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Leniency and Plea Bargaining in Cartel Investigations in the United States and Europe©

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Bob Bloch is a senior partner in Mayer Brown LLP in Washington, D.C., specializing in antitrust law, complex civil litigation, white collar criminal defense and health care law. He represents major national corporations, non-profit entities and corporate officials in criminal and civil investigations and mergers before the Antitrust Division and Federal Trade Commission, and defends against private class action litigation in federal and state courts.

Bob has represented a wide range of clients in the airline, banking, food additives, motion picture, music, oil commodities, electrical utility, semiconductor, silicon metal, newspaper, health care and pharmaceutical industries.

Bob was counsel to Aetna in its $9 billion acquisition of U.S. Healthcare and its $1 billion acquisition of Prudential Insurance Co.'s health care business, to Dow in its $7 billion sale of Marion Merrill Dow to Hoechst, to Fresenius Medical Care in its $4 billion acquisition of Renal Care Group and to United Healthcare in its $3 billion acquisition of Sierra Health Services.

Recent antitrust class action representations include the defense of Cypress Semiconductor Corp. in *In re Static Random Access Memory Antitrust Litigation* (N.D. Cal.); Evanston Northwestern Healthcare in *Reed, et al., v. Advocate Health Care, et al* (N.D. Ill.); Bertelsmann, Inc. in *In re Compact Disc Minimum Advertised Price Antitrust Litigation* (D. Me.); *In re Compact Disc Antitrust Litigation* (C.D. Cal.); ETI Explosives Technology Intl, Inc. in *In re Commercial Explosives Antitrust Litigation* (D. Utah); and the defense of Cargill, Inc. in *In re Citric Acid Antitrust Litigation* (N.D. Cal.) and *In re High Fructose Corn Syrup Antitrust Litigation* (C.D. Ill.). Bob was also lead counsel in the defense of UnitedHealth Group against conspiracy and boycott allegations in *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc., et al.* (D. Kan.); VHA/Novation against exclusive dealing and conspiracy allegations in *Retractable Technologies, Inc. v. Becton Dickinson & Co., et al.* (E.D. Tex.) and *Burlington Drug Co. v. VHA, Inc., et al.* (D. Vt.); and in defense of DeVry, Inc. in a complex, predatory pricing case, *Dauberman et al. v. DeVry, Inc., et al.* (Sup. Ct. L.A.)

Prior to joining Mayer Brown LLP, Bob served in the Antitrust Division of the Department of Justice for almost 18 years where he held several senior-level positions. He was Chief of the Professions and Intellectual Property Section where he was responsible for supervising antitrust investigations concerning the health care industry, the newspaper and publishing industries, the professions, the motion picture industry and intellectual property.

Bob received numerous awards and commendations at the Department of Justice including the Attorney General's John Marshall Award and the Antitrust Division's Harold M. Stevens Award for Outstanding Service. He was chosen as one of Chambers USA's "Leading Lawyers" for 2005-2008, one of Washington's "Best Antitrust Lawyers" for 2008 and a Washington "Super Lawyer" for 2007.

Bob is a member of the American Bar Association's Section of Antitrust Law where he served as Vice Chair and as a member of the Section's governing Council. He is a frequent writer and speaker on a broad range of antitrust issues.

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Gary has contributed to various publications of the American Bar Association's Antitrust Section, including *The Indirect Purchaser Litigation Handbook* (2007), *Antitrust Law Developments* (5th ed. 2002 and 6th ed. 2007) and the *Handbook on Antitrust Grand Jury Investigations* (2002).

JENNIFER M. DRISCOLL

Jennifer Driscoll is counsel with Mayer Brown LLP in Washington, D.C. Her practice focuses on antitrust investigations, litigation and counseling. She has represented clients in international cartel investigations, merger investigations before the European Commission and Sherman Act Section Two class action lawsuits in federal courts.

Her recent publications include "A New Approach to Compliance: True Corporate Leniency for Executives" (2008) (co-authored with Donald C. Klawiter) in Antitrust Magazine and "Standard-Setting Policies and the Rule of Reason: When Does the Shield Become a Sword?" (2008) in Global Competition Policy Magazine.

Jennifer received her Bachelor of Science and Master in Public Affairs degrees from Cornell University in 1993 and 1996, respectively. She received her law degree from the University of Pennsylvania in 2000. Jennifer is admitted to practice in New York and in England and Wales as a solicitor.

Leniency, Plea Bargaining and Settlement in Cartel Investigations in the United States and Europe

Executive Summary

Cartel enforcement has been on the rise for at least the last fifteen years. The competition authorities in the United States and Europe have prosecuted numerous cartels in a wide variety of industries, collected billions of dollars in fines, and obtained jail sentences for scores of executives.

Leniency programs and settlements are the driving force underlying these enforcement efforts. The competition authorities in both the United States and Europe are continuously revising their enforcement policies to make them more effective and borrowing each other's best practices. The result is a general convergence of enforcement policy across the Atlantic. While differences exist, they are narrowing over time.

This paper provides an in-depth outline of the leniency programs in the United States and Europe, focusing on their many aspects of convergence. In particular, with respect to the United States, it discusses:

- The requirements for corporations and individuals to obtain leniency from the Antitrust Division of the U.S. Department of Justice, including being the "first in the door," ceasing all illegal activity, and providing full cooperation;
- The measures that the U.S. has taken to increase the incentives for cooperation, including use of the "Amnesty Plus" and "Penalty Plus" programs and, more recently, the development of an "Affirmative Amnesty" program, under which the Division discloses its knowledge of a cartel with an insider in exchange for the insider's participation in exposing the inner workings of the cartel;
- The benefits for leniency applicants in civil litigation under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004;
- The benefits that are available to cooperating companies even if leniency is no longer possible (either because of the corporation's or individual's role in the cartel or because another corporation or individual is already receiving leniency); and
- The potential implications of the revocation of leniency in the *Stolt-Nielsen* action – the only instance in which the Antitrust Division has revoked a grant of amnesty.

With respect to Europe, it discusses:

- The revisions to the EC leniency program in 2006, including the situations in which an applicant may be eligible for immunity or a reduction in fine;
- The differences between the revised EC leniency policy and its predecessor, including the creation of a "marker system" that enables an applicant to hold its place in line while it completes its internal investigation of the alleged infringement at issue; clarification of the types of information and evidence that a leniency applicant must provide, and how such evidence will be evaluated; and permission of oral corporate statements, with additional protections to limit the discoverability and use of the statements in private damages actions, to ensure that cooperating companies are in no worse position than non-cooperating companies;
- The comments by the American Bar Association and International Bar Association regarding those changes (from the period in which the changes were under consideration);
- The similarities and differences between the revised EC leniency program and the U.S. leniency programs; and
- A description of the European Communities Network's new "Model Leniency Program."

The paper also discusses the important role of plea bargaining in the United States, describing the different types of plea bargains that are available, the obligations of pleading parties, the U.S. method of computing sentences and fines, and the use of plea bargains as both an investigative tool and a means of maximizing enforcement resources. The paper then contrasts the European experience, discussing the relative paucity of settlement proceedings in Europe. It also examines the new regulation on settlement procedures adopted by the European Commission on July 1, 2008, explaining the similarities and differences between the substance of the EC regulation on the one hand and plea bargaining and settlement in the United States on the other. Finally, the paper provides practical advice regarding what companies facing a cartel investigation should do in the first few days and weeks after notification of the investigation.

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INTRODUCTION

Anti-cartel enforcement is one of the highest priorities of competition authorities in the United States and Europe because of the grave threat that cartels pose to competition.[1] In the last decade and a half, the Antitrust Division of the United States Department of Justice – the principal competition authority in the U.S. – has placed enormous emphasis on detecting and prosecuting cartels organized to fix, raise, or stabilize prices, rig bids, limit output and divide markets. From an enforcement perspective, the Division has achieved stunning success: It has collected billions of dollars in fines, obtained jail sentences for scores of executives and put an end to cartels that have affected commerce in a wide variety of industries.

Not surprisingly, given the highly globalized nature of business today, many of these cartels have operated internationally and have involved companies with operations and sales on both sides of the Atlantic. As a result, the Directorate General-Competition of the European Commission in recent years also has become a major anti-cartel enforcer, using the authority given to it by Article 81 of the EC Treaty[2] to investigate cartel activity throughout Europe and impose fines totaling billions of Euros. The Commission regularly carries out "dawn raids" in coordination with the U.S. Antitrust Division, such as the raid on marine hose producers in France, Italy and the U.K.[3]

[1] *See, e.g.*, Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, *Cartel Enforcement in the United States (and Beyond)*, Presented at the Cartel Conference, Budapest, Hungary (Feb. 16, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/221868.htm; Neelie Kroes, European Commissioner for Competition Policy, *Reinforcing the Fight Against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a More Competitive Europe*, Presented at Commission/IBA Joint Conference on EC Competition Policy, Brussels, Belgium (Mar. 8, 2007), *available at*: http://ec.europa.eu/comm/competition/speeches/index_theme_1.html.

[2] Article 81 of the EC Treaty, consolidated versions of the Treaty on the European Union and of the Treaty establishing the European Community, OJ C 321E [2006] p.1, prohibits agreements and practices that may affect trade between Member States and that have as their object or effect the prevention, restriction, or distortion of competition within the common market.

[3] *See* Press Release, *Antitrust: Commission Has Carried Out Inspections in the Marine Hose Sector* (May 3, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/163&format=HTML& aged=0& language=EN&guiLanguage=en.

In addition, the national competition authorities for individual Member States retain their power to prosecute cartel activity, and many have. Some recent statistics give a picture of the intensity of anti-cartel enforcement by the U.S. and EU authorities:

United States

- The Division obtained sentences totaling 31,391 jail days in fiscal year 2007—the highest total number of jail days imposed in any given year and more than double the previous high of 13,157 jail days imposed during fiscal year 2005.[4] As of August 15, 2008, the Division had obtained 13,785 jail days for fiscal year 2008.

- During fiscal year 2007 the Division also obtained more $630 million in criminal fines, most of which derived from the Division's investigation of the air transportation industry.[5] On August 1, 2007, the Division announced that British Airways Plc and Korean Air Lines Co. Ltd. each agreed to pay a $300 million criminal fine for their respective roles in the conspiracies to fix prices of passenger and cargo flights.[6] The British Airways and Korean Air fines equaled the fine imposed on Samsung Electronics Company Ltd. during the Dynamic Random Access Memory ("DRAM") price-fixing investigation as the second largest criminal antitrust fine in U.S. history.[7] Thus far, the Division has obtained $697.78 million in fines for fiscal year 2008.

- The Division's investigation of the air transportation industry has generated similarly impressive headlines in fiscal year 2008. On November 27, 2007, Qantas Airways Limited ("Qantas") agreed to plead guilty and pay $61 million for its role in the conspiracy to fix prices for international air cargo shipments. In May 2008, Japan Airlines followed suit by pleading guilty and agreeing to pay a $110 million fine for its role in the conspiracy to fix rates for international cargo shipments. Finally, in July 2008, SAS Cargo Group A/S ("SAS"), Cathay Pacific Airways Limited

[4] *See* Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, Remarks before the ABA Section of Antitrust Law, Spring Meeting (March 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/232716.htm [hereinafter, Hammond, *Recent Developments*].

[5] Thomas O. Barnett, Assistant Attorney General, Antitrust Division, *Perspectives on Cartel Enforcement in the United States and Brazil*, Address at the Universidade de São Paulo, São Paulo, Brazil (April 28, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/236096.pdf.

[6] *See* Press Release, U.S. Department of Justice, *British Airways Plc and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling $600 Million for Fixing Prices on Passenger and Cargo Flights* (August 1, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/224928.htm.

[7] *See* Hammond, *Recent Developments*, *supra* note 4.

("Cathay"), Martinair Holland N.V. ("Martinair"), Société Air France ("Air France") and Koninklijke Luchtvaart Maatschappij N.V. ("KLM") all pled guilty to participating in the conspiracy to fix air cargo rates. The Division imposed criminal fines on the air transportation companies as follows: SAS $52 million, Cathay $60 million, Martinair $42 million and Air France-KLM (which now operates under the common ownership of a single holding company) $350 million. These cases are the first criminal convictions obtained against commercial airlines for violating U.S. antitrust laws.[8] Additionally, the former highest-ranking executives in the US for SAS and Qantas pled guilty to fixing cargo rates in the US and were sentenced to 6 and 8 months in jail, respectively.[9]

- At the close of fiscal year 2007, the Division had 135 pending grand jury investigations—the highest number since 1992—including over 50 investigations of suspected international cartel activity.[10] As of August 15, 2008, the Division had 142 pending grand jury investigations for fiscal year 2008.

- In May 2007, a Korean executive was sentenced to 14 months in prison for his participation in the DRAM price-fixing cartel, which at the time represented the longest prison sentence imposed on a non-US antitrust executive.[11] Subsequently in November 2007, two French nationals received 14 month jail sentences for their participation in the marine hose cartel. In December 2007, the Division surpassed this benchmark when it filed plea agreements calling for sentences of 20, 24 and 30 months, respectively, for three British executives who participated in the marine hose cartel.[12]

- On July 28, 2008, the Division announced that Manuli Rubber Industries SpA ("Manuli") and the former president of its now-defunct Florida-based subsidiary had pled guilty to a one county felony charge for participating in the marine hose cartel. Under the terms of their plea agreements, Manuli agreed to pay a $2 million fine and

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8 *See id.*

9 *See* Press Release, U.S. Department of Justice, *Former SAS Cargo Group A/S Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy*, (July 28, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/235514.htm.

10 *See* Hammond, *Recent Developments*, *supra* note 4.

11 *See* Press Release, U.S. Department of Justice, *Sixth Samsung Executive Agrees to Plead Guilty to Participating in DRAM Price-Fixing Cartel* (April 19, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/222770.pdf.

12 *See id.*

the former president agreed to pay a $75,000 fine and serve 14 months in prison.[13] On August 21, 2008, Manuli executive and Italian citizen Giovanni Scodeggio also pled guilty to a one count felony charge and was sentenced to six months home confinement and two years probation, but received credit for the 15 months he was detained in the U.S. after his arrest in Houston, Texas on May 2, 2007.

- The Division has also initiated extradition proceedings against non-U.S. individuals involved in price-fixing. In 2005, the Bow Street Magistrates' Court in London ruled that Ian Norris, the former Chairman and CEO of Morgan Crucible, could be extradited on price-fixing charges and for obstruction of justice. The Secretary of State approved the extradition request. In March 2008, the House of Lords, the highest court in the United Kingdom, blocked the extradition request on grounds that at the time of Norris' alleged misconduct price-fixing was not a crime in the UK. The House of Lords remanded the issue of whether Norris could be extradited on the concomitant obstruction of justice charge to the district magistrates court. On July 25, 2008, the magistrates court rejected Norris' arguments that the obstruction of charge was subsidiary to the price-fixing charges and extradition would violate Norris' human rights. Counsel for Norris have announced they will appeal the magistrates court's ruling.[14]

Europe

- In 2006, the Commission issued the (then) second-largest fine ever on all members of a single cartel (€519 million in the synthetic rubber cartel) and imposed a record total fine of €1.8 billion.[15]

- In 2007, the Commission has already broken its previous records for the largest fine for a single member of a cartel, the largest total fine for all members of a single cartel, and the total amount of fines. In particular, it has levied total fines of €3.3 billion, levied a record fine of €992 million in the elevator and escalators cartel, and levied an individual fine of €479 million on ThyssenKrupp (elevators and escalators).

[13] *See* Press Release, U.S. Department of Justice, *Italian Marine Hose Manufacturer and Marine Hose Executives Agree to Plead Guilty to Participating in Worldwide Bid-Rigging Conspiracy* (July 28, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/224928.htm.

[14] *See Norris Faces Extradition to the US Again*, Global Competition Review (July 25, 2008), *available at* http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=7050.

[15] All statistics are available at http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.

The Commission also issued a substantial fine of €396 million on Siemens (gas insulated switchgear cartel).[16]

- From 2002 through 2007, the Commission has imposed ten fines of more than €150 million on individual companies and has decided 39 cartel cases.[17]

- As of June 25, 2008, the Commission had decided four cases for cartel infringement that imposed administrative fines exceeding €151 million.[18] One of those decisions marked the first time that the Commission applied point 18 of the 2006 Fines Guidelines, a calculation method for cartels that are broader than the European Economic Area.[19]

- On July 8, 2008, the Court of First Instance upheld a €1,000 fine imposed on a company that did not directly participate in a cartel, but acted as "the principal record holder and communications hub" for organic peroxide cartel members.[20]

- The competition authorities of the Member States have also imposed large fines in recent years. For instance, in 2003, Germany imposed €660 million in fines against six cement producers for market allocation and quota agreements. In 2005, France imposed €534 million in fines against three telecom companies for price-fixing and information sharing. In 2006, Italy imposed €56.9 million in fines against eight firms in the industrial gas sector for customers allocation and information sharing. And, in 2007, the U.K. imposed an €180 million fine against British Airways for price-fixing (plus an additional fine of €220 million in the U.S.), while Virgin Atlantic – the whistle-blower – received immunity.[21] More recently, on June 11, 2008, a UK

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Press Release, *Commission Fines Aluminium Fluoride Procedures €4.97 Million for Price Fixing Cartel* (June 25, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1007&format=HTML&aged=0&language=EN&guiLanguage=en.

[20] *See CFI Allows Third-Party Cartel Fine*, Global Competition Review (July 8, 2008), *available at* http://www.globalcompetitionreview.com/news/news item.cfm?item id=6972.

[21] *See* Press Releases, *Bundeskartellamt Imposes Fines Totaling 660 Million Euro on Companies in the Cement Sector on Account of Cartel Agreements* (Apr. 14, 2003), *available at* http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_14.php; Conseil de la Concurrence, *Anticompetitive Agreements in the Mobil Telephony Market: The Conseil de la Concurrence Imposes Fines Totaling 534 Million Euros on Orange France, SFR and Bouygues Telecom* (Dec. 1, 2005), *available at* http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502; Autorità Garante della Concorrenza e del Mercato, *Antitrust: Fines of 56.9 Million Euros on Eight Companies in the Industrial Gases Sector* (May 20, 2006), *available at* http://www. (cont'd)

> Crown Court judge imposed the first prison sentences for cartel offenses pursuant to Section 188 of the Enterprise Act on the three British executives involved in the marine hose cartel. The judge meted out sentences between 30 and 36 months—significantly higher than the 20 to 30 month sentences that the same executives received in the U.S.[22]

Without a doubt, the driving force behind the enforcement agencies' ability to detect these cartels and impose huge fines and jail sentences has been the respective leniency programs in the U.S. and the EC. The current U.S. leniency program took shape in 1993, and an explosion of anti-cartel enforcement ensued. Companies seeking to avoid prosecution under the Leniency Program's guidelines have provided information that has enabled the Antitrust Division to identify cartel members, obtain documents and testimony demonstrating the existence of the cartel and extract both corporate guilty pleas (resulting in fines) and individual pleas (usually resulting in jail time). In the past decade, many elements of the U.S. program have been adopted in the EC and in many of its Member States (as well as in other jurisdictions such as Japan and Canada), providing companies around the world with strong incentives to self-report and cartel enforcement authorities with the information needed to impose large fines.

While competition agencies in the U.S. and the EC have had great success using their leniency programs to crack international cartels, there have been important differences between the U.S. and the EC models of enforcement. One of those differences is that in the U.S., after the initial leniency applicant is given immunity from prosecution, the Antitrust Division routinely seeks guilty pleas from the remaining cartel participants – and indeed the Division provides incentives in the form of reduced fines for those who cooperate and provide timely valuable information to assist the investigation. This is partly a function of the U.S. system of criminal enforcement that enables a prosecutor to deal with defendants separately, but in the antitrust context, it also reflects a policy decision that guilty pleas offer the swiftest and most efficient method of bringing an investigation to a close. In Europe, by contrast, the EC must conduct its entire investigation before reaching a decision and imposing fines, a system that the Commissioners have criticized as slow and inefficient. That difference may be alleviated in part by the Commission's new settlement procedure for cartels, announced on June 30, 2008.[23]

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agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/e77c5ed3e7ce461ec125717 7005c0e80?OpenDocument; Office of Fair Trading, *British Airways to Pay Record €121.5m Penalty in Price Fixing Investigation* (Apr. 1, 2007), *available at* http://www.oft.gov.uk/news/press/2007/113-07.

