<sup>d</sup></b>	<b>100</b>	<b>100</b>
<p>Source: Appendix Tables 1 and 2, summarized in J. Connor, <i>Price Fixing Overcharges Master Data Set</i>, spreadsheet dated October 2013.</p> <p><sup>a</sup> Point estimates or midpoints of ranges.</p> <p><sup>b</sup> Undercharges are converted to positive numbers.</p> <p><sup>c</sup> Four estimates of “weak cartels” are assumed to be 1% overcharges.</p> <p><sup>d</sup> For effective cartels (those with positive overcharges) the mean average is 58.9%.</p>				

Source: John M. Connor, "Cartel Overcharges," *Research In Law & Economics*, Nov. 12, 3013, Table 6.

## Appendix 2

(Attach a copy of John M Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime pays," 34 Cardozo L. Rev. 427 (2012))

## Appendix 3

(Attach a copy of Connor's "Cartel Overcharges" article from Research In Law & Economics, Nov. 12, ~~2013~~ 2013)