[22] *See Marine Hose Three Sentenced*, Global Competition Review (June 11, 2008), *available at* http://www.globalcompetitionreview.com/news/news_print.cfm?item_id=6854.

[23] Press Release, *Antitrust: Commission Introduces Settlement Procedure for Cartels* (June 30, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1056&format=HTML&aged=0&language=EN&gui Language=en.

In this paper, we provide a roadmap to the U.S. and EC systems of cartel enforcement, emphasizing the importance of both competition authorities' leniency programs and the heavy reliance on plea agreements in the U.S. We then explain how the settlement proposal may change EC cartel enforcement and provide some practical considerations for companies facing a cartel investigation.

I. Amnesty / Leniency Policies in the United States and Europe

A. The United States

1. The Division has enacted both a Corporate Leniency Policy and a Leniency Policy for Individuals.[24] The cornerstone of these policies is their transparency and predictability and their provision of substantial benefits to cooperating companies.[25] Numerous recent developments have contributed to the effectiveness of these programs.

2. In general, a corporation will *automatically* receive amnesty from prosecution under the Corporate Leniency Policy if the corporation comes forward with information about illegal conduct *before an investigation has begun* and meets the following six conditions: (i) at the time the company reported the illegal activity, the Division has not yet received information concerning the illegal activity from any other source; (ii) the corporation took prompt and effective action to terminate the unlawful activity upon its discovery; (iii) the corporation reports the wrongdoing with candor and completeness, and provides full, continuing and complete cooperation to the Division throughout the investigation; (iv) the confession of wrongdoing is a corporate act, as opposed to the actions of individual executives or officials; (v) the corporation makes restitution to injured parties, where possible; and (vi) the corporation did not coerce another party to participate in the illegal activity, and was clearly not the leader or originator of the activity.

3. A corporation may also receive amnesty under the Corporate Leniency Policy, even after an investigation has begun (or if the corporation fails to meet the above six requirements), if it meets the following seven conditions: (i) the corporation was the first one to come forward and qualify for leniency with respect to the illegal activity in question; (ii) the Division does not yet have evidence that is likely to result in a sustainable conviction against the company; (iii) the corporation took prompt and effective action to terminate the unlawful activity upon its discovery; (iv) the corporation reports the wrongdoing with candor and completeness, and provides full, continuing and complete cooperation to the Division throughout the investigation; (v) the confession of wrongdoing is a corporate act, as opposed to the actions of individual executives or officials; (vi) the corporation makes restitution to injured parties, where possible; and (vii) the Division determines that granting leniency would not be unfair

[24] U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.htm; U.S. Department of Justice, Antitrust Division, Leniency Policy for Individuals (Aug. 10, 1994), *available at* http://www.usdoj.gov/atr/public/guidelines/0092.htm.

[25] *See, e.g.*, Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, Remarks before the ABA Section of Antitrust Law, Spring Meeting (March 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.htm [hereinafter Hammond, *Second-In Cooperation*].

to others, given the nature of the illegal activity, the confessing corporation's role in it and how long it takes for the corporation to come forward. The primary considerations in this inquiry are how early the corporation comes forward and whether it was the leader or originator of the activity. The burden of satisfying this requirement increases as the Division comes closer to having evidence likely to result in a sustainable conviction.

4. There is no uniform leniency proffer. Some counsel have immediately provided a detailed explanation of the evidence and the companies and individuals that are involved. Other counsel have contacted the Division and sought a "marker"[26] to hold the corporation's place in line before its application for immunity is complete. The staff will provide the corporation with a reasonable period to complete its internal investigation and perfect its application for immunity, unless there is another party that is also seeking leniency and is ready to come in with evidence.[27]

5. Generally, all exchanges with the Division will be conducted orally, because any writing to the Division is likely unprivileged and therefore discoverable in subsequent private damages actions.

6. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004[28] provides that a corporation receiving amnesty will pay only damages attributable to its own commerce in a private damages action, so long as the corporation also cooperates with the plaintiffs in making their case against the remaining cartel members. This provision eliminates treble damages and joint and several liability for the successful amnesty applicant.

    a. This provision will expire on June 23, 2009 unless renewed by Congress, although an applicant accepted into the amnesty program before that date may still qualify for single damages.

    b. The court in the private damages action must make a determination that the amnesty applicant provided satisfactory cooperation to the plaintiffs, including providing a full

[26] "Marker" is simply the name that the Division uses for the place-holder while a company completes its internal investigation and determines whether it actually wants to seek leniency.

[27] *See, e.g.*, Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?*, Presented at the National Institute on White Collar Crime (Mar. 8, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/7647.htm [hereinafter Hammond, *Costs and Benefits*].

[28] Pub. L. 108-237, tit. II, § 201, 118 Stat. 661 (2004), *codified at* 15 U.S.C. § 1 note.

account of all facts known about the cartel. One court has found these conditions satisfied.[29]

7. In certain circumstances, the corporation's amnesty may extend to the corporation's officers, directors, and employees.

   a. If a corporation comes forward before an investigation has begun and satisfies the six conditions for amnesty,[30] its officers, directors and employees can also qualify for immunity under the Corporate Leniency Policy, provided that those individuals (i) admit their involvement in the illegal activity as part of the corporate confession; (ii) candidly and completely admit their involvement in the activity and (iii) continue to assist the Division throughout the investigation.

   b. If those conditions are not satisfied, however, the officers, directors, and employees may still be considered for immunity. This is often desirable, even if the corporation has amnesty, to avoid creating an evidentiary trail in treble damage actions brought by private litigants and to expedite resolution of the matter.

   c. While the Division has increasingly sought to "carve out" more culpable employees from the non-prosecution protection of corporate plea agreements in recent years, the Division usually will limit the number of "carved out" employees for early cooperating companies.[31]

8. Even if the corporation does not seek amnesty under the Corporate Leniency Policy, an individual may gain personal amnesty from prosecution under the Antitrust Division's Leniency Policy for Individuals by coming forward, reporting the illegal activity, and meeting the following three conditions: (i) the Division had not previously received information about the illegal activity from any other source; (ii) the wrongdoing is reported with candor and completeness, and full and continuing cooperation is provided throughout the investigation; and (iii) the individual was neither a leader nor initiator of the illegal conduct, and did not coerce another party to participate in the conduct.

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[29] *See In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 330 (N.D. Ill. 2005).

[30] *See supra* Section I.A.2.

[31] *See* Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All*, Address before the OECD Competition Committee (Oct. 17, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/219332.htm [hereinafter Hammond, *Negotiated Plea Agreements*]; Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *Charting New Waters in International Cartel Prosecutions*, Presented before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/214861.htm [hereinafter Hammond, *Charting New Waters*].

9. If an individual does not qualify for amnesty under the Individual Leniency Policy, he or she will be considered for statutory or informal immunity, determined on a case-by-case basis.

10. The Antitrust Division has adopted numerous measures to increase the effectiveness of its leniency programs.

    a. The Division has introduced a policy called "Amnesty Plus," which allows companies that are currently being investigated for one violation to report a second antitrust violation. The company not only receives the benefits of full amnesty in the second offense but also receives a substantial additional discount in its fine for its participation in the first violation. Today, nearly half of the Division's investigations are initiated by evidence obtained as a result of an investigation of a completely separate market.

    b. The Division also has introduced a policy called "Penalty Plus," under which a company that is currently being investigated for one violation and fails to report a second violation will face a potentially harsher penalty for the second violation.

    c. In recent years, the Division has begun a program called "Affirmative Amnesty" for situations in which the Division discovers likely cartel conduct before anyone has sought amnesty for it. Under this program, the Division will approach an insider, disclose the existence of the investigation and exchange amnesty for the insider's participation in exposing the inner workings of the cartel. The Division will offer this deal to companies that it has worked with before and trusts not to disclose the investigation.[32]

11. Receiving leniency does not bar subsequent private damages actions, and indeed may make them more likely because plaintiffs' lawyers scour securities industry disclosures and other sources to determine the identity of leniency applicants. However, seeking leniency may help a company fare better in those actions for two reasons. First, because leniency requires an applicant to make restitution, leniency applicants can often generate good will. Second, because the leniency applicant will not be prosecuted, it will not be found (or need to plead) guilty. Thus, there will be no *prima facie* effect from a criminal conviction under 15 U.S .C. § 16, and private litigants will be at a disadvantage in proving liability because they cannot sit back and piggy-back on the government's case and resultant finding of guilt (as they usually do). This enables a leniency applicant to settle on more favorable terms than if it had pled guilty or lost in a criminal trial.

12. Even if another company is already receiving amnesty, a corporation that is "second in the door" can also reap substantial benefits from cooperating.

[32] *See, e.g.*, Hammond, *Second-In Cooperation*, *supra* note 25.

a. The rewards for second-in companies are not uniform but instead vary

from case-to-case depending on the value of the second-in company's cooperation. The benefits include:

i. The Division may reduce the scope of affected commerce used to calculate a second-in company's Sentencing Guidelines fine range if the company's cooperation reveals that the suspected conspiracy was broader than had been previously identified.

ii. The Division may recommend a substantial assistance departure and a fine below the minimum Guidelines range if the second-in company substantially advances the investigation. Cooperation discounts for second-in companies are, on average, in the range of 30% to 35% off of the bottom of the Guidelines fine range.

iii. Unless the second-in company had a significant leadership role in the conspiracy or is subject to "Penalty Plus" for failing to report a second violation, the Division may choose a low starting point when applying the cooperation discount.

iv. The Division may secure more favorable treatment for culpable executives. Typically, the Division will carve out only the highest-level culpable individuals as well as any employees who refuse to cooperate from the non-prosecution protection of the corporate plea agreement. In addition, those employees who are carved out often will be able to negotiate more favorable deals.

v. The Division is increasingly likely to grant "Amnesty Plus" credit. In the past, the main beneficiaries of the Amnesty Plus program have been second-in companies that are quick to clean house and determine that they have antitrust exposure in other markets.

vi. The Division may approach the second-in company and offer it "affirmative amnesty."

b. Cooperation by second-in companies has resulted in substantially reduced criminal fines. In one case, Crompton Corporation was second in the door in the Division's rubber chemicals investigation and provided useful information. Crompton received a 59% discount off its minimum Guidelines criminal fine, representing a reduction of over $70 million.[33]

13. The Division has enacted policies to reassure companies hesitant to apply for amnesty with the Division out of fear of creating liability in foreign nations. In particular, the Division will

[33] *Id.*

not disclose any information gained from an amnesty applicant to foreign antitrust agencies unless the applicant agrees to the disclosure (usually because it is also seeking leniency in one or more foreign jurisdictions).[34]

14. The current amnesty program has proved much more successful than its predecessor in encouraging corporations to come forward with reports of illegal activity, resulting in a "surge" of applications and generating many of the Antitrust Division's criminal cases. Fines of $100 million or more have been issued in nine cases and fines of $10 million or more have been levied against more than 50 corporate defendants. Given the risk of a high fine, companies have a strong incentive to divulge illegal activities to the Division before their co-conspirators do. In several recent prosecutions in which some defendants paid massive fines and executives served jail sentences, the amnesty applicant paid no fine and cooperating executives received non-prosecution protection.[35]

15. The Division retains the power to rescind an amnesty agreement if the applicant misrepresents facts or does not cooperate fully with the Division. To date, the Division has taken this drastic measure only once in a case involving Stolt-Nielsen, S.A.

    a. In *Stolt-Nielsen*, the Division granted conditional leniency to Stolt-Nielsen for its exchange of customer allocation lists with two of its competitors. But following the grant of leniency, the Division learned that Stolt-Nielsen's participation in the illegal collusive practices did not cease in March 2002, as Stolt-Nielsen had represented, but instead had continued through November 2002. The Division therefore revoked Stolt-Nielsen's conditional leniency. Stolt-Nielsen filed a complaint in federal district court seeking to enjoin the government from filing an indictment against the company. The United States Court of Appeals for the Third Circuit held that the district court lacked the authority to enjoin the government from filing an indictment.[36]

    b. On remand, the district court dismissed the indictment, noting that "[t]here is no credible or plausible evidence that Stolt-Nielsen breached any provision of the [Immunity] Agreement."[37] As the court observed, "[t]he Agreement imposed two requirements on Stolt-Nielsen: (1) to take prompt and effective action to terminate its part in the conspiracy, and (2) to provide full, continuing and complete cooperation to the Division." From the court's vantage point, there was no evidence that

[34] Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *An Update of the Antitrust Division's Criminal Enforcement Program*, Remarks before the ABA Section of Antitrust Law 2005 Fall Forum (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm.

[35] *Id.*

[36] *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir.), *cert. denied* 127 S. Ct. 494 (2006).

[37] 2007 WL 4225664, at *23 (E.D. Pa. Nov. 30, 2007).

either condition was violated.[38]

c. On December 21, 2007, the Division announced that although it was disappointed with the district court's ruling, it would not appeal the decision out of deference to "the role of the court in making the factual determinations that support the decision that Stolt-Nielsen, two of its subsidiaries, and two executives did not breach the conditional leniency agreement."[39]

d. During its battle to retain leniency, Stolt-Nielsen sued the Division under the Freedom of Information Act ("FOIA"),[40] demanding the release of all amnesty agreements (albeit with the names and identities of leniency applicants redacted) that the Division entered into since 1993. The Division filed a Vaughn Index and maintained that the documents were shielded from disclosure by six exemptions. The United States District Court for the District of Columbia denied Stolt-Nielsen's request on summary judgment, holding that the exemptions applied and the government properly withheld the agreements in their entirety because "the information contained in the leniency agreements is not reasonably segregable."[41] On July 25, 2008, the United States Court of Appeals for the District of Columbia Circuit ruled that although the Vaughn Index "establishe[d] at least a colorable basis"[42] for withholding the agreements to avoid disclosing the identity of confidential sources, the court remanded the case for further proceedings as to whether a reasonably segregable portion of non-confidential information could in fact be released.[43] Some commentators have lauded the decision, arguing that "greater transparency" will enhance the Corporate Leniency Program. Others have expressed concern that the ruling will have a chilling effect on amnesty applications.[44]

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[38] *Id.* at *22-*24.

[39] *See* Press Release, U.S. Department of Justice, Justice Department Will Not Appeal *Stolt-Nielsen* Decision (Dec. 21, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228788.htm.

[40] *See* 5 U.S.C. § 552 (2008).

[41] *Stolt-Nielsen Transportation Group Ltd. v. United States*, 480 F. Supp. 2d 166, 182 (D.D.C. 2007).

[42] *Stolt-Nielsen Transportation Group Ltd. v. United States*, Nos. 07-5191, 07-5192, 2008 WL 2853214, at *3 (D.C. Cir. July 25, 2008).

[43] *See id.* at *4.

[44] *DoJ Faces Amnesty Exposure*, Global Competition Review (July 28, 2008), *available at* http://www.globalcompetitionreview.com/news/news_print.cfm?item_id=7052.

e. It remains to be seen whether the revocation of leniency in Stolt-Nielsen will be a one-time occurrence. The Division is unlikely to revoke leniency barring extreme circumstances because it might deter corporations from seeking leniency in the first place and undermine the leniency program. On the other hand, the fact that the government has expended such efforts litigating the issue in *Stolt-Nielsen* sends a clear warning to companies in the program that the government is serious about enforcing an amnesty applicant's obligations. To avoid another protracted battle like *Stolt-Nielsen* that could irreparably damage the Corporate Leniency Program, the Division has made "a subtle shift away from early grants of conditional leniency based exclusively on counsel's representations to the use of an 'extended marker' investigation,"[45] which affords the Division a higher "degree of certainty . . . from being able to develop the evidence methodically."[46]

[45] Donald C. Klawiter & J. Clayton Everett, *The Legacy of* Stolt-Nielsen*: A New Approach to the Corporate Leniency Program?*, Antitrust Source at 6 (Dec. 2006).

[46] *Id.* at 7. *See also DoJ Will Not Appeal* Stolt-Nielsen *Decision*, Global Competition Review (Jan. 2, 2008), *available at* http://www.globalcompetitionreview.com/news/ news item.cfm?item id=61 68.

B. Europe

1. In Europe, leniency may be sought both from the EC and from most of the Member States (including Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Sweden and the United Kingdom).

2. The EC has no power to impose criminal sanctions (although some of its Member States do). It may, however, impose large civil penalties on companies, and has done so with increasing frequency in recent years.

3. The EC recently revised its leniency program in December 2006. The main changes to the leniency program in December 2006 include:

    a. Creation of a marker system, so that an applicant can hold its place in line while it completes its internal investigation of the alleged infringement at issue.

    b. Detailed clarification of the types of information and evidence that a leniency applicant must provide, and how such evidence will be evaluated.

    c. Permission to provide oral corporate statements, and additional protections to limit the discoverability and use of statements in private damages actions, to ensure that cooperating companies are in no worse position than non-cooperating companies.

4. Under the EC's 2006 Leniency Program, a firm that informs the Commission of a cartel can obtain full immunity from fines if: (i) the firm is the first to submit information and evidence that would enable the Commission to carry out a targeted inspection in connection with the alleged cartel; (ii) at the time of the submission, the Commission did not yet have sufficient evidence to adopt a decision initiating an investigation; (iii) the firm provides the Commission with all relevant evidence and information available to the firm, cooperates fully on a continual and expeditious basis, swiftly answers Commission requests that may help to resolve factual issues, makes current (and, if possible, former) employees and directors available for interviews with the Commission, does not destroy or conceal relevant information or evidence and promises not to disclose the fact or any content of its application before the Commission has issued a Statement of Objections (unless otherwise agreed); (iv) the firm ends its involvement in the activity no later than when it makes the initial disclosure to the Commission, except for involvement that is reasonably necessary to preserve the

integrity of the inspections; and (v) the firm has not taken steps to coerce "other undertakings" to participate in illegal activity.[47]

5. A firm may also obtain full immunity if: (i) no other firm has yet obtained full immunity by meeting the above five requirements; (ii) at the time of the submission, the Commission did not yet have sufficient evidence to find an infringement of Article 81 of the EC Treaty; (iii) the firm is the first to provide contemporaneous, incriminating evidence of the alleged cartel, as well as a corporate statement, which together enable the Commission to find an infringement of Article 81 of the EC Treaty; (iv) the firm provides the Commission with all relevant evidence and information available to the firm, cooperates fully on a continual and expeditious basis, swiftly answers Commission requests that may help to resolve factual issues, makes current (and, if possible, former) employees and directors available for interviews with the Commission, does not destroy or conceal relevant information or evidence, and promises not to disclose the fact or any content of its application before the Commission has issued a Statement of Objections (unless otherwise agreed); (v) the firm ends its involvement in the activity no later than when it makes the initial disclosure to the Commission, except for involvement that is reasonably necessary to preserve the integrity of the inspections; and (vi) the firm has not taken steps to coerce "other undertakings" to participate in illegal activity.[48]

6. An applicant seeking immunity from the EC can either apply for a marker to protect the applicant's place in line or submit a formal application for immunity.

   a. An application for a marker must include: (i) the name and address of the applicant; (ii) the other parties to the alleged cartel; (iii) the affected product(s); (iv) the affected territory(-ies); (v) the duration; (vi) the nature of the alleged cartel conduct; (vii) the Member State(s) where the evidence is likely to be located; and (viii) information on its other past or possible future leniency applications in relation to the alleged cartel. The EC will decide whether to grant a marker on a case-by-case basis.

   b. A formal application for immunity should include all information and evidence relating to the alleged cartel that the applicant possesses and a corporate statement addressing: (i) the aims, activities and functioning of the cartel; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts and all relevant explanations in connection with the various pieces of evidence;

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[47] *See* Commission Notice (2006/C 298/11) on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ C 298 [2006] p.1 7, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT [hereinafter 2006 Commission Leniency Notice].

[48] *See id.*

(ii) the name and address of the applicant and other participants in the alleged cartel; (iii) the names, positions, office locations, and home addresses (where necessary) of all individuals who have been involved in the alleged cartel; and (iv) information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel.

i. If the applicant does not yet have all the information and evidence it needs, it can initially present the requested information in hypothetical terms along with a detailed descriptive list of the evidence that it proposed to disclose at a later agreed date. The name of the applicant and other participants in the alleged cartel need not be disclosed until the evidence described in the application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

c. Corporate statements can be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. Applicants will then have an opportunity to check the transcription and submit corrections.

d. Access to corporate statements will be limited to addressees of a statement of objections provided that the addressee (and any legal counsel getting access to information on its behalf) commits (i) not to make any make any copy of the information by mechanical or electronic means; and (ii) to use the information solely for the purposes of judicial or administrative proceedings before the Commission. If an addressee violates either of these provisions, the Commission will seek an increased fine for the responsible undertaking and/or seek other disciplinary action.

e. The EC will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, regardless of whether the immunity application is presented formally or by requesting a marker. However, once another applicant has come forward, the EC will generally close the file and prevent the original applicant from supplementing its application until the Commission has reached a decision on the original immunity application.[49]

7. Even if a firm does not qualify for full immunity – perhaps because it has taken steps to coerce "other undertakings" to participate in illegal activity or because another leniency applicant has already come forward – the firm may still qualify for a reduction in fines.

a. To qualify for a reduction in fines, the firm must (i) provide the Commission with evidence that provides "significant added value" – *i.e.*, evidence that strengthens the Commission's ability to prove the infringement by its very nature and/or its level of detail – considering when the evidence originated and whether it would require

[49] *Id.*; *see also* Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft Commission Notice on Immunity from Fines and Reduction in Fines in Cartel Cases, at 14 (Nov. 2006), *available at* http://www.abanet.org/antitrust/at-comments/2006/1 1 -06/comments-ec-leniency.pdf.

corroboration from additional sources; (ii) provide the Commission with all relevant evidence and information available to the firm, cooperate fully on a continual and expeditious basis, swiftly answer Commission requests that may help to resolve factual issues, make current (and, if possible, former) employees and directors available for interviews with the Commission, not destroy or conceal relevant information or evidence, and promise not to disclose the fact or any content of its application before the Commission has issued a Statement of Objections (unless otherwise agreed); and (iii) end its involvement in the activity no later than when it makes the initial disclosure to the Commission, except for involvement that is reasonably necessary to preserve the integrity of the inspections.

b. The first firm to provide "significant added value" will earn a reduction of 30-50%. The second firm to do so can obtain a 20-30% reduction, and all subsequent firms can gain a reduction of up to 20%. The precise amount of the reduction will be determined by evaluating the timing of the firm's cooperation and the extent to which the firm's evidence strengthens the Commission's ability to prove the facts in question.[50]

8. The Commission retains the power to revoke immunity when the company fails to comply with the conditions for immunity. This happened in the Raw Tobacco Italy case.[51] In that case, Deltafina was granted conditional immunity at the beginning of the procedure, but it subsequently breached its cooperation obligations by revealing to its main competitors that it applied for leniency before the Commission could carry out surprise inspections. Nevertheless, Deltafina' s cooperation was regarded as a factor justifying a reduction in the fine imposed.

9. The current EC leniency program and the U.S. leniency program are very similar. The main likenesses include:

   a. Only the first applicant to provide helpful information (and meet the other criteria) is eligible for immunity.

   b. Subsequent cooperating companies may still receive substantial reductions in fines. The amount of the reduction depends on the corporation's place in line and the timeliness and value of its cooperation.

   c. Use of a marker system to allow a leniency applicant to retain its place in the line before its internal investigation is complete.

[50] *See* 2006 Commission Leniency Notice, *supra* note 47.

[51] Commission Decision of 20 October 2005, Case COMP/C.38.281/B.2 – Raw Tobacco Italy, OJ L 353 [2006] p. 45, para. 9.3.1.

d. Acceptance of oral information and evidence.

e. Charges cannot be bargained away—meaning that provable charges will not be dropped in exchange for a guilty plea.[52]

10. There still are, however, differences between the EC leniency program and the U.S. leniency program, including:

a. The EC requires additional information to obtain a marker, and its marker system is more discretionary. In the U.S., applicants for a marker need only disclose a description of the product market in which the cartel operated to obtain a marker. The Division will grant a conditional marker almost automatically. However, the EC program requires an applicant for a marker to provide additional information. Moreover, the Commission retains the power to grant or decline a marker on a "case-by-case basis."

b. The EC program requires an immunity applicant to submit all contemporaneous incriminating evidence that is in the applicant's possession or available to it at the time of the application, whereas the U.S. program has no such threshold requirement.

c. The EC program requires applicants to affirm the contents of the written transcript of an oral corporate statement, whereas the U.S. program does not.

d. The EC will notify an immunity applicant in writing if immunity is not available, whereas the U.S. does not use written notification.

e. The EC will wait until the conclusion of an investigation to announce whether a company has provided sufficient cooperation to engage in settlement discussions and receive a reduced fine, although the EC's new settlement procedures may expedite resolution. In contrast, a company that doesn't qualify for amnesty in the U.S. may immediately start plea negotiations with the Division to resolve its claims and possibly obtain a mitigation in penalties by cooperating with the government.[53] Moreover, in the EU, cooperation consists of "waiv[ing] . . . certain procedural rights and not the type of substantial assistance that is provided to the Division by settling cartel participants in the U.S."[54]

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[52] *See* Ann O'Brien, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, *Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions*, Remarks before the 1 3th Annual EU Competition Law and Policy Workshop, Florence, Italy (June 6, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/235598.htm.

[53] *See id.*

[54] *Id.*

(cont'd)

e. Most importantly, in the U.S., a leniency applicant will not be

prosecuted and thus not be found guilty. A Commission decision, by contrast, will describe the infringement and state its findings about the undertaking, including findings relating to the leniency applicant's conduct.[55] Subsequent courts may rely on these findings.[56] This increases the likelihood that a leniency applicant to the EC will become a primary target of private litigants.

11. During the public consultation period in which the European Commission was considering adopting its revised policy, sections of both the American Bar Association and the International Bar Association submitted comments addressing the convergence of the EC and U.S. leniency programs (as well as many other national and international institutions and organizations). The Bar Associations lauded the EC's attempts to increase the predictability, certainty and transparency in the leniency process. However, they also closely examined the differences between the two programs, expressing concern that some of the changes to the EC program may actually hinder those objectives. In particular:

    a. The Bar Associations remarked that the increased information to procure a marker and increased discretion in the EC's choice to grant a marker may deter self-reporting by making the requirements too onerous and increasing the costs of "getting it wrong" by acting too quickly. They also observed that other parties could potentially leap-frog the applicant, since there is no guarantee that the marker will be respected.

    b. The Bar Associations expressed concern that stringent evidentiary requirements to obtain immunity may deter corporations from seeking immunity and decrease the utility of submissions, because corporations are usually better situated to assess and describe the significance of evidence later in the process.

    c. The Bar Associations noted that affirming the contents of the written transcript could have deleterious consequences in civil litigation if the information in the corporate statement was later incorporated into the Statement of Objections or if the Commission used the written transcript in evidence in subsequent proceedings.

(... cont'd)

[55] *See* Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 [2003] p.1.

[56] *See, e.g.*, Sec. 33(4) of the German Act against Restraints of Competition ("Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community.").

d. The Bar Associations observed that any written notification that an immunity application has been denied might be discoverable in subsequent private damages actions.[57]

12. An application for leniency to the EC or one Member State is not considered an application for leniency to another competition authority. Counsel should consider seeking leniency from each competition authority that is affected by the infringement and that may have jurisdiction over the matter.

13. The new European Competition Network introduced a model leniency program in September 2006 to alleviate the burden associated with multiple leniency filings.[58] In particular, the program sets forth a "summary application" procedure for those cases in which the leniency applicant is the first to provide information that would enable a competition authority to carry out a targeted inspection in connection with the alleged cartel and the Commission is "particularly well placed" to deal with the matter.

    a. In those situations, the leniency applicant files a leniency application with the Commission and a summary application with the other national competition authorities ("NCA"). The summary applications would contain: (i) the name and address of the applicant; (ii) the other parties to the alleged cartel; (iii) the affected product(s); (iv) the affected territory(-ies); (v) the duration; (vi) the nature of the alleged cartel conduct; (vii) the Member State(s) where the evidence is likely to be located; and (viii) information on its other past or possible future leniency applications in relation to the alleged cartel.

    b. The NCA receiving the summary application will not grant or deny conditional immunity. Instead, it will acknowledge receipt of the summary application and confirm to the applicant that it is the first to apply for immunity. If the NCA later decides to take action, the applicant will be given a reasonable period to complete the application.

    c. Summary applications are currently accepted by the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Sweden and the United Kingdom.

    d. As long as the NCA has not decided to take action in the case, the applicant's duty to provide further information and assist with the investigation applies only to the

[57] *See* Comments of the ABA Section of Antitrust Law, *supra* note 49; International Bar Association Antitrust Committee Working Group on Leniency Programmes, *Submission to the European Commission's Consultation with Regard to a New Commission Leniency Notice* (Nov. 2006), *available at* http://www.ibanet.org/images/downloads/lpd/Revised%20Leniency%20Submission%2003-1 1 -06%20(2).pdf.

[58] ECN Model Leniency Programme (Sept. 29, 2006), a*vailable at* http://ec.europa.eu/comm/competition/ecn/model _leniency _en.pdf.

Commission. However, the applicant must comply with any specific additional information requests of a NCA that has received a summary application so that the NCA can reach an informed view on case allocation.[59]

[59] *Id.* For additional guidance on the interaction of the enforcement activities of the NCAs and DG Competition of the European Commission in the area of professional services, see Overview of National Competition Authorities' Advocacy and Enforcement Activities in the Area of Professional Services (Feb. 2004 – Spring 2006), *available at* http://ec.europa.eu/comm/competition/ecn/reference_paper.pdf.

14. The EC generally receives approximately 20 leniency applications per year. The EC has not been especially generous in granting leniency in recent decisions. In the *Synthetic Rubber* decision, Shell obtained no reduction.[60] In the *Gas Insulated Switchgear* decision, the EC granted immunity to ABB but did not grant any reduction to the remaining six leniency applicants because their cooperation did not provide any "significant added value."[61] In the *Elevators and Escalators* decision, the immunity applicant, Kone, was fined a total of €142 million, qualifying for immunity in Belgium and Luxembourg but not in Germany or the Netherlands. In that decision, several other leniency applicants obtained reductions in some national markets concerned but not all of them.[62]

15. Though Stolt-Nielsen filed an application for immunity with the EC and was granted provisional immunity in February 2003, the EC issued a Statement of Objections against Stolt-Nielsen in April 2007.[63] However, on May 8, 2008, the EC informed Stolt-Nielsen that it had closed its investigation of the deep-sea parcel tanker industry.[64]

I. Plea Bargaining and Settlement Procedures in the United States and Europe

A. The United States

1. The United States has extensive plea bargaining procedures. In the late stages of a criminal investigation, immunity will not be available. Instead, the Antitrust Division will insist that a corporation enter a guilty plea to a felony charge.

2. Plea bargains can provide defendants with a number of benefits, including certainty, expedience, finality, and substantially reduced criminal penalties. Over the last twenty years, over 90% of the corporate defendants charged with an antitrust offense have entered into plea

[60] Press Release, *Commission Fines Producers and Traders of Synthetic Rubber €519 Million for Price Fixing Cartel* (Nov. 29 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1647.

[61] Press Release, *Competition: Commission Fines Members of Gas Insulated Switchgear Cartel Over 750 Million Euros* (Jan. 24, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&guiLanguage=en.

[62] Press Release, *Competition: Commission Fines Members of Lifts and Escalators Cartels Over €990 Million* (Feb. 21, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209&format=HTML&aged=0&language=EN&guiLanguage=en.

[63] Press Release, *Stolt-Nielsen S.A. Confirms Receipt of European Commission Statement of Objections* (Apr. 11, 2007), *available at* http://biz.yahoo.com/iw/070411/0237501.html.

[64] *See* Press Release, *Stolt-Nielsen S.A. Has Been Informed that the European Commission Has Closed the Deep-Sea Parcel Tanker Investigation* (May 8, 2008), *available at* http://www.stolt-nielsen.com/Media-Centre/Feed-News.aspx?link=http://cws.huginonline.com/S/1 54/PR/200805/121 7582.xml.

agreements with the Division where they admitted guilt and cooperated with the Division's criminal investigations.[65]

3. Three types of plea agreements are available under Federal Rule of Criminal Procedure 11. Which type of plea a corporation enters is an important subject of negotiation:

   a. In an "A" agreement, the government promises to move for dismissal on fewer than all pending charges.

   b. In a "B" agreement, the government agrees to recommend, or agrees to not oppose, a defendant's request for a particular sentence.

   c. In a "C" agreement, the government and the defendant agree on the specific sentence and it is presented jointly to the court.

4. The Division will consider the following factors when deciding whether to enter a plea agreement with a defendant and when choosing the appropriate type of plea agreement: (i) the defendant's willingness to cooperate in the investigation or prosecution of others; (ii) the defendant's criminal history; (iii) the nature and seriousness of the charged offense(s); (iv) the defendant's willingness to assume responsibility for its conduct; (v) the desirability of prompt and certain disposition of the case; (vi) the likelihood of a conviction at trial; (vii) the probable effect on witnesses; (viii) the probable sentence for a conviction; (ix) the public interest in having a trial; (x) the expense of trial and appeal; (xi) the need to avoid delay in disposing of other pending cases; and (xii) the effect upon the victim's right to restitution.[66] To enter into a plea agreement, the Division will require a defendant to provide all documents, wherever located, requested by the Division in connection with its investigation and to make available certain key employees.[67]

5. While the Division will entertain plea proposals both before and after indictment, most are entered pre-indictment. Plea negotiations are generally considered confidential, and the statements therein will usually be inadmissible at trial. They often focus on: (i) who will have to plead guilty; (ii) the violations for which the defendant must admit guilt; (iii) the scope of the antitrust charge, including the products or services covered by the conspiratorial

[65] Hammond, *Negotiated Plea Agreements*, *supra* note 31; *see also* Hammond, *Charting New Waters*, *supra* note 31.

[66] Principles of Federal Prosecution, U.S. Attorney's Manual § 9-27.420, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.420.

[67] Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, *Negotiating The Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases*, Presentation before the ABA Criminal Justice Section Thirteenth Annual National Institute on White Collar Crime (Mar. 4, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2275.htm.

agreement, and the duration and geographic scope of the conspiracy; (iv) who will be covered by the non-prosecution and cooperation provisions of the plea agreement; and (v) the sentencing recommendation of the parties.[68]

6. A plea agreement with the Division must be in writing and include (i) a factual admission of guilt; (ii) an enumeration of the rights and procedural safeguards that the defendant is waiving by entering into a plea agreement, including the right to appeal a conviction and sentence (unless the court imposes a sentence above that recommended in the plea arrangement); (iii) an enumeration of the statutory maximum penalty that may be imposed against the defendant upon conviction of each charged offense; (iv) the recommended sentence; and (v) the consequences if the defendant violates the plea agreement.[69]

7. A plea agreement also will typically include provisions (i) restricting the government's use of self-incriminating information provided by the defendant pursuant to the plea agreement, (ii) promising not to bring further criminal charges against a defendant for certain criminal acts committed prior to the date the plea agreement was signed, and (iii) stating that, if requested, the Division will advise other government agencies of the defendant's cooperation. The plea agreement also will generally include a factual basis to support the guilty plea, though the amount of factual detail is often considerably less than if the matter were litigated at a public trial.[70]

8. When the Division enters into a plea agreement that requires foreign nationals to travel to the United States for interviews or testimony, the Division will agree not to take any action to arrest, detain, or serve the individual with process or prevent the individual from departing, unless that individual commits perjury, contempt, obstructs justice or makes a false statement. For cooperating aliens, the Division will advise them of their ultimate immigration status before they plead to a crime (so that their convictions will not be used by the INS as a basis to deport or exclude them from the United States).[71]

9. The maximum criminal penalties increased under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004:

   a. The legislation increased the maximum fine for a Sherman Act violation to $100 million for a corporation and $1 million for an individual. However, depending on the gravity of

[68] Hammond, *Negotiated Plea Agreements*, *supra* note 31.

[69] *Id.*

[70] *Id.* Model corporate and individual plea agreements are attached as Appendix E and Appendix F.

[71] *Id.*

the conspiracy, its scope and duration, a corporation or an individual may be required to pay twice the pecuniary gain derived from the crime, or twice the pecuniary loss to the victims, if that amount exceeds the statutory maximum.[72]

b. The legislation increased the maximum term of imprisonment for an antitrust offense from three to ten years.

10. The maximum fine or term of imprisonment is not imposed in every case. Traditionally, the U.S. Sentencing Guidelines helped determine the actual sentence to be imposed. Under *United States v. Booker*, imposition of a sentence within the range provided by the Sentencing Guidelines is not mandatory, but the Guidelines may be used in an "advisory" manner.[73] A district court's choice of sentence will be overturned by an appellate court only if the sentence represents an abuse of judicial discretion.[74]

a. The Division has stated that it will continue to seek Guidelines sentences, "because they have promoted consistency, fairness, and transparency in sentencing."[75]

b. Under the Guidelines, a fine range is determined for corporations by evaluating the "base fine" and then making adjustments based on the culpability of the defendant.

i. The base fine is the greatest of (i) the amount shown on the Offense Level Fine Table; (ii) the pecuniary gain to the organization; or (iii) 20% of the volume of affected commerce.[76] When a firm makes multiple product lines, only the volume of commerce in the affected product is generally included, not the firm's total sales.[77]

ii. After the base fine is ascertained, the firm's "culpability score" is determined. A firm starts with a culpability score of 5. Points are added for (i) involvement of high-level personnel; (ii) proof of recidivism; and (iii) obstruction of justice during the investigation (among other factors). Points are subtracted if the offense occurred

[72] *See* 18 U.S.C. § 3571(d).

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

[74] *Gall v. United States*, 128 S. Ct. 586 (U.S. 2007).

[75] Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants*, Remarks before the ABA Section of Antitrust Law, Spring Meeting (Mar. 30, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/208354.htm [hereinafter Hammond, *Antitrust Sentencing*].

[76] U.S.S.G. § 8C2.4(a)(1-3); *id.* § 2R1.1(d)(1).

[77] *See United States v. Andreas*, 216 F.3d 645, 677 (7th Cir. 2000).

despite an "effective program" to prevent and detect violations of the law (unless high-level personnel were involved in the offense or the corporation delayed reporting the offense) or for self-reporting, cooperation and acceptance of responsibility.[78]

iii. Each culpability score has a minimum and maximum multiplier. The fine range is determined by multiplying the base fine by the minimum and maximum multiplier.[79]

c. Individual fines are computed similarly (though not identically).[80]

d. Individual terms of imprisonment are calculated slightly differently. The range of imprisonment is determined by the base offense level (with any adjustments) and the criminal history score.

i. The base offense level for antitrust offense is 12. Additions to the base offense level, up to a total of 16 points, are made for the volume of affected commerce attributed to the individual over $1 million.[81]

ii. The base offense level can be adjusted upward if the defendant was an organizer, leader or manager of the activity, and the activity involved five or more people or was otherwise extensive.[82] The base offense level can also be increased if an individual with specialized training "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense."[83]

iii. The base offense level can be adjusted downward if the defendant was a minimal or minor participant in the activity and was "responsible in some minor way for his

[78] U.S.S.G. § 8C2.5.

[79] *Id.* §§ 8C2.6, 8C2.7.

[80] *See id.* § 2R1.1.

[81] *See id.*

[82] *Id.* § 3B1.1.

[83] *Id.* § 3B1.3 & Commentary n.3.

firm's participation in the conspiracy."[84] The base offense level also can be adjusted downward for acceptance of responsibility.[85]

iv. The range of imprisonment is then determined by a Sentencing Table, though a downward departure is available in rare cases in which a mitigating circumstance is not adequately taken into account in the Guidelines.[86]

e. If the recommended fine or term of imprisonment does not exceed the statutory maximum, the Division need not include the relevant aggravating facts in the plea agreement. However, if the Division seeks to exceed the statutory maxima, it must include the relevant facts in the plea bargain.[87] This is usually the situation if the Division seeks to rely on the extent of the gain or loss. The Division will not enter into a plea agreement with any defendant that seeks to contest the amount of gain or loss.[88]

11. The benefits from pleading guilty are directly related to the timing of cooperation. For early cooperating companies, a variety of benefits may be sought, including: (i) reducing the scope of the charged conduct; (ii) reducing the volume of commerce involved; (iii) obtaining a substantial cooperation discount; and (iv) securing more favorable treatment for culpable executives. Individual defendants that cooperate early can often avoid a lengthy jail sentence. (The Division has stopped offering foreign national defendants "no jail" deals).[89]

12. Plea bargaining in the U.S. is often used as part of the investigative process. Cooperation provided pursuant to a plea agreement can often lead to the detection of other previously unidentified cartels relating to different products or in different geographic markets. Plea bargainers can qualify for Amnesty Plus credit or receive affirmative amnesty consideration, leading to substantial benefits both for the defendant and the Division.[90]

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[84] *Id.* § 3B1.2 & Commentary to 2R1.1.

[85] *Id.* § 3E1.1.

[86] 18 U.S.C. Appx., ch.5, *available at* http://www.ussc.gov/2006guid/5a.html, Pt. A; 18 U.S.C. § 3553(b).

[87] *See Booker*, 543 U.S. at 231 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

[88] Hammond, *Antitrust Sentencing*, *supra* note 75.

[89] *Id.*

[90] *Id.*

13. In the Stolt-Nielsen case, Odfjell ASA, Odfjell Seachem AS and Odfjell USA, Inc., competitors of Stolt-Nielsen in the parcel tanker shipping market, reached a plea agreement with the DOJ and agreed to cooperate with the ongoing case against Stolt-Nielsen.[91]

[91] *See* Stolt Antitrust Blog, *Stolt Competitor Moves To Quash Subpoenas* (Mar. 2, 2007), *available at* http://stoltantitrust.info/blog/?m=200703.

B. Europe

1. Plea bargaining is much less prevalent in Europe than in the U.S. Only a few Member States (such as France) have plea bargaining procedures. In Germany, the Bundeskartellamt has in the past adopted "amicable fine decisions." The EC has procedures for commitment settlements, but they do not apply to cartel investigations or cases in which the Commission intends to impose a fine. However, the EC has adopted settlement procedures that apply to all cartel cases.

2. In France, companies may engage in negotiated settlements pursuant Article L.464-2 III and R. 464-4 of the Code de Commerce. The negotiated settlement applies only to procedures regarding infringements of Article L.420-I but not to infringements of Article 81 of the EC Treaty.

    a. Procedurally, such settlements take place during proceedings before the Conseil de la Concurrence and after the parties have been notified of the objections raised against them. If a company does not dispute the factual basis of the complaints and commits to alter its behavior, the rapporteur général may propose that the Conseil reduce the fine. Most fine reductions are in the range of 30 to 50%.

    b. Contrary to the EC commitment settlements, the negotiated settlement is applied to – and is intended for – cases in which a fine is appropriate. The law provides for a reduction of the fine by half, but the Conseil may grant a further reduction.

    c. Settlement applications will be rejected where a company does not clearly, totally and without ambiguity accept the objections but recharacterizes the alleged practices.[92]

    d. For companies, the negotiated settlement can prove successful. From 2003 to 2006 nine settlements were negotiated. In 2004, the Conseil reduced a fine imposed on La Poste by 90%.[93] In 2007, three decisions have already been adopted.

3. In Germany, there is no statutory provision covering plea bargaining or settlements in proceedings where Bundeskartellamt intends to impose a fine.

    a. In the past, the Bundeskartellamt has negotiated so-called "amicable fine decisions" in a number of cases. Amicable fine decisions usually contained an agreement in which the

[92] *See, e.g.*, Conseil de la Concurrence, Rapport annuel 2006, at 217.

[93] Decision of the Conseil de la Concurrence 04-D-65 of 30th November 2004, relative to practices by the French post office La Poste in its sales contracts, *available at* http://www.conseil-concurrence.fr/pdf/avis/04d65.pdf.

companies and individuals involved confessed to the alleged offense. In turn, they were granted a reduction of the fine. The Bundeskartellamt closed the matter by issuing a shortened notice, consisting only of the most relevant facts of the case and the legal assessment.

b. Such settlements usually took place where the Bundeskartellamt already possessed strong evidence regarding the offense. They mainly served to shorten the proceedings to reduce the Bundeskartellamt's investigative expense s.[94]

c. In some recent cases, the Bundeskartellamt has adopted a "quasi-settlement" procedure. It sent a draft fining decision, containing a specified fine, to the counsel of the concerned party. In exchange for obtaining a confession, the Bundeskartellamt would offer to make the draft decision the final one.

d. Important legal limitations for settlement agreements have been established by case law. Most importantly, a defendant cannot waive its right to appeal before judgment.[95] Consequently, plea bargaining has not frequently been used since the 1990s.

4. In the EU, the procedure for so-called "commitment settlements" exists under Article 9(1) of Council Regulation 1/2003. Commitment settlements are typically used in borderline cases, when the conduct under scrutiny is not clear-cut (for instance when there is a possibility of objective justification), when the companies are willing to change the conduct to remove any competitive concerns and when efficiency considerations caution against the issuance of a formal prohibition decision. Commitment settlements are not available in cartel cases; rather, the procedure applies when coordinated activities that are otherwise prohibited under Article 81(1) fall within one of the exemptions set forth in Article 81(3).

a. Article 9 commitment decisions do not address whether there was or still is a breach of the EU competition rules. Nor do they involve fines. The EC retains the authority to seek commitments from some members of the undertaking but prosecute other participants.

b. Commitment decisions are based solely on a preliminary assessment of the facts and not a full evidentiary record.

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[94] Bundeskartellamt, Plea bargaining / settlement of cartel cases, OECD 2006, DAF/COMP/WP3/WD(2006)77, para. 14., *available at* http://www.bundeskartellamt.de/wDeutsch/download/pdf/OECD/Plea_Bargaining_Roundtable.pdf.

[95] Decision of the Bundesgerichtshof (German Federal Court of Justice), judgment of 28 August 1997, 4 StR 240/97, para. 34-38. This development originally occurred in criminal procedure but applies to fining decisions of the Bundeskartellamt too. *Bundeskartellamt, Plea bargaining, supra note* 94, para. 8.

c. Commitment decisions are binding only on those offering the commitment and the Commission. They do not effect (potential) proceedings by other competition authorities.[96]

d. The EC has procured commitments from the German Football League regarding the central marketing of the media rights of the Bundesliga and 2. Bundesliga; Repsol CPP SA, concerning the conditions under which the company will distribute fuel for motor vehicles through service stations in Spain; the FA Premier League, concerning the sale of media rights to the Premier League Football competition; Coca-Cola, regarding various exclusive contracting practices; and DeBeers, regarding its control over alternative sources of supply.[97]

5. For several years, Commissioner Kroes has proposed consideration of a more extensive settlement procedure. Between 2000 and 2007, the Commission adopted 53 infringement decisions for an average of between 7 and 8 decisions per year.[98] These investigations take many years and require substantial resources, especially because the EC must investigate the substantive details of every case that is brought. As a result, Commissioner Kroes proposed serious consideration of a settlement system that would permit the "simplified handling of cases in which the parties to the cartel and enforcer concur as to the nature and scope of the illegal activity undertaken and the appropriate penalty to be imposed" in order to save EC resources and ensure swift enforcement, timely punishment and effective deterrence of cartel activity.[99]

[96] *See Bundeskartellamt, Plea bargaining*, *supra note* 94, para. 8.

[97] Commission Decision of 19 January 2005, Case COMP/C-2/37.214 – German Bundesliga, OJ L 134 [2005] p. 46; Commission Decision of 22 June 2005, Case COMP/A.39.116/B2 – Coca-Cola, OJ L 253 [2005] p. 21; Commission Decision of 22 February 2006, Case COMP/B-2/38.381 – DeBeers, OJ L 205 [2006] p. 24; Commission Decision of 22 March 2006, Case COMP/C-2/38.173 – FA Premier League, not yet published; Commission Decision of 12 April 2006, Case COMP/B-1/38348 – Repsol CPP SA; not yet published. Non-confidential versions of the decisions are available at http://ec.europa.eu/comm/competition/antitrust/cases/.

[98] *See* http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.

[99] *See* Neelie Kroes, European Commissioner for Competition Policy, *Delivering on the Crackdown: Recent Developments in the European Commission's Campaign Against Cartels*, Speech delivered at the 10th Annual Competition Conference at the European Institute, Fiesole, Italy (Oct. 13, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/595&format=HTML&aged=0&lan; Neelie Kroes, European Commissioner for Competition Policy, *The First Hundred Days*, Speech delivered at the 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, Brussels (Apr. 7, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en.

6. On June 30, 2008, the EC amended Commission Regulation (EC) No. 773/2004 to streamline the procedures for settling cartel cases.[100]

   a. Unlike in the U.S. the proposed settlement procedure is independent from and runs in parallel to the existing leniency program. It will be an administrative case-closure tool and not part of the investigative process.

   b. The EC stated that it hopes to achieve significant procedural savings through the settlement procedures: [C]artel cases are typically long and procedurally complex. Our experience shows that procedural burdens are exacerbated in the handling of cartel cases because the procedure involves multiple parties, each raising specific confidentiality issues. The average cartel file numbers tens of thousands of pages, all of which have to be screened for confidentiality issues. Finally, parties to a case often request the use of multiple different languages for the administrative procedure. * * * If even some of these issues can be avoided while fully respecting rights of defence, there is a tremendous scope to make substantial procedural savings, such that would justify a reward for cooperation."[101]

   c. Unlike Article 9 of Council Regulation 1/2003, the settlement procedure will apply to cartel cases.

7. According to Commission Regulation (EC) No. 622/2008, implemented on July 1, 2008:

   a. A party may ask the Commission to engage in settlement discussions upon learning of an investigation. However, the Commission has broad discretion in determining which cases may be suitable for settlement discussions. In doing so, the Commission will take into account the probability of reaching a common understanding within a reasonable timeframe. Factors to be considered are (i) the number of parties involved; (ii) possible conflicting views as to liability; (iii) the extent to which facts are contested; and/or (iv) the appropriateness of setting a possible precedent. Conversely, the Commission can also decide to initiate settlement proceedings with a company, but it must do so before issuing

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100 *See* Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as Regards the Conduct of Settlement Procedures in Cartel Cases, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171 :0003:0005:EN:PDF [hereinafter "Commission Regulation (EC) No. 622/2008"].

101 Neelie Kroes, European Commissioner for Competition Policy, *Assessment of and Perspectives for Competition Policy in Europe*, Celebration of the 50th anniversary of the Treaty of Rome, Barcelona (Nov. 19, 2007), *available at* http://ec.europa.eu/commission_barroso/kroes/index_en.html.

a statement of objections or a preliminary assessment pursuant to Article 9(1) of Commission Regulation (EC) No. 1/2003.[102]

b. Then, the Commission will offer bilateral contacts between the Directorate General for Competition and the prospective settling party. The Commission retains full discretion to determine (i) the appropriateness of the settlement discussions; (ii) their pace, order and sequence; and (iii) the timing of the information disclosure (including the evidence in the Commission file).

c. Settlement discussions focus on the alleged facts, their classification, the gravity and duration of the infringement and the resultant fine, and allow the company to learn about the essential elements of the Commission's case, such as (i) the objections the Commission intends to raise; (ii) the evidence supporting the Commission's objections; and (iii) the range of potential fines. The Commission will grant access to non-confidential versions of file documents if the Commission considers this necessary for the settling party to ascertain its position. The hearing officer will be called upon to resolve any disputes about access to the evidence.

d. If both the Commission and the party reach a common understanding about the scope of the cartel and the estimated likely fine range, the party must make a settlement submission orally or in writing within the time period set by the Commission. The settlement submission must conform to a specific template and contain:

(i) an unequivocal acknowledgement of the party's liability for the infringement regarding the main facts, legal qualification, and the duration of its participation;

(ii) an indication of the maximum fine that the party would be willing to pay;

(iii) a confirmation that the party has been sufficiently informed of the Commission's objections and has had an opportunity to make its views known to the Commission;

(iv) a confirmation that the party does not anticipate requesting access to the file or an oral hearing; and

(v) an agreement to receive the statement of objections and the final decision in a given official EC language.

e. The settling party will be granted a maximum 10% reduction in fine, cumulative of any other leniency application reduction.

102 *See id.* Art. 1.

f. Following the settlement submission, the Commission will issue a statement of objections. The settling party will then have an opportunity to confirm that the statement of objections corresponds to its submission. A prospective settling party cannot unilaterally revoke a settlement submission. However, if the party asserts that the statement of objections or final decision does not accurately reflect its submission, the admissions set forth therein are deemed withdrawn and the case reverts to the normal administrative procedure.

g. Upon receipt of the party's confirmation, the Commission may immediately adopt the decision after consultation of the Advisory Committee without granting the party an oral hearing or further access to the Commission file. When the Commission issues a decision that departs from the statement of objections, however, it must issue a new statement of objections, and the normal administrative procedure will apply. Again, the party's admissions will be viewed as withdrawn and cannot be used against it.

h. Settlement submissions are generally shielded from disclosure so that potential claimants and other parties cannot use the materials to institute their own legal actions. However, other parties implicated in the investigation that do not settle can review the submissions on Commission premises.

10. The Commission Regulation (EC) No. 622/2008 is considerably different from the U.S. plea bargaining procedure.

    a. Unlike in the United States, where plea bargaining settlements are often conducted as part of the investigative process and used to gather evidence – and therefore for the Antitrust Division to "build its case" – the EC will not use settlements as a tool of investigation. The fact that the Commission would initiate the process before issuing the statement of objections implies that the Commission will have preliminarily assessed the facts, identified the most important evidence and made a fine calculation. As such, the settlement procedure does not afford companies the opportunity to negotiate as to the existence of an infringement or the appropriate sanction. Rather, the settlement procedure rewards companies that expedite a formal decision with a reduced penalty.

    b. Plea bargaining in the United States occurs in the context of a criminal investigation and prosecution that are subject to judicial scrutiny and approval. In the EC, such settlements occur in an administrative context that is more complex and subject to more regulatory oversight. Moreover, settlements will have to take the form of decisions by the EC instead of an "agreement" with the company.

    c. In the United States, companies that enter into plea agreements may receive amnesty for illegal conduct in other markets under the "Amnesty Plus" program – a substantial incentive for pleading guilty. The EC does not have an equivalent program.

    d. In the United States, companies that enter into plea agreements waive their rights to appeal the conviction and sentence (unless the sentence is above that the Division recommends). There is a serious question whether such a waiver is permissible under the provisions of the EC Treaty, and consequently, Commission Regulation (EC) No. 662/2008 does not contemplate a settlement agreement in which the party waives its rights to appeal. However, a company admitting to liability *ex ante* would presumably face significant obstacles if challenging the Commission's decision before a European Court.

III. Practical Considerations for Companies Facing a Cartel Investigation

Although a cartel investigation is not something a corporation wants to think about, preparation for such an event is essential. Having a plan to perform a quick internal investigation and understand (at least) the broad contours of the situation is essential to avoid chaos and minimize the risk of false statements, destruction of evidence and obstruction of justice – which the U.S. Antitrust Division takes very seriously

and will seek to punish severely if it occurs.[103] Part of the corporation's antitrust compliance training for executives should be devoted to explaining how an antitrust investigation begins and what to do – and, more importantly, not do – once an investigation has begun. Executives should be advised that enforcement officials may show up at their homes and ask questions. They should know their rights and their responsibilities in that setting. The split second decision to hide, alter or destroy documents at the early stage of an investigation should also be explained to an executive before any investigation begins. When the investigation begins, there is usually a period of chaos before counsel has created a strategy on how to treat documents and has informed executives of that strategy. It is better for executives to anticipate this moment and be prepared rather than free-associating at the time of a raid or service of a subpoena. Indeed, even a couple of hours between the raid or subpoena and a "hold order" would allow the executives to make tragic mistakes.[104]

While it is beyond the scope of this paper to provide tips on handling every aspect of a cartel investigation, a few observations are in order. In the event in-house counsel learns of possible cartel activity occurring within a company before any competition authority has issued a subpoena or conducted a raid, it is essential to move swiftly to conduct an internal investigation in order to preserve the ability to apply for leniency. In both the U.S. and Europe, leniency is a sure thing only for companies that self-report cartel activity before an investigation has commenced. Therefore, counsel must – swiftly and confidentially – conduct interviews with any "whistleblowers" and others likely to have relevant information, as well as review any documents that may reveal or simply suggest cartel activity. It is essential at this stage that counsel learn as much as possible in order to advise corporate management on a strategy for dealing with the problem, while at the same time ensuring that participants in the cartel activity do not take steps – such as destruction of documents or tipping of other cartel participants – that could undermine or eliminate the company's ability to obtain full amnesty. Thus, if the initial information obtained by counsel strongly suggests cartel activity, the company must think seriously about obtaining a marker. As discussed above, the requirements for obtaining a marker are more onerous in the EU than in the U.S., and thus in Europe it may be necessary to conduct a more extensive investigation before making this decision. Eventually, counsel will need to present detailed evidence that it has uncovered that either suggests or establishes an antitrust conspiracy and identify likely witnesses and specific evidence. This presentation should be oral to avoid creating evidence that may be discoverable in a subsequent private damages action. If a corporate decision is made that leniency should be sought, counsel must ensure that each of the criteria are satisfied – most importantly, that all participation in the cartel is terminated and the company has returned to engaging in lawful competition.

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103 Thomas O. Barnett, Assistant Attorney General, Antitrust Division, *Seven Steps to Better Cartel Enforcement*, Presentation to the 11th Annual Competition Law & Policy Workshop, European Union Institute, Florence, Italy (June 2, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/216453.htm.

104 *See* Donald C. Klawiter, *Antitrust Compliance in 2005: It's Not the Numbers, It's the Results*, THE ANTITRUST REVIEW OF THE AMERICAS 2005 (Global Competition Review).

Much more commonly, counsel are faced with the surprise service of a subpoena, a raid and visits by investigating agents to the homes of key corporate employees. In this situation, the very first step the corporation must take is to ensure that all potentially relevant documents are preserved so as to avoid any subsequent charge of obstruction of justice (in the U.S.) or any loss of opportunity for a reduction of a fine (in the EU). This is usually done through a "hold order" which is sent out as a broadcast email and informs employees of the need to preserve all documents – whether in hard copy form or stored electronically – relating in any way to the product under investigation. Since the scope of the investigation often will not be clear at this early stage, the best practice is to cast the net wide both in terms of recipients, subject matter covered and time period for preservation. As the business world becomes increasingly dominated by electronically stored information, counsel experienced in overseeing the preservation of such documents should be consulted at the outset. As the investigation progresses, there likely will be an opportunity to narrow the scope of the document production, and counsel may have an opportunity to release categories of documents (including documents from earlier time periods) or employees from the hold order.

One of the most important issues in a cartel investigation is the role that senior executives may have had in the cartel activity. No senior executive who played a role in the investigation should have any role in overseeing the investigation, advising shareholders or customers of its significance or speaking to securities analysts or investors about the investigation. The prospect of someone involved in the misconduct denying wrongdoing or comforting the investors complicates and exacerbates the situation and could potentially create a securities problem or an obstruction-of-justice problem that is much more serious than the underlying antitrust violation. It has become the duty of the board of directors and its audit committee to take charge to avoid additional problems immediately after the investigation begins.[105]

Once steps are taken to ensure that documents are preserved, a company must quickly conduct an extensive internal investigation. This should consist of interviews of key executives and other employees (such as sales or marketing representatives) calculated to learn whether there were agreements or potentially troublesome contacts with competitors and quick initial reviews of documents, including key employees' e-mail files. If interviews or reviews of documentary material yields evidence of collusion, counsel should consider and discuss the possibility of seeking leniency with the company's management. In this setting, there is far more pressure to make a decision about self-reporting to the competition authorities. All firms under investigation are conducting internal investigations and considering whether to seek leniency (or a marker to hold a place in line), and the benefits will go only to the first. If the decision is made to seek leniency, the corporation should, of course, take prompt and effective action to terminate its participation in any illegal activity, while taking care not to announce its withdrawal to other competitors. At this stage of the proceeding, any communications with competitors regarding the illegal activity could be construed as "tipping off" the investigation and could be viewed by enforcement officials as obstruction of justice.

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105 *See* Donald C. Klawiter, *Please Show This to Senior Executives: Risks of Antitrust Investigations in the Courtroom and the Boardroom*, COMPETITION LAW INTERNATIONAL (Oct. 2006).

Assuming that the corporation chooses to proceed with its leniency application, full cooperation with the competition authorities is essential. This includes not having any executives or Board members say anything that seeks to put the company's prior behavior in the best light with investors and the public or otherwise disparages the investigation.

If potential cartel activity is uncovered yet leniency is unavailable, counsel must consider whether there are any benefits to the company of being "second in the door." In both the U.S. and Europe, those benefits are uncertain and highly dependent on the nature of the information the company can provide and the extent to which the investigation has already progressed. If the company happens to be involved in as-yet undetected cartel activity in a different product or industry than the one under investigation, there may be an opportunity to obtain "Amnesty Plus" credit in the U.S. The decision whether to cooperate after leniency is no longer available may also depend on counsel's evaluation of the evidence: If it strongly indicates that the company participated in collusive activity, waiting is likely to result in an increased fine down the road, particularly if there are other companies likely to come forward and seek "second-in" status. On the other hand, if counsel does not uncover clear evidence of participation in a cartel, the decision may be made to hold off, investigate further and possibly defend against the investigation. Indeed, there have been several recent examples in the U.S. in which the Division began an investigation in one industry because of information provided by an "Amnesty Plus" applicant in a related industry, yet uncovered insufficient evidence to prosecute cartel activity in the first industry.

As an investigation proceeds, counsel may be faced with the prospect that the opportunity to be "second in the door," or to provide any meaningful cooperation, has evaporated. At that point, in the U.S., counsel uncovering evidence of participation in a cartel must consider whether a plea bargain is in the company's best interest. This decision involves a host of complex factors, including the nature of the information counsel has developed and whether it will assist investigators in prosecuting other cartel members; what other evidence of a cartel the government possesses and the extent to which prosecutors are willing to reveal it; the potential size of the fine and its effect on the company; the potential damage to the company's reputation in the public domain and among customers; whether there will be carve-outs of individual employees; the disruption entailed by continuing to defend compared with the measure of peace that can be bought by terminating the matter and the virtual impossibility of avoiding payment of a settlement or damages in civil litigation.

In Europe, in contrast, a company that can no longer qualify for leniency historically has had no opportunity to resolve its liability from the EC before the Commission goes through its lengthy procedures including a statement of objections, hearings, and production of a detailed decision. The new settlement procedures, however, will change this landscape and present an opportunity for companies faced with a cartel investigation in Europe to resolve its liability in a more predictable and timely manner.

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Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

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 clearly was not the leader in, or originator of, the activity.

B. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their

views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.

If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

C. Leniency Procedure

If the staff that receives the request for leniency believes the individual qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Deputy Assistant Attorney General for Litigation, setting forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General for Litigation will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, the individual and his or her counsel may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation to make their views known. Individuals and their counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1994

Commission Notice on Immunity from fines and reduction of fines in cartel cases

(Text with EEA relevance)

(2006/C 298/11)

I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC ([1]).

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. ([2])

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel

(1) Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement. (2) OJ L 8, 12.1.2001, p. 1.

affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel ([1]); or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(a) A corporate statement ([2]) which includes, in so far as it is known to the applicant at the time of the submission:

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.

— The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;

— The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

— Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

([1]) The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

([2]) Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC,.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely ([3]), fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:

— providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

— remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

— making current (and, if possible, former) employees and directors available for interviews with the Commission;

— not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

— not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

([3]) This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, Commission v SGL Carbon AG a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395-399.

(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. **Procedure**

(14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:

(a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or

(b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (1 6)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. **REDUCTION OF A FINE**

A. **Requirements to qualify for reduction of a fine**

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/ or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a reduction of 30-50 %,

— second undertaking to provide significant added value: a reduction of 20-30 %,

— subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. **Procedure**

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. **CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE**

(31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence.

(32) Upon the applicant's request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Council Regulation (EC) No 1/200 3 ([1]) and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 ([2]), undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(1) OJ L 1, 4.1.2003, p. 1.

(2) OJ L 123, 27.4.2004, p. 18. Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(3) In accordance with the Commission Notice on rules for access to the Commission file ([3]), access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(4) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice ([4]) are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. **GENERAL CONSIDERATIONS**

(5) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

(3) OJ C 325, 22.12.2005, p. 7.

(4) Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

(37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

(38) The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

(39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

(40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 ([1]), even after the decision has been taken.

([1]) OJ L 145, 31.5.2001, p. 43.

ECN MODEL LENIENCY PROGRAMME

I. INTRODUCTION

1. In a system of parallel competences between the Commission and National Competition Authorities, an application for leniency[1] to one authority is not to be considered as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to all Competition Authorities which have competence to apply Article 81 of the EC Treaty (hereafter CAs) in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question[2].

2. The purpose of the ECN Model Leniency Programme (hereafter the ECN Model Programme) is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Programme aims to alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed by introducing a model for a uniform summary application system.

3. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. The ECN Model Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme.

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[1] The term "leniency" refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case (see paragraph 37 of the Commission Notice on cooperation within the Network of Competition Authorities (hereafter the Network Notice)).

[2] See paragraph 38 of the Network Notice.

II. SCOPE OF THE PROGRAMME

4. The ECN Model Programme concerns secret cartels, in particular agreements and/or concerted practices between two or more competitors aimed at restricting competition through the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.

III. IMMUNITY FROM FINES

Type JA

5. The CA will grant an undertaking immunity from any fine which would otherwise have been imposed provided:

   a) The undertaking is the first to submit evidence which in the CA's view, at the time it evaluates the application, will enable the CA to carry out targeted inspections in connection with an alleged cartel;

   b) The CA did not, at the time of the application, already have sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and

   c) The conditions attached to leniency are met.

6. With a view to enabling the CA to carry out targeted inspections, the undertaking should be in a position to provide the CA with the following:

   – The name and address of the legal entity submitting the immunity application;

   – The other parties to the alleged cartel;

   – A detailed description of the alleged cartel, including:

      – The affected products;

      – The affected territory (-ies);

      – The duration; and

      – The nature of the alleged cartel conduct;

   – Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence);

   – Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.

Type JB

7. In cases where no undertaking had been granted conditional immunity from fines before the CA carried out an inspection or before it had sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection, the CA will grant an undertaking immunity from any fine which would otherwise have been imposed if:

a) The undertaking is the first to submit evidence which in the CA's view, enables the finding of an infringement of Article 81[3] in respect of an alleged cartel;

b) At the time of the submission, the CA did not have sufficient evidence to find an infringement of Article 81 in connection with the alleged cartel; and

c) The conditions attached to leniency are met.

Excluded immunity applicants

8. An undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme[4].

IV. REDUCTION OF FINES: TYPE 2

9. Undertakings that do not qualify for immunity may benefit from a reduction of any fine that would otherwise have been imposed.

10. In order to qualify for a reduction of fines, an undertaking must provide the CA with evidence of the alleged cartel which, in the CA's view, represents significant added value relative to the evidence already in the CA's possession at the time of the application. The concept of 'significant added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the CA's ability to prove the alleged cartel.

11. In order to determine the appropriate level of reduction of the fine, the CA will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc. undertaking to apply) and the CA's assessment of the overall value added to its case by that evidence. Reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine which would otherwise have been imposed.

12. If a Type 2 applicant submits compelling evidence which the CA uses to establish additional facts which have a direct bearing on the amount of the fine, this will be taken into account when setting any fine to be imposed on the undertaking which provided this evidence.

V. CONDITIONS ATTACHED TO LENIENCY

13. In order to qualify for leniency under this programme, the applicant must satisfy the following cumulative conditions:

(1) It ends its involvement in the alleged cartel immediately following its application[5] save to the extent that its continued involvement would, in the

[3] For national programmes, the equivalent national legal basis should be added.

[4] Germany and Greece note that the sole ringleader is not eligible for immunity from fines under their respective programmes.

CA's view, be reasonably necessary to preserve the integrity of the CA's inspections;

(2) It cooperates genuinely, fully and on a continuous basis from the time of its application with the CA until the conclusion of the case; this includes:

(a) providing the CA promptly with all relevant information and evidence that comes into the applicant's possession or under its control;

(b) remaining at the disposal of the CA to reply promptly to any requests that, in the CA's view, may contribute to the establishment of relevant facts;

(c) making current and, to the extent possible, former employees and directors available for interviews with the CA;

(d) not destroying, falsifying or concealing relevant information or evidence; and

(e) not disclosing the fact or any of the content of the leniency application before the CA has notified its objections[6] to the parties (unless otherwise agreed with the CA).

(3) When contemplating making an application to the CA but prior to doing so, it must not have:

(a) destroyed evidence which falls within the scope of the application; or

(b) disclosed, directly or indirectly, the fact or any of the content of the application it is contemplating except to other CAs or any competition authority outside the EU.

VI. PROCEDURE

Approaching the CA

14. An undertaking wishing to benefit from leniency must apply to the CA and provide it with the information specified above. Before making a formal application, the applicant may on an anonymous basis approach the CA in order to seek informal guidance on the application of the leniency programme.

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[5] 'Application' in this paragraph 13 refers to an application for a marker, a summary application or a full leniency application (as the case may be).

[6] Due to the variety of procedures and investigative measures applied in the various jurisdictions, the ECN Model Programme has been drafted in a manner that takes into account both administrative and judicial proceedings. The terms "objections" and "statement of objections" should be read as covering all equivalent steps under the relevant procedures where the investigative stage has been completed and the parties are formally notified of the CA's objections.

15. Once a formal application has been made, the CA will, upon request, provide an acknowledgement of receipt confirming the date and time of the application. The CA will assess applications in relation to the same alleged cartel in the order of receipt.

Procedure for immunity applications

Marker for immunity applicants

16. An undertaking wishing to make an application for immunity may initially apply for a 'marker'. A marker protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.

17. The CA has discretion as to whether or not it grants a marker. Where a marker is granted, the CA determines the period within which the applicant has to 'perfect' the marker by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

18. To be eligible to secure a marker, the applicant must provide the CA with its name and address as well as information concerning:

– The basis for the concern which led to the leniency approach;

– The parties to the alleged cartel;

– The affected product(s);

– The affected territory (-ies);

– The duration of the alleged cartel;

– The nature of the alleged cartel conduct; and

– Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.

Granting immunity

19. Once the CA has verified that the evidence submitted is sufficient to meet the relevant evidential threshold for immunity, it will grant the undertakings conditional immunity from fines in writing.

20. If the relevant evidential threshold is not met, the CA will inform the undertaking in writing that its application for immunity is rejected. The undertaking may in that case request the CA to consider its application for a reduction of the fine.

21. The CA will take its final position on the grant of immunity at the end of the procedure. If the CA, having granted conditional immunity, ultimately finds that the immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the CA will inform the applicant of this promptly. If immunity is withheld because the CA finds at the end of the procedure that the

conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any other favourable treatment under this programme in respect of the same proceedings.

Summary applications in Type JA cases

22. In cases where the Commission is 'particularly well placed' to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing an application for immunity with the Commission may file summary applications with any NCAs which the applicant considers might be 'well placed' to act under the Network Notice. Summary applications should include a short description of the following:

– The name and address of the applicant;

– The other parties to the alleged cartel;

– The affected product(s);

– The affected territory(-ies);

– The duration;

– The nature of the alleged cartel conduct;

– The Member State(s) where the evidence is likely to be located; and

– Information on its other past or possible future leniency applications in relation to the alleged cartel.

23. Having received a summary application, the NCA will acknowledge receipt and confirm to the applicant that it is the first to apply to that CA for immunity.

24. Should an NCA having received a summary application decide to request specific further information, the applicant should provide such information promptly. Should an NCA decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the threshold. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the summary application was made.

25. Summary applications are deemed to be applications within the meaning of paragraph 41(1) of the Network Notice.

Procedure for reductions of fines applications

26. If the CA comes to the preliminary conclusion that the evidence submitted by an undertaking constitutes 'significant added value' within the meaning of the programme, it will inform the undertaking in writing of its intention to apply a reduction of fines. This confirmation will be given as early as possible and no later than the date the statement of objections is notified to the parties. The final amount of reduction will be determined at the latest by the end of the procedure.

27. If the CA finds that one or more of the conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any favourable treatment under this programme in respect of the same proceedings.

Oral procedure

28. Upon the applicant's request, the CA may allow oral applications. In such cases the statements[7] may be provided orally and recorded in any form deemed appropriate by the CA. The applicant will still need to provide the CA with copies of all pre-existing documentary evidence of the cartel.

29. No access to any records of the applicant's oral statements will be granted before the CA has issued its statement of objections to the parties.

30. Oral statements made under the present programme will only be exchanged between CAs pursuant to Article 12 of Regulation No 1/2003 if the conditions set out in the Network Notice are met and provided that the protection against disclosure granted by the receiving CA is equivalent to the one conferred by the transmitting CA.

VII. REVIEW OF THE ECN MODEL PROGRAMME

31. The ECN Model Programme may be reviewed on the basis of the experience gathered by the ECN members. In any event, no later than at the end of the second year after the publication of the ECN Model Programme, the state of convergence of the leniency programmes of ECN members will be assessed.

[7] The term 'statement' refers both to corporate statements given by legal representatives on behalf of their clients and witness statements made by employees and directors of the undertakings.

ECN MODEL LENIENCY PROGRAMME

EXPLANATORY NOTES

I. INTRODUCTION

Importance of leniency programmes in the fight against cartels

1. Cartel activities are very serious violations of competition law. They injure consumers by raising prices and restricting supply. In the long term, they lead to a loss of competitiveness and reduced employment opportunities. Undertakings involved in these types of illegal activities that are willing to put an end to their participation and inform the European Commission and the National Competition Authorities (i.e. CAs) of the existence of such activities should not be dissuaded from doing so by the high fines to which they are potentially exposed. The CAs consider that it is in the public interest to grant favourable treatment to undertakings which co-operate with them.

2. The purpose of leniency programmes is to assist CAs in their efforts to detect and terminate cartels and to punish cartel participants. The CAs consider that the voluntary assistance with the above objectives has an intrinsic value for the economic well-being of individual Member States as well as the Common Market which may justify immunity in certain cases (Type 1A and 1B) and a reduction of a any fine in others (Type 2).

Safeguards for leniency information within the ECN

3. In order to prevent the mechanisms for cooperation between CAs established by Regulation No 1/2003 [8] discouraging applicants from voluntarily reporting cartel activities, the Network Notice sets out special safeguards for leniency related information[9]. These safeguards enable the CAs to exchange and use in evidence leniency related information without jeopardising the effectiveness of their respective programmes.

4. According to paragraph 39 of the Network Notice, leniency related information submitted pursuant to Article 11 of Regulation 1/2003 cannot be used by other CAs to start an investigation.

5. According to paragraph 41, information submitted by a leniency applicant or collected on that basis, may only be exchanged between two CAs in the following circumstances:

   – The applicant consents to the exchange; or

[8] OJ L 1, 4.1.2003, page 1.

[9] See paragraphs 39-42 of the Network Notice. Leniency related information covers not only information contained in the leniency application itself, but all information that has been collected following any fact-finding measures that could not have been carried out but for the leniency application.

– The applicant has applied for leniency with both CAs in the same case; or

– The receiving CA provides a written commitment not to use the information transmitted or any information it may obtain after the date of the transmission to impose sanctions on the applicant, its subsidiaries or its employees. A copy of the written commitment is sent to the applicant.

Purpose of the ECN Model Programme

6. Making multiple parallel applications across the ECN is a complex exercise given the existing discrepancies between the different leniency regimes. Certain discrepancies may have adverse effects on the effectiveness of individual programmes. In addition, for cases involving a significant number of jurisdictions and for which the Commission is particularly well placed to act within the meaning of the Network Notice, the multiple filing of complete applications to all other possibly well placed CAs can be a cumbersome process which could discourage certain applicants from applying for leniency under any programme.

7. The purpose of the ECN Model Programme is to address the issue of multiple parallel applications and to provide a greater degree of predictability for potential applicants. The ECN Model Programme is based on the common experience of the CAs having operated a leniency programme for a number of years and has two principal objectives. Firstly, the ECN Model Programme is meant to trigger soft harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few CAs who do not currently operate one. Secondly, it sets out the features of a uniform type of short form applications (so-called summary applications) designed to alleviate the burden on both undertakings and CAs associated with multiple filing in large, cross-border cartel cases.

8. While it is highly desirable to ensure that all CAs operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt one uniform system. The ECN Model Programme therefore sets out the principal elements which, after the soft harmonisation process has occurred, should be common to all leniency programmes across the ECN. This would be without prejudice to the possibility for a CA to add further detailed provisions which suit its own enforcement system or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement.

9. The Commission and the NCAs are committed to seeking the alignment of the programmes in their jurisdictions within the framework specified by the ECN Model Programme. It is recognised that some ECN members do not have the power to implement changes in their national leniency programmes as this power is held by other bodies. However, the existence of the ECN Model Programme should assist all relevant bodies (ECN members as well as other decision-making bodies) in implementing an efficient policy and making sure that cooperation within the ECN works as efficiently and effectively as possible.

II. THE ECN MODEL PROGRAMME

10. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope.

The ECN Model Programme does not give rise to any legal or other legitimate expectations on the part of any undertaking.

A. Scope of the programme

11. The ECN Model Programme concerns secret cartels.

12. Cartels constitute very serious violations of competition rules which are often extremely difficult to detect and investigate without the cooperation of at least one of the participants. The interests of consumers and citizens in ensuring that such cartels are detected, terminated and punished outweighs the interest in fining those undertakings that enable a CA to detect, terminate and punish such illegal practices.

13. For the purpose of the ECN Model Programme cartels are agreements and/or concerted practices between competitors aimed at restricting competition by co-ordinating their competitive behaviour or influencing the relevant parameters of competition within the EEA. Cartel participants would typically collude to fix their purchase or selling prices, and/or to allocate production or sales quotas and/or to share markets. These cartel practices include arrangements which either directly or indirectly affect prices, volumes, market shares and other relevant parameters of competition. By way of example, collusive practices such as restrictions on imports or exports, bid-rigging or joint boycotts fall within the scope of the ECN Model Programme.

14. Other types of restriction such as vertical agreements and horizontal restrictions other than cartels are normally less difficult to detect and/or investigate and therefore do not justify being dealt with under a leniency programme. In addition, including agreements other than cartels within the scope of a leniency programme may risk re-introducing a kind of de facto notification system which would be undesirable.

15. The ECN Model Programme only concerns corporate leniency. It does not cover sanctions on natural persons which are not undertakings. In order to ensure that corporate leniency programmes work efficiently, it is however important to protect to the greatest extent possible employees and directors of the undertakings applying for immunity. It may also be appropriate to offer protection from individual sanctions to employees and directors of applicants for a reduction of any fine.

B. Immunity from fines: Type 1A and 1B

Evidential thresholds for immunity

16. The ECN Model Programme contains two different evidential thresholds for granting immunity:

– one for the first undertaking that provides the CA with sufficient evidence to enable it to carry out targeted inspections in connection with an alleged cartel (Type 1A); and

– one for the first undertaking that submits evidence which in the CA's view may enable the finding of an infringement of Article 81 EC in connection with an alleged cartel (Type 1B).

17. Immunity is no longer available under Type 1B if it has already been granted under Type 1A.

18. Immunity is available under a lower threshold in Type 1A compared to Type 1B in order to create an incentive for cartel participants to leave the cartel and to report infringements which are not yet known to the CAs.

19. The threshold in a Type 1A situation is that the applicant must provide the CA with sufficient information to allow it to carry out targeted inspections. The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant. The list contained in the ECN Model Programme and described in more detail below should serve as guidance for the applicant to anticipate what is usually required by a CA.

20. In order to meet the evidential threshold in Type 1A cases, undertakings should generally be in a position to provide the CA with the following information and evidence:

– The name and address of the legal entity submitting the immunity application, as well as the names of individuals who are or have been involved in the alleged cartel on its behalf;

– The identity of all the other undertakings which participate(d) in the alleged cartel as well as of the individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel;

– A detailed description of the alleged cartel conduct, including for instance its aims, activities and functioning; the product(s) or service(s) concerned, the geographic coverage, the duration and the estimated market volumes affected by the alleged cartel; the dates, locations, content and participants of alleged cartel contacts; all relevant explanations in connection with evidence provided in support of the application;

– Evidence relating to the alleged cartel in the possession of the applicant or available to it at the time of the submission, in particular contemporaneous evidence; and

– Information on which other CAs, inside or outside the EU, have been approached or are intended to be approached by the applicant in relation to the alleged cartel.

21. If a CA has carried out an inspection or already has in its possession sufficient evidence to carry out an inspection, immunity under Type 1A will no longer be available.

Excluded applicants

22. An undertaking which has taken steps to coerce one or more undertakings to join or remain in the cartel should, as a matter of principle, be excluded from the benefit of immunity. Considerations of natural justice prevent an undertaking that has played

such a role from escaping sanction altogether. The scope of the exclusion is narrow, however, so as to avoid creating uncertainty for potential applicants.

C. Reduction of fines: Type 2

23. It is in the interest of CAs to obtain the cooperation in the proceedings of those undertakings which do not qualify for immunity, either because they failed to meet the relevant evidential threshold or because of the role they played in the cartel. Such cooperation ensures that cartel activities are more efficiently investigated and penalised.

24. The value of the cooperation depends on the timing (including whether the applicant was the first, second or third, etc. to apply) and the quality and nature of the evidence submitted. There are various ways of combining these parameters to reward the contribution of the applicant. However, all systems should ensure that there is a significant difference between immunity from fines and reductions of fines in order to make applications for immunity significantly more attractive. Significant added value for type 2 applications should therefore not be rewarded with a reduction of any fine of more than 50%.

25. Applicants are required to adduce evidence which constitutes in the CA's view significant added value with respect to the evidence already in its possession at the time the application was submitted. The CA will generally consider written evidence originating from the period to which the facts pertain to have a greater value than evidence subsequently created, and incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required to rely on the evidence submitted will have an impact on the value of that evidence.

26. The ECN Model Programme contains a provision to counter any potentially adverse consequences for Type 2 applicants when they submit compelling evidence relating to additional facts which have a direct bearing on the amount of the fines.

D. Conditions attached to leniency

27. Qualifying for conditional immunity or bringing significant added value to an investigation will entitle an applicant to immunity or a reduction of fines provided that three cumulative conditions are met.

28. The final assessment of full compliance with the conditions attached to leniency is made at the end of the procedure.

29. The first condition relates to the termination of the alleged cartel conduct. Undertakings should terminate all cartel activities as soon as possible. However, experience shows that immediate termination, e.g. sudden unexplained absences from regular cartel meetings, after the application and before the CA has undertaken inspections can seriously undermine the effectiveness of subsequent inspections by alerting other cartel participants and allowing them to conceal or destroy evidence. It is therefore in the public interest to delay the complete termination of all cartel activities until the point in time necessary to safeguard the integrity of the inspection. This strikes the appropriate balance between bringing an end to the illegal activities of the applicant as soon as possible and protecting the effectiveness

of the CA's investigation. This is also necessary to allow coordination between the various CAs in the event of parallel proceedings and to avoid applicants from being exposed to conflicting demands. The need to continue with certain cartel conduct should be discussed between the applicant and the CA at a very early stage.

30. The second condition is the obligation to cooperate with the CA throughout the procedure. This obligation starts from the date of application to the CA. Cooperation is an essential feature of the programme which rewards assistance to the CA in the investigation. The cooperation has to be sincere and there is no reason to distinguish between applicants for immunity and those for a reduction of fines. It has various facets. It involves providing without delay any pre-existing evidence and information which is available to the applicant or comes into its possession or under its control during the investigation. It also requires answering without delay any question from the CA and making current and, where possible former, individual employees and directors available for interviews with the CA. It encompasses not destroying, falsifying or concealing evidence which falls within the scope of the application after having applied for leniency. It also requires the applicant not to reveal (directly or indirectly) without the CA's prior consent the fact or any of the content of its leniency application before the CA has notified its objections to the parties.

31. The third condition requires that the applicant should not, when contemplating making a leniency application to the CA but before doing so, have:

    a) destroyed evidence which falls within the scope of the application; or

    b) disclosed, directly or indirectly, the fact or any of the content of its contemplated application except to other CAs.

32. Failure to comply fully with any of these conditions will disqualify the applicant from the leniency programme in the relevant proceedings.

E. Procedure

Approaching the CA

33. All CAs accept anonymous approaches by potential applicants wishing to obtain guidance on their respective programmes. Some CAs have more formalised systems for such approaches, such as hypothetical applications.

Marker for immunity applicants

34. A marker protects an applicant's place in the queue for a given period of time. It allows the applicant to complete its internal investigation to gather the required information and evidence in order to meet the threshold.

35. In the ECN Model Programme, markers are available at the discretion of the CA. Some CAs may choose only to grant markers when it is clear that immunity is available or in certain type of situations, whereas certain others may grant markers in every case. Taking account of the specificities of each individual case the CA may decide the duration of the marker. In the event of parallel action by a number of CAs, the CAs will endeavour to use their discretion in a manner that allows their respective investigations to be coordinated smoothly.

36. The ECN Model Programme specifies the information required to secure a marker within the meaning of this programme. It is broadly equivalent to what is required to file a summary application. Some CAs however may decide to protect the applicant's place in the queue on the basis of more limited information, depending on the case at hand. In any event, an applicant would as a minimum have to provide its name and address and to satisfy a CA that it has a concrete basis for a reasonable concern that it has participated in cartel conduct.

Procedure for immunity and reduction of fines applications

37. CAs should deal with an application in a manner which ensures a high degree of legal certainty for the applicant. This implies that the applicant is informed as early as possible of the status of its application and that it will receive an acknowledgement of receipt of its submission(s).

38. If a CA has granted conditional immunity, no fines will be imposed on the applicant in relation to the cartel which is the subject of the application, provided that the conditions attached to leniency are fulfilled during the procedure and that it is not found that the applicant has acted as a coercer. Similarly, any position taken on an application for reduction of fines is subject to the conditions set out in the programme.

Summary applications in Type JA cases

39. Experience has shown that applicants often choose to apply to several CAs simultaneously in cases for which the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Such precautionary multiple applications are time-consuming both for the CAs and the applicants. They are however useful to allow network members to have an informed view on whether or not they want to act on a case and to protect the applicant in the event of a case being reallocated, given that an application to one CA does not count as an application to all CAs.

40. In order to alleviate the burden associated with multiple parallel applications on both undertakings and national CAs, the ECN Model Programme introduces a model for a uniform system of summary applications. By filing a summary application, the applicant protects its position as the first in the queue with the CA concerned for the alleged cartel.

41. A summary application is an application for immunity and CAs having received such an application are entitled to exchange information without the consent of the applicant, in accordance with paragraph 41(1) of the Network Notice.

42. The national CAs will not process summary applications, i.e. they will not grant or deny conditional immunity. They will only confirm to the applicant that (a) it is the first to file an application with that CA and (b) it would have a given period of time in which to complete the application, should the CA at any point later decide to take action in respect of the case.

43. As long as the CA has not decided to take action in the case, the applicant's duty to provide further information and generally assist with the investigation only exists

towards the Commission.[10] However, the applicant must comply with any specific additional information requests of an NCA which has received a summary application in particular for the NCA to reach an informed view on the issue of case allocation. Failure to comply with such requests by an NCA fully and expeditiously would result in loss of the summary application protection.

44. The timing of the termination by the applicant of its participation in the cartel in summary application cases is for the Commission to determine.

45. The ECN Model Programme lists the information which must be contained in a summary application. Firstly, the information and the level of detail must be sufficient to enable the CA to decide whether it wants to act in the case. Secondly, it must allow the CA to determine whether the applicant is in a Type 1A situation. NCAs agree to show flexibility (to the extent legally permissible) as to the language(s) in which summary applications can be made.

46. The ECN Model Programme only provides for the filing of summary applications in Type 1A cases. Summary applications in Type 1B and Type 2 cases are neither necessary nor always practicable. They are unnecessary because, at the time of the approaches and unlike in Type 1A cases, the applicant normally knows which of the well placed CAs is (or are) dealing with the case. They are not always practicable because, unlike Type 1A cases, such applications are generally assessed against what is already in the CA's file at the time of the application. In a re-allocation scenario the CA would not normally have its own file by reference to which the application could be assessed, with the result that it might have been necessary to interlink the CAs' respective files in order to avoid over- or under protection of such applicants[11].

Oral procedure

47. The ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a CA in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs' leniency programmes, could undermine the effectiveness of the CAs' fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated. Experience has so far shown that it is more likely that discovery orders will be made in cases which the Commission is particularly well placed to deal with than in cartels that are limited to a certain region or a certain Member State.

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[10] The duties specified under paragraphs 13(2)(d) and (e) of the ECN Model Programme will also be owed to the CA which has accepted the summary application.

[11] The information from the leniency applicant could be compared to: (i) only the information provided by the immunity applicant; (ii) the information gathered at the point of re-allocation by the previous acting CA(s); or (iii) the information gathered by the previous acting CA(s) before the date of the summary application.

48. In order to limit any such negative consequences for the CAs' leniency programmes, the ECN Model Programme allows for oral applications (summary, marker or full applications) in all cases where this would appear to be justified and proportionate. Oral applications are always justified and proportionate in cases where the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Some CAs will accept oral applications without requiring the applicant to demonstrate that its request is justified and proportionate.

49. The ECN Model Programme also stipulates that no access will be granted to any records of any oral statements before the statement of objections has been issued. In addition, given the differences in the rules concerning access to the file and/or public access to documents in the various jurisdictions, the ECN Model Programme stipulates that the exchange of records of oral statements between CAs is limited to cases where the protections afforded to such records by the receiving CA are equivalent to those afforded by the transmitting CA.

* * *

Model Annotated Corporate Plea Agreement
Last Updated December 19, 2006

UNITED STATES DISTRICT COURT

[XXXXXXX] DISTRICT OF [XXXXXXXXX]

UNITED STATES OF AMERICA	)	Criminal No. [XXXX]
	)	
	)	Filed:
v.	)	
	)	Violation:
[GLOBAL PRODUCTS, INC.],	)	
	)	
Defendant.	)	
_____	)	

PLEA AGREEMENT[1]

The United States of America and [Global Products, Inc.] ("defendant"), a corporation organized and existing under the laws of [STATE *OR if foreign*--COUNTRY], hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B *OR* C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

[1] *This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney's Office in the district where the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division's model plea agreements are available at http://www.usdoj.gov/atr/public/criminal.htm.*

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

RIGHTS OF DEFENDANT

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

[(c) as a corporation organized and existing under the laws of [COUNTRY], to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXX] District of [XXXX];]

(d) to plead not guilty to any criminal charge brought against it;

(e) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;

(f) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(g) to appeal its conviction if it is found guilty; and

(h) to appeal the imposition of sentence against it.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXXX] District of [XXXX]]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other

writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence[2] in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) [*for C agreements only, also insert* "-(c)"].[3] Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information [in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere], [TIME FRAME], in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3 The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

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[2] *If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.*

[3] *Due to certain Bar rulings in Ohio, Tennessee, and North Carolina regarding waiver of claims of ineffective assistance of counsel or prosecutorial misconduct, plea agreements filed in those states or by attorneys licensed in those states will also contain language such as "Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct" or comparable language used in the relevant district. Such plea agreements may also include following stipulation: "The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct."*

FACTUAL BASIS FOR OFFENSE CHARGED[4]

4 Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts :[5]

(a) For purposes of this Plea Agreement, the "relevant period" is that period [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was a corporation organized and existing under the laws of [STATE *OR if foreign*--COUNTRY]. The defendant has its principal place of business in [CITY, STATE *OR if foreign*--CITY, COUNTRY]. During the relevant period, the defendant was a [producer] of [PRODUCT], was engaged in the sale of [PRODUCT] in [the United States and elsewhere][, and employed X or more individuals]. [SHORT PRODUCT DESCRIPTION]. [During the relevant period, the defendant's sales of [PRODUCT] to U.S. customers totaled at least $ [AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES

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[4] *A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the decision in United States v. Booker, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than $10 million for a pre-June 22, 2004 Sherman Act conspiracy or above $100 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(e). For a discussion of the implications of Booker on Division charging and plea agreement practice, see Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), available at http://www.usdoj.gov/atr/public/speeches/208354.htm].*

[5] *The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.*

RANGE].]

(b) During the relevant period, the defendant, through its [RELEVANT ACTORS, e.g. officers and employees], [including high-level personnel of the defendant,] participated in a conspiracy among major [PRODUCT] [producers], the primary purpose of which was to [DESCRIPTION OF THE CHARGE] sold in [the United States and elsewhere]. In furtherance of the conspiracy, the defendant, through its [RELEVANT ACTORS], engaged in discussions and attended meetings with representatives of other major [PRODUCT] [producers]. During these discussions and meetings, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. *[In a bid-rigging case where defendant submitted comp bid(s), may insert* – The largest contract on which the defendant submitted a complementary bid in connection with the conspiracy was in the amount of $[XXX].]

(c) [*Description of relevant interstate and foreign commerce. Common description is as follows* --

During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate [and foreign]commerce.] The business activities of the defendant and its co-conspirators in connection with the [production and sale] of [PRODUCT] affected by this conspiracy were within the flow of, and substantially affected, interstate [and foreign]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXX] District of [XXXXX], [XXXXX] Division. [*Description of relevant venue. Common*

descriptions are as follows -- [The conspiratorial meetings and discussions described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by a representative of the defendant] occurred in this District.] *OR* [[PRODUCT] affected by this conspiracy was sold by one or more of the conspirators to customers in this District.]]

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

(a) $[10]^6$ million (15 U.S.C. § 1);

(b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 357 1(c) and (d)); or

(c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

(a) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years;

(b) pursuant to § 8B 1.1 of the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or "Guidelines"), 18 U.S.C. § 3563(b)(2) or

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[6] *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum corporate fine under Sherman Act would be $100 million.*

3663 (a)(3), the Court may order[7] it to pay restitution to the victims of the offense; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a $400 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES[8]

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,[9] along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the

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[7] *In corporate antitrust cases, restitution may be ordered under 18 U.S. C. § 3563 (b) (2) as a condition of probation or under 18 U.S. C. § 3663 (a) (3) to the extent agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.*

[8] *Guidelines calculations may also be included in the Plea Agreement.*

[9] *While it is the norm to apply the Guidelines Manual in effect at sentencing, note that under U.S.S.G. §1B1.11(b)(1) if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used, except where this practice contravenes existing case law. See e.g., United States v. DeMaree, 459 F.3d 791 (7th Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines).*

defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).][10]

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B *OR* C), [*if a B agreement*-- the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] *OR* [*if a C agreement*-- the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,] a sentence [within the applicable Guidelines range][11] requiring the defendant to pay to the United States a criminal fine of $[XX] million[12][, pursuant to 18 U.S.C. § 3571(d),[13]][payable in full before the fifteenth (15th) day after the date of judgment] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]][14], [and restitution of $XXX pursuant to 18 U.S.C. §

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[10] *A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.*

[11] *This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.*

[12] *The recommended fine for corporations is usually a specific dollar amount, but a plea agreement may recommend a sentence within a certain Guidelines range.*

[13] *Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at a recommended fine above the Sherman Act maximum.*

[14] *The time for payment of the fine should be specified using one of these options. If the defendant requests, and the staff agrees, that the fine be paid in installments, payable over a period not exceeding five years, the plea agreement should also include a paragraph such as Paragraph 8(a) setting forth the recommended installment schedule. For an installment schedule to be imposed, there must be a finding that installment payments are "in the interest of justice" under 18 U.S.C. § 3572(d)(1); for example, if the organization is financially unable to make immediate payment or if such payment would be unduly burdensome. See U.S.S.G. §8C3.2(b). Note that if any fine is not paid in full before the 15th day after the date of judgment,*

[3563(b)(2)/3663(a)(3)/ *OR* 3663A(c)(1)(A)(ii)][15] [payable in full before [DATE]] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 361 2(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]]] ("the recommended sentence"). The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.[16] The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

[(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §8C3.2(b)], that the fine be paid in the following installments: within thirty (30) days of imposition of sentence -- $[XX] million [(plus any accrued interest)]; at the one-year anniversary of imposition of sentence ("anniversary") -- $[XX] million [(plus any accrued interest)]; at the two-year anniversary -- $[XX] million [(plus any accrued interest)]; at the three-year anniversary -- $ [XX] million [(plus any accrued interest)]; at the four-year anniversary -- $ [XX] million

the payment of interest is required on any fine or restitution of more than $2,500 pursuant to 18 U.S.C. § 3612(f) (1) unless the defendant does not have the ability to pay interest, in which case the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f) (3) (A) or § 3612(h).

[15] *See footnote 7 above. It is extremely rare to have restitution included as part of a plea agreement in a Sherman Act case, as civil suits are normally filed by victims to recover damages. See U. S.S. G. §8B1. 1 and optional Paragraph 13.*

[16] *This language refers to the inapplicability of U.S.S.G. §5K2.0 "out of the heartland" departures, while the next sentence allows for a substantial assistance or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.*

[(plus any accrued interest)]; and at the five-year anniversary -- $[XX] million [(plus any accrued interest)]; provided, however, that the defendant shall have the option at any time before the five-year anniversary of prepaying the remaining balance [(plus any accrued interest)] then owing on the fine.][17]

(b) The defendant understands that the Court will order it to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed.

[(c) Both parties will recommend that no term of probation be imposed, but the defendant understands that the Court's denial of this request will not void this Plea Agreement.][18]

[(d) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 10, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and defendant agree to request jointly that the Court accept the defendant's guilty plea

[17] *The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case, but the Division's policy is, and the Guidelines recommend, that the length of the schedule may not exceed five years. See U.S.S.G. §8C3.2, n.1.*

[18] *This optional subparagraph may be included unless probation is specifically called for under U. S.S. G. §8D1. 1 or 18 U. S.C. §§ 3553 (a) and 3562 (a) (e.g. to ensure payment of restitution, to ensure payment of fine if paid in installments, to protect against future crime by defendant, recidivism within last 5 years by company or high-level personnel, etc.) or if the local district practice is to require probation whenever the fine is paid in installments.*

and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. §6A1.1, and [Rule XXX] of the Criminal Local Rules. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.][19]

[(e)[20] The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify the recommended sentence set forth in this paragraph, pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation.]

9.[21] [The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 14 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §8C4.1, for a downward departure from the Guidelines fine range and will request that the Court impose the recommended sentence set out in Paragraph 8 of

[19] *Paragraph 8(d) applies only when the parties want to expedite sentencing. In jurisdictions where the practice is permissible, the Division generally will agree to a request for expedited sentencing made by a foreign-based corporation which is pleading guilty pursuant to a C agreement.*

[20] *Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).*

[21] *If the recommended fine is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay determination.*

this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] *OR*

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and the defendant further agree that the recommended fine is appropriate, pursuant to [U.S.S.G. §8C3.3(a) [and 18 U.S.C. § 3572(b)][22], due to the inability of the defendant to pay a fine greater than that recommended without impairing its ability to make restitution to victims] *OR* [U.S.S.G. §8C3.3(b), due to the inability of the defendant to pay a fine greater than that recommended without substantially jeopardizing its continued viability].[23]

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 14 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and its commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

11. The United States and the defendant understand that the Court retains complete

[22] *Insert 18 U.S. C. § 3572(b) if restitution will be ordered pursuant to 18 U.S. C. § 3563(b)(2), 3663 (a) (3), or in a fraud case 3663A (c) (1) (A) (ii) and a Guidelines fine would impair the ability of the defendant to make restitution.*

[23] *Normally only one of these inability to pay provisions would be used, and in most cases it will be the second provision.*

discretion to accept or reject the recommended sentence[24] provided for in Paragraph 8 of this Plea Agreement. [*If a B agreement* --- The defendant understands that, as provided in Fed. R. Crim. P. 11 (c)(3)(B), if the Court does not impose the recommended sentence[25] contained in this Agreement, it nevertheless has no right to withdraw its plea of guilty.]

[*Insert (a) and (b) only for C agreements*-- (a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11 (c)(5) and (d)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 16 of this Plea Agreement will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew its guilty plea or for a period of

[24] *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."*

[25] *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."*

sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.]

12.[26] [The defendant shall give notice of its conviction and sentence to victims of the offense as specified in the presentence report. The form of the notice shall be approved by the U.S. Probation Officer and the Court. The defendant shall bear the costs associated with the mailing of the notice.]

[The defendant shall publicize at its expense in [the Wall Street Journal] and in [the New York Times] in prominent, one-quarter page advertisements within ten days of the date of conviction the nature of the offense committed by the defendant in this case, the fact of conviction, the sentence imposed in this case, and the steps that will be taken to prevent the recurrence of similar offenses.]

[13. In light of the availability of civil causes of actions, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information.[27]]

[26] *The optional notices in Paragraph 12 have been ordered previously in Division cases where it was agreed that defendant provide notice to victims or public notice of the offense.*

[27] *If civil actions have been filed, this language should be modified to reflect the filing of these suits; the staff may want to cite those filed cases in this paragraph and state "In light of the civil cases filed, which potentially provide . . . ."*

DEFENDANT'S COOPERATION [28]

14. The defendant [and its [LIST TYPES OF OTHER RELATED CORPORATE ENTITIES][29] [(collectively, "related entities") --- *only use if more than one type of related entity is listed*]] will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT][30], any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding").[31] The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

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[28] *The entities and employees covered in the cooperation terms in Paragraphs 14 and 15 must be co-extensive with the nonprosecution terms of Paragraphs 16 and 17(a). For instance, if the named defendant and certain related entities (e.g., subsidiaries) are receiving nonprosecution protection (i.e., transactional immunity) under Paragraph 16, then the same entities must be required to provide ongoing cooperation under Paragraph 14 of the Plea Agreement. Likewise, the class of individuals (i.e., the directors, officers, and employees of the defendant and its related entities) receiving nonprosecution protection under Paragraph 17(a) must be required to provide ongoing cooperation under Paragraphs 14(b), 14(c), and 15.*

[29] *Related entities such as subsidiaries of the named corporate defendant may be covered by the Plea Agreement if those entities can and will provide ongoing cooperation to the staff in its investigation. Often the covered subsidiaries are limited to those that "are engaged in the sale or production" of the product at issue. While past Division plea included "affiliates" in the definition of related entities, the Division's current practice is not to include such a broad term in the Plea Agreement. If the defendant seeks to have certain affiliates included, those affiliates should be specifically named.*

[30] *If the investigation involves a domestic conspiracy, this description will be limited in the cooperation provision normally to "the [manufacture or sale] of [PRODUCT] in [geographic area] . . . ."*

[31] *The term "Federal Proceeding" identifies the federal investigations and litigation in which the corporate defendant and its employees must cooperate in order to receive the Plea Agreement's protections. Paragraph 14 defines how the corporate defendant must cooperate in any Federal Proceeding. Paragraph 15(a)-(f) defines how the directors, officers, and employees of the corporate defendant must cooperate in any Federal Proceeding.*

(a) producing to the United States all non-privileged[32] documents, information, and other materials, wherever located,[33] in the possession, custody, or control of the defendant [or any of its [related entities]], requested by the United States in connection with any Federal Proceeding;

[(b) securing the ongoing, full, and truthful cooperation, as defined in Paragraph 15 of this Plea Agreement, of [NAMED INDIVIDUALS], including making such persons available in the United States and at other mutually agreed-upon locations, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding;][34] and

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[32] *The term "non-privileged" should be included except in rare situations where a claim of privilege could be asserted over key information, the production of which is a critical part of the defendant's cooperation. As required by the December 12, 2006 McNulty memo, a request for waiver of claims of attorney-client privilege or attorney work product involving factual information must be authorized in writing by the Antitrust Division's AAG and the request must be communicated in writing by the Antitrust Division's AA G to defendant's counsel. With respect to a request for a waiver of attorney-client communications or non-factual attorney work product, the Antitrust Division's AAG must obtain written authorization from the Deputy Attorney General, and the request must be communicated in writing by the Antitrust Division's AAG to defendant's counsel. For specific waiver request procedures, see McNulty memo at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.*

[33] *The defendant's obligation to produce responsive documents in its possession, custody, or control wherever located applies to plea agreements in both domestic and international cases. See Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13th Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at http://www.usdoj.gov/atr/public/speeches/2275.htm, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.*

[34] *This provision has been used infrequently where the defendant's cooperation is based on the cooperation of certain key foreign-based executives and the company's cooperation is essentially meaningless without the Division having access to the specified individuals. See "Negotiating The Waters" at § II(E), p. 6-7.*

(c) using its best efforts[35] to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 15 of this Plea Agreement, of the current [and former][36] directors, officers, and employees of the defendant [or any of its [related entities]][, in addition to those specified in subparagraph (b) above,] as may be requested by the United States, [but excluding [Samuel T. Jones], [John R. Doe], and [Robert P. Smith],][37] including making these persons available [in the United States and at other mutually agreed-upon locations], at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

15. The ongoing, full, and truthful cooperation of each person described in [either] Paragraph 14(b) [or 14(c)] above will be subject to the procedures and protections of this

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[35] *See "Negotiating The Waters" at § II(F), p. 7-8 for a discussion of what constitutes best efforts.*

[36] *If the nonprosecution terms of Paragraph 17(a) cover <u>former</u> executives, then the cooperation terms of Paragraphs 14(c) and 15 must also cover former employees. Before nonprosecution protections of the corporate plea agreement will be extended to former employees, company counsel must make a commitment that the company can assist in securing the cooperation of key former employees, e.g., that the former employees will be made available for interviews. If a former employee is now employed at a competitor and is a subject or target of the investigation, the employee will be excluded from Paragraphs 14(c) and 17(a).*

[37] *The Division seeks to prosecute culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant, and thus, will carve culpable individuals out of the corporate plea agreement. Companies that offer early cooperation may have fewer carved-out executives than latecomers. See Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech by Scott D. Hammond, Before 54th Annual American Bar Association Section of Antitrust Law Spring Meeting at § II(D) (March 29, 2006), available at http://www.usdoj.gov/atr/public/speeches/215514.htm. Employees refusing to cooperate may also be carved out of the Plea Agreement's coverage. The carved-out individuals will be excluded from both the corporate cooperation requirements of Paragraph 14(c) and the nonprosecution coverage of Paragraph 17(a).*

paragraph, and shall include, but not be limited to:

(a) producing [in the United States and at other mutually agreed-upon locations] all non-privileged[38] documents, including claimed personal documents, and other materials, wherever located, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews [in the United States and at other mutually agreed-upon locations], not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged[39] material or information not requested in (a) - (c) of this paragraph that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings[in the United States] fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*); and

[38] *See footnote 32.*

[39] *See footnote 32.*

(f) agreeing that, if the agreement not to prosecute him or

her in this Plea Agreement is rendered void under Paragraph 17(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 17(a) will be tolled as to him or her for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.[40]

GOVERNMENT'S AGREEMENT

16. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 14 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant [or any of its [related entities]] for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT][41]. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

17. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the

[40] *Cooperating individuals will have to sign a separate letter tolling the statute of limitations with respect to them before they can receive the nonprosecution protections of the corporate plea agreement.*

[41] *If the investigation involves a domestic conspiracy, the nonprosecution provisions will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."*

exceptions noted in Paragraph 17(c), the United States will not bring criminal charges against any current [or former] director, officer, or employee of the defendant [or its [related entities]] for any act or offense committed before the date of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant [or its [related entities]] that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT][42] ("Relevant Offense")[, except that the protections granted in this paragraph shall not apply to [Samuel T. Jones], [John R. Doe], or [Robert P. Smith])];

(b) Should the United States determine that any current or former director, officer, or employee of the defendant [or its [related entities]] may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 17(b) fails to comply with his or her obligations under Paragraph 15, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 17(e), information provided by a person described in Paragraph 17(b) to the United States under the terms of this Plea Agreement

[42] *See footnote 41.*

pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 15 of this Plea Agreement, the agreement in Paragraph 17(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 14(a) and 15(a) shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant [or any of its [related entities]].[43]

[18.[44] The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention, or service of process, or to

[43] *For a discussion of Division policy on this issue, see "Negotiating The Waters" at § II(C), p. 5-6.*

[44] *Paragraph 18 may be inserted if the defendant has foreign-located officers, directors, or employees. See "Negotiating The Waters" at § II(G), p. 8-9 for a discussion of Division policy regarding this safe passage provision.*

prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[19. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant [and its [related entities]] as a matter for that agency to consider before determining what administrative action, if any, to take.][45]

REPRESENTATION BY COUNSEL

20. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

[45] *Optional paragraph where administrative actions are a possibility.*

VOLUNTARY PLEA

21. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

22. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant [or any of its [related entities]] have failed to provide full and truthful cooperation, as described in Paragraph 14 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph),[46] and the defendant [and its [related entities]] shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant [and its [related entities]] agree that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant [or its [related entities]] for any offense referred to in Paragraph 16 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this Plea

[46] *See "Negotiating The Waters" at § II(H), p. 9 for a discussion of Division policy regarding voiding the Plea Agreement.*

Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

23. The defendant understands and agrees that in any further prosecution of it [or its [related entities]] resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's [or its [related entities']] violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it[, its [related entities],] or [current or former directors, officers, or employees of it [or its [related entities]]][47] to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it [or its [related entities]] in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

24. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge[s] in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

25. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

26. The undersigned attorneys for the United States have been authorized

[47] *This language should be consistent with the individuals covered in the nonprosecution and cooperation paragraphs.*

by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[27. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED:

Respectfully submitted,

BY: _____ BY: _____
[CORPORATE REPRESENTATIVE][48] [STAFF]
[Title]
[Global Products, Inc.]

Attorneys
U.S. Department of Justice
Antitrust Division
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
Tel.: [(XXX) XXX-XXXX]

[48] *Most courts will not accept a corporate plea agreement that is executed by counsel for the company. An authorized corporate officer, not the company attorney, must normally sign the Plea Agreement and the Resolution of the Board of Directors, which is attached to the Plea Agreement, should grant that officer the power to enter into the agreement on behalf of the company.*

BY:_____
[NAME OF CORPORATE COUNSEL]
Counsel for [Global Products, Inc.]

Model Annotated Individual Plea Agreement
Last Updated December 19, 2006

UNITED STATES DISTRICT COURT

[XXXX] DISTRICT OF [XXXXXX]

UNITED STATES OF AMERICA	)	
	)	Criminal No. [XXXX]
v.	)	
	)	Filed
[JOHN R. DOE],	)	
	)	Violation:
Defendant.	)	
	)	

PLEA AGREEMENT[1]

The United States of America and [John R. Doe] ("defendant") hereby enter into the following Plea Agreement pursuant to Rule 1 1(c)(1)(B *OR* C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:

   (a) to be represented by an attorney;

   (b) to be charged by Indictment;

[1] *This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney's Office in the district where the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division's model plea agreements are available at http://www.usdoj.gov/atr/public/criminal.htm.*

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

(c) as a citizen and resident of [COUNTRY], to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXX] District of [XXXX];]

(d) to plead not guilty to any criminal charge brought against him;

(e) to have a trial by jury, at which he would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;

(f) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

(g) not to be compelled to incriminate himself;

(h) to appeal his conviction, if he is found guilty; and

(I) to appeal the imposition of sentence against him.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2 The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(h) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXXXX] District of [XXXXXX]]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that

sentence is consistent with or below the recommended sentence[2] in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) [*for C agreements only, also insert* "-c)"].[3] Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information[in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere] [TIME FRAME FROM CHARGING PARAGRAPH OF THE INFORMATION] in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3 The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below. [The United States agrees that at the arraignment, it will stipulate to the release of the

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[2] *If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.*

[3] *Due to certain Bar rulings in Ohio, Tennessee, and North Carolina regarding waiver of claims of ineffective assistance of counsel or prosecutorial misconduct, plea agreements filed in those states or by attorneys licensed in those states will also contain language such as "Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct" or comparable language used in the relevant district. Such plea agreements may also include following stipulation: "The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct."*

defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.[4]]

FACTUAL BASIS FOR OFFENSE CHARGED[5]

4 Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:[6]

(a) For purposes of this Plea Agreement, the "relevant period" is that period [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was [POSITION] of [CORPORATE EMPLOYER], an entity organized and existing under the laws of [STATE *OR if foreign*-COUNTRY] and with its principal place of business in [CITY, STATE *OR if foreign* -- CITY, COUNTRY]. During the relevant period, [CORPORATE EMPLOYER] was a

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[4] *The Antitrust Division will follow local practice regarding the release of the defendant on his own recognizance. Personal recognizance bonds may be appropriate in some cases.*

[5] *A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the decision in United States v. Booker, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore, facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than $350,000 for a pre-June 22, 2004 Sherman Act conspiracy or above $1 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(b). For a discussion of the implications of Booker on Division charging and plea agreement practice, see Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), available at http://www.usdoj.gov/atr/public/speeches/208354.htm].*

[6] *The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.*

[producer] of [PRODUCT] and was engaged in the sale of [PRODUCT] in [the United States and elsewhere]. [SHORT PRODUCT DESCRIPTION.] [During the relevant period, [CORPORATE EMPLOYER]'s sales of [PRODUCT] to U.S. customers totaled at least $[AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES FINE AND IMPRISONMENT RANGES].]

(b) During the relevant period, the defendant participated in a conspiracy with other persons and entities engaged in the [manufacture and sale] of [PRODUCT], the primary purpose of which was to [DESCRIPTION OF THE CHARGE] sold in [the United States and elsewhere]. In furtherance of the conspiracy, the defendant engaged in conversations and attended meetings with representatives of other major [PRODUCT] [producing] firms. During such meetings and conversations, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. [The defendant was an [organizer or leader/manager or supervisor] in the conspiracy[, which involved at least five participants/was extensive].] [The defendant significantly facilitated the [commission/concealment] of the conspiracy by his abuse of his position of trust.] [During the investigation of the conspiracy, the defendant [willfully obstructed or impeded/attempted to obstruct or impede] the investigation.]

(c) [*Description of relevant interstate and foreign commerce. Common description is as follows* -- During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate

[and foreign]commerce.] The business activities of [CORPORATE EMPLOYER] and co-conspirators in connection with the [production and sale] of [PRODUCT] affected by this conspiracy were within the flow of, and substantially affected, interstate [and foreign]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXX] District of [XXXXX], [XXXX] Division. [*Description of relevant venue. Common descriptions are as follows*-- [The conspiratorial meetings and conversations described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by the defendant] occurred in this District.] *OR* [[PRODUCT] affected by this conspiracy was sold by one or more of the conspirators to customers in this District.]]

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Antitrust Act is:

(a) a term of imprisonment for [three (3)][7] years (15 U.S.C. § 1);

(b) a fine in an amount equal to the greatest of (1) [$35Ø,ØØØ],[8] (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice

[7] *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum jail term would be 10 years.*

[8] *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum fine under Sherman Act would be $1 million rather than $350,000.*

the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C.

§ 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of [one (1)][9] year following any term of imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for [the entire term of supervised release][10] (18 U.S.C. § 3559(a)[(5)][11]; 18 U.S.C. § 3583(b)[(3)][12] and (e)(3); and United States Sentencing Guidelines ("U. S. S.G.," "Sentencing Guidelines," or "Guidelines") §5D1 .2(a)[(3)][13]).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. §5E1.1, the Court may order[14] him to pay restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the

[9] *Note if the defendant is pleading guilty to an antitrust conspiracy that continued on or after June 22, 2004 such that the maximum jail term is 10 years, the offense will become a Class C felony under 18 U.S.C. § 3559(a)(3) and will carry a maximum term of supervised release of 3 years under 18 U.S.C. § 3583(b)(2) and U.S.S.G. §5D1.2(a)(2).*

[10] *For antitrust offenses committed on or after June 22, 2004, applicable language is "up to two (2) years".*

[11] *Cite 3559(a) (3) for antitrust offenses committed on or after June 22, 2004.*

[12] *Cite 3583 (b) (2) for antitrust offenses committed on or after June 22, 2004.*

[13] *Cite 5D1.2 (a) (2) for antitrust offenses committed on or after June 22, 2004.*

[14] *In an antitrust case against an individual, restitution may be ordered under 18 U.S.C. § 3583(d) as a condition of supervised release or under 18 U.S. C. § 3663 (a) (3) to the extent agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.*

defendant to pay a $100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES[15]

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,[16] along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).][17]

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 1 1(c)(1)(B *OR* C), [*if a B agreement*--the

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[15] *Guidelines calculations may be included in the Plea Agreement.*

[16] *While it is the norm to apply the Guidelines Manual in effect at sentencing, note that under U.S.S.G. §1B1.11(b)(1) if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used, except where this practice contravenes existing case law. See e.g., United States v. DeMaree, 459 F.3d 791 (7th Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines).*

[17] *A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.*

United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] *OR* [*if a C agreement*-- the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,] a sentence [within the applicable Guidelines range][18] requiring the defendant to pay to the United States a criminal fine of $[XXXXX][, pursuant to 18 U.S.C. § 3571(d)[19],] [payable in full before the fifteenth (15th) day after the date of judgment] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]][20]; [a period of incarceration of XXXX months/years;][21]

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[18] *This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.*

[19] *Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at recommended fine greater than the Sherman Act maximum.*

[20] *The time for payment should be specified using one of these options. For an installment schedule to be imposed on an individual defendant, there must be a finding that installment payments are "in the interest of justice" under 18 U.S.C. § 3572(d)(1); for example, if a lump sum payment would have an unduly severe impact on the defendant or his dependents. See U.S.S.G. §5E1.2(f). If the defendant requests, and the staff agrees, that the fine may be paid in installments, a paragraph such as Paragraph 8(a) setting forth the recommended installment schedule should also be included. Note that if any fine or restitution greater than $2,500 is not paid in full before the 15th day after the date of judgment, the payment of interest is required pursuant to 18 U.S.C. § 3612(f)(1) unless the defendant does not have the ability to pay interest, in which case, the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f)(3)(A) or § 3612(h).*

[21] *The Antitrust Division will not agree to a "no jail" sentence for an individual defendant and the Division's practice is not to remain silent if a defendant argues for no jail at sentencing. The Division seeks to prosecute and obtain jail time for some or all of the culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant. See Speech by Scott D. Hammond Before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime, Charting New Waters in International Cartel Prosecutions (March 2, 2006), available at http://www.usdoj.gov/atr/public/speeches/214861.htm.*

[and no period of supervised release][22] [and restitution of $XXX pursuant to 18 U.S.C. § [3583(d)/3663(a)(3)/ *OR* 3663A(c)(1)(A)(ii)][23] [payable in full before [DATE]] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]] ("the recommended sentence")[24]. [The United States will not object to the defendant's request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp (if possible at [CITY], [STATE]) to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date on or after [MONTH DAY, YEAR].][25] The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure

[22] *The Division usually does not seek supervised release when the defendant is a foreign national and will return to his country after completing the jail sentence.*

[23] *See footnote 14 above. It is extremely rare to have restitution included as part of a plea agreement in an antitrust case, especially one with an individual defendant, as civil suits are normally filed by victims to recover damages. See U. S.S. G. §5E1.1 and optional Paragraph 13 in the corporate Plea Agreement.*

[24] *The recommended sentence is not required to be a specific number of months or years of incarceration or a specific dollar amount for the fine; the Plea Agreement may recommend a sentence within a certain Guidelines range.*

[25] *This sentence regarding the place of incarceration applies only when the defendant requests, and the Division agrees with, such a provision. The Court's or Bureau of Prison's refusal to grant such a request will not void the Plea Agreement, and thus, if such a request is included in the Plea Agreement, language such as "Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence" should be added to the end of Paragraph 11(a).*

pursuant to U.S.S.G. §5K2.0.[26] The parties agree not to seek or support any sentence outside of

the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that [the recommended sentence] set forth in this Plea Agreement is reasonable.

[(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §5E1.2(f)], that the fine be paid in the following installments: within [XX] days of imposition of sentence — $[XXXX] [(plus any accrued interest)]; at ninety (90) days after the imposition of sentence-- $[XXXX] [(plus any accrued interest)]; at one hundred and eighty (180) days after the imposition of sentence -- $ [XXXX] [(plus any accrued interest)]; at two hundred and seventy (270) days after imposition of sentence -- $[XXXX] [(plus any accrued interest)]; and at the one-year anniversary of the imposition of sentence— $[XXXX] [(plus any accrued interest)]; provided, however, that the defendant shall have the option at any time before the one-year anniversary of prepaying the remaining balance [(plus any accrued interest) then owing on the fine].][27]

[(b)[28] The United States contends that had this case gone to trial, the United

[26] *This language refers to the inapplicability of U.S.S.G. §5K2.0 "out of the heartland" departures, while the next sentence allows for a substantial assistance or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.*

[27] *The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case. Note that U.S.S.G. §5E1.2(f) and 18 U.S.C. § 3561 (c) (1) provide that the length of the installment schedule for individual defendants generally should not exceed twelve months and shall not exceed five years.*

[28] *Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).*

States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of [INSERT RECOMMENDED FINE], pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives his rights to contest this calculation.]

(c) The defendant understands that the Court will order him to pay a $100 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.

9.[29] [The United States and the defendant agree that the applicable Guidelines [fine and incarceration] range[s] exceed the [fine and term of imprisonment] contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §5K1.1, for a downward departure from the Guidelines [fine and incarceration] range(s) in this case and will request that the Court impose the [fine and term of imprisonment][30]

[29] *If the recommended sentence for either the fine or incarceration is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay determination.*

[30] *Most Division substantial assistance agreements contain a recommendation for a specific reduced fine and jail sentence. However, it is not uncommon for Division plea agreements, especially agreements with individuals, to contain a recommendation for a "freefall departure," in which both the Division and defendant are free to argue for the appropriate amount of a departure. Because there is no agreed-upon departure amount, a freefall agreement is more common in B agreements and cases where sentencing is deferred until the defendant's cooperation is complete. The typical freefall B agreement language is as follows: "If the United States determines that the defendant has provided substantial assistance in any investigations or prosecutions, and has otherwise fully complied with all of the terms of this Plea Agreement, it will file a motion, pursuant to USSG §5K1. 1, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence*

contained in the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] *OR*

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and the defendant further agree that the recommended fine set out in

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the defendant in light of the factors set forth in USSG §5K1.1(a)(1)-(5). The defendant acknowledges that the decision whether he has provided substantial assistance in any investigations or prosecutions and has otherwise complied with the terms of this Plea Agreement is within the sole discretion of the United States. It is understood that, should the United States determine that the defendant has not provided substantial assistance in any investigations or prosecutions, or should the United States determine that the defendant has violated any provision of this Plea Agreement, such a determination will release the United States from any obligation to file a motion pursuant to USSG §5K1. 1, but will not entitle the defendant to withdraw his guilty plea once it has been entered. The defendant further understands that, whether or not the United States files a motion pursuant to USSG §5K1. 1, the sentence to be imposed on him remains within the sole discretion of the sentencing judge." A separate paragraph usually precedes the freefall paragraph and provides as follows to ensure that the U.S. has the ability to recommend any specific sentence: "The defendant understands that the sentence to be imposed on him is within the sole discretion of the sentencing judge. The United States cannot and does not make any promises or representations as to what sentence he will receive, and is free to recommend any specific sentence to the Court. However, the United States will inform the Probation Office and the Court of (a) this Agreement; (b) the nature and extent of the defendant's activities with respect to this case and all other activities of the defendant which the United States deems relevant to sentencing; and (c) the nature and extent of the defendant's cooperation with the United States. In so doing, the United States may use any information it deems relevant, including information provided by the defendant both prior and subsequent to the signing of this Agreement. The United States reserves the right to make any statement to the Court or the Probation Office concerning the nature of the criminal violation charged in the attached Information, the participation of the defendant therein, and any other facts or circumstances that it deems relevant. The United States also reserves the right to comment on or to correct any representation made by or on behalf of the defendant, and to supply any other information that the Court may require."

Paragraph 8 above is appropriate, pursuant to U.S.S.G. §5E1.2(e)[and 18 U.S.C. § 3572(b)][31], due to the inability of the defendant to pay a fine greater than that recommended.]

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 12 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and his commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. [To enable the Court to have the benefit of all relevant sentencing information, the United States may request, and the defendant will not oppose, that sentencing be postponed until his cooperation is complete.]

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence[32] provided for in Paragraph 8 of this Plea Agreement. [*If a B agreement*--The defendant understands that, as provided in Fed. R. Crim. P. 11 (c)(3)(B), if the Court does not impose a sentence consistent with the recommendation[33] contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.]

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[31] *Insert "and 18 U.S.C. § 3572(b)" if restitution will be ordered pursuant to 18 U.S.C. § 3583(d), 3663 (a) (3), or in a fraud case 3663A (c) (1) (A) (ii) and a Guidelines fine would impair the ability of the defendant to make restitution.*

[32] *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."*

[33] *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommendation" here, it is more appropriate to refer to "either party's sentencing recommendation."*

[*Insert (a) and (b) only for C agreements*--(a)If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void. [Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence.][34]

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw his guilty plea (Fed. R. Crim. P. 1 1(c)(5) and (d)). If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 13 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater. [*For foreign national defendants residing abroad*---For a period of three (3) consecutive days following such a withdrawal of the guilty plea under this subparagraph, the United States shall take no action, based upon either a Relevant Offense or any actual

[34] *Insert this sentence if Paragraph 8 of the Plea Agreement includes a request by the defendant for a certain prison facility.*

or alleged violation of the Plea Agreement, to revoke the defendant's release on his personal recognizance, to subject the defendant to service of process, arrest, or detention, or to prevent the defendant from departing the United States.]]

DEFENDANT'S COOPERATION

12. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT][35], any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing [in the United States and at other mutually agreed-upon locations] all non-privileged[36] documents, including claimed personal documents,

[35] *If the investigation involves a domestic conspiracy, this description in the cooperation provision will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA] . . . ." The nonprosecution provision will be similarly limited.*

[36] *The term "non-privileged" should be included except in rare situations where a claim of privilege could be asserted over key information, the production of which is a critical part of the defendant's cooperation. In accord with the December 12, 2006 McNulty memo, a request for waiver of claims of attorney-client privilege or attorney work product involving factual information must be authorized in writing by the Antitrust Division's AAG and the request must be communicated in writing by the Antitrust Division's AA G to defendant's counsel. With respect to a request for a waiver of attorney-client communications or non-factual attorney work product, the Antitrust Division's AAG must obtain written authorization from the Deputy Attorney General, and the request must be communicated in writing by the Antitrust Division's AAG to defendant's counsel. For specific waiver request procedures, see McNulty memo at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.*

and other materials, wherever located,[37] in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) making himself available for interviews [in the United States and at other mutually agreed-upon locations], not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged[38] material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding; and

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings[in the United States], fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand

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[37] *The defendant's obligation to produce responsive documents in his possession, custody, or control wherever located applies to plea agreements in both domestic and international cases. See Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13th Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at http://www.usdoj.gov/atr/public/speeches/2275.htm, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.*

[38] *See Footnote 36 above.*

jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*).

GOVERNMENT'S AGREEMENT

13. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT][39] ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

[14.[40] The United States agrees that when the defendant travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject the defendant to arrest, detention, or service of process, or to prevent the defendant from departing the United States. This paragraph does not apply to the defendant's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings

[39] *If the investigation involves a domestic conspiracy, the nonprosecution provision normally will be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."*

[40] *Insert Paragraphs 14 and 15 if defendant is a foreign national. See "Negotiating The Waters" at § II(G), p. 8-9 for a discussion of Division policy regarding the safe passage provision in Paragraph 14.*

(18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401 - 402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[15.[41] (a) Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under Sections 238 and 240 of the Immigration and Nationality Act, 8 U.S.C. §§ 1228 and 1229a, based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2), 8 U.S.C. § 1229a(e)(2)).

(b) The Antitrust Division of the United States Department of Justice has consulted with United States Immigration and Customs Enforcement ("ICE") on behalf of the United States Department of Homeland Security ("DHS"). ICE, on behalf of DHS and in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant. The Secretary of DHS has delegated to ICE the authority to enter this

[41] *See "Negotiating The Waters at § IV(B), p. 14-17 for a discussion of the Division's policy regarding immigration relief. Note this language has been updated since the time of "Negotiating the Waters "due to creation of the Department of Homeland Security.*

agreement on behalf of DHS.

(c) So that the defendant will be able to obtain any nonimmigrant visa that he may need to travel to the United States, DHS and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the defendant's inadmissibility. This waiver will remain in effect so long as this agreement not to seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant's application for a nonimmigrant visa on the basis of the defendant's guilty plea and conviction in this case, and DHS will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case.

(d) This agreement not to seek to remove the defendant will remain in effect so long as the defendant:

(I) acts and has acted consistently with his cooperation obligations under this Plea Agreement;

(ii) is not convicted of any felony under the laws of the United States or any state, other than the conviction resulting from the defendant's guilty plea under this Plea Agreement or any conviction under the laws of any state resulting from conduct constituting an offense subject to this Plea Agreement; and

(iii) does not engage in any other conduct that would warrant his removal from the United States under the Immigration and Nationality Act.

The defendant understands that should the Antitrust Division become aware that the defendant has violated any of these conditions, the Antitrust Division will notify DHS.

DHS will then determine, in consultation with the Antitrust Division, whether to rescind this agreement not to seek to remove the defendant.

(e) The defendant agrees to notify the Assistant Attorney General of the Antitrust Division should the defendant be convicted of any other felony under the laws of the United States or of any state.

(f) Should the United States rescind this agreement not to seek to remove the defendant because of the defendant's violation of a condition of this Plea Agreement, the defendant irrevocably waives his right to contest his removal from the United States under the Immigration and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his right to notice of removal proceedings.]

[16. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.][42]

[42] *Optional paragraph where administrative actions are a possibility.*

REPRESENTATION BY COUNSEL

17. The defendant has reviewed all legal and factual aspects of this case with his attorney and is fully satisfied with his attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

18. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

19. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under

this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

20. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

[21.[43] The defendant agrees to and adopts as his own the factual statement contained in Paragraph 4 above. In the event that the defendant breaches the Plea Agreement, the defendant agrees that the Plea Agreement, including the factual statement

[43] *Insert Paragraph 21 if defendant is a foreign national. If it is not the standard practice in the filing district to have the factual basis included in the Plea Agreement, the factual basis may be attached to the Plea Agreement. See "Negotiating The Waters" at § IV(C), p. 17-18 for a discussion of Division policy regarding extradition of foreign nationals.*

contained in Paragraph 4 above, provides a sufficient basis for any possible future extradition request that may be made for his return to the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment. The defendant further agrees not to oppose or contest any request for extradition by the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment.]

ENTIRETY OF AGREEMENT

22. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge[s] in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

23. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[24. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED: _____ Respectfully submitted,

BY: BY:

[JOHN R. DOE] [STAFF]
Defendant

[NAME OF COUNSEL]
Counsel for [John R. Doe]

Attorneys
U.S. Department of Justice
Antitrust Division
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
Tel: [(XXX) XXX-XXXX]

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1987.

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

Commentary to Sentencing Table

Application Notes:

1. *The Offense Level (1 -43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I- VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*

2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.*

3. *The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462).

PART B - PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S. C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Historical Note: Effective November 1, 1987.

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 356 1(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 356 1(a)(3).

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

(a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2 Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not authorize a sentence of probation. See §5C1. 1 (Imposition of a Term of Imprisonment).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S. C. § 3561 (a) (3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S. C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1. 1(a) (2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 1992 (see Appendix C, amendment 462).

§5B1.2. Term of Probation

(a) When probation is imposed, the term shall be:

(1) at least one year but not more than five years if the offense level is **6** or greater;

(2) no more than three years in any other case.

Commentary

Background: This section governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level. Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.

Historical Note: Effective November 1, 1987.

§5B1.3. Conditions of Probation

(a) Mandatory Conditions--

(1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));

(2) for a felony, the defendant shall (A) make restitution, (B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).

(3) for any offense, the defendant shall not unlawfully possess a controlled substance ~~(see~~ 18 U.S.C. § 3563(a));

(4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));

(5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;

(7) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (~~see~~ 18 U.S.C. § 3563(a));

(8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));

(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 1 15(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) (Policy Statement) The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

(d) (Policy Statement) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)[*]); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

[*]So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1 .2 (Term of Supervised Release) --

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property,

house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation.

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1 .2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F 1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation.

Commentary

Application Note:

1. *Application of Subsection (a)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S. C. §§ 16911 and 16913.)*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 273, 274, and 302); November 1, 1997 (see Appendix C, amendment 569); November 1, 1998 (see Appendix C, amendment 584); November 1, 2000 (see Appendix C, amendment 605); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendment 644); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701 and 711).

§5B1.4. [Deleted]

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 271, 272, and 302), was deleted by consolidation with §§5B1.3 and 5D1.3 effective November 1, 1997 (see Appendix C, amendment 569).

PART C - IMPRISONMENT

§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*

2. *Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.*

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*

   (A) It may impose a sentence of imprisonment.

   (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

   (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment*

of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4 *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5 *Subsection (e) sets forth a schedule of imprisonment substitutes.*

6 *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement* than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*

7 *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not*

recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.

8 Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release. ..any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(1 1) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(1 1) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(1 1) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 51); November 1, 1989 (see Appendix C, amendments 271, 275, and 302); November 1, 1992 (see Appendix C, amendment 462); November 1, 2002 (see Appendix C, amendment 646).

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1 .3 (Departures Based on Inadequacy of Criminal History Category);

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level **17**.

Commentary

Application Notes:

1. *"More than 1 criminal history point, as determined under the sentencing guidelines," as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).*

2. *"Dangerous weapon" and "firearm," as used in subsection (a)(2), and "serious bodily injury," as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Offense," as used in subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subsection (a) (5), mean the offense of conviction and all relevant conduct.*

4. *Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

5. *"Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).*

6. *"Engaged in a continuing criminal enterprise," as used in subsection (a) (4), is defined in 21 U.S. C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S. C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor*

of others in the offense."

7. *Information disclosed by the defendant with respect to subsection (a) (5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.*

8. *Under 18 U.S. C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32(c)(1), (3).*

9. *A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.*

Background: This section sets forth the relevant provisions of 18 U.S. C. § 3553(f), as added by section 80001 (a) of the Violent Crime Control and Law Enforcement Act of 1994, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S. C. § 3553(f). See also H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

Historical Note: Effective September 23, 1994 (see Appendix C, amendment 509). Amended effective November 1, 1995 (see Appendix C, amendment 515); November 1, 1996 (see Appendix C, amendment 540); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 624); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674).

PART D - SUPERVISED RELEASE

§5D1.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case.

Commentary

Application Notes:

1. *Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.*

2. *Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of one year or less for any of the reasons set forth in Application Note 1.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 1995 (see Appendix C, amendment 529).

§5D1.2. Term of Supervised Release

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.

(2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for

the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S. C. § 1201; or (vi) an offense under 18 U.S. C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S. C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

3. Substantial Assistance Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S. C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (b) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 52); November 1, 1989 (see Appendix C, amendment 302); November 1, 1995 (see Appendix C, amendment 529); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 637 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2005 (see Appendix C, amendment 679); November 1, 2007 (see Appendix C, amendment 701).

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions--

(1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

(4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));

(5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;

(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S .C. § § 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 1 15(a)(8), Nov. 26, 1997) shall report the address where the

defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of

the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

(d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

* So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1 .2 (Term of Supervised Release) --

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1 .1 (Community Confinement).

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release.. .any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(1 1) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(1 1) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is

authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1 .2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1 .5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

Commentary

Application Note:

1. *Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that*

has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S. C. §§ 16911 and 16913.)

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 276, 277, and 302); November 1, 1997 (see Appendix C, amendment 569); November 1, 1998 (see Appendix C, amendment 584); November 1, 2000 (see Appendix C, amendment 605); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 644 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701and 711).

PART E - RESTITUTION, FINES, ASSESSMENTS, FORFEITURES

§5E1.1. Restitution

(a) In the case of an identifiable victim, the court shall --

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply --

(1) when full restitution has been made; or

(2) in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) In a case where there is no identifiable victim and the defendant was convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under §5E1.2.

(e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

(f) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(g) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §5E1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Application Note:

1 The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapter 46 or 96 of Title 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 et seq.). See 18 U.S.C. § 3663(c)(4).

Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under Subchapter C of Chapter 227 of Title 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See 18 U.S.C. § 3663(c)(5).

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A, and 21 U.S.C. § 853(q). For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

Subsection (d) implements the instruction to the Commission in section 205 of the Antiterrorism and Effective Death Penalty Act of 1996. This provision directs the Commission to develop guidelines for community restitution in connection with certain drug offenses where there is no identifiable victim but the offense causes "public harm."

To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 53); November 1, 1989 (see Appendix C, amendments 278, 279, and 302); November 1, 1991 (see Appendix C, amendment 383); November 1, 1993 (see Appendix C, amendment 501); November 1, 1995 (see Appendix C, amendment 530); November 1, 1997 (see Appendix C, amendment 571); May 1, 2001 (see Appendix C, amendment 612); November 1, 2001 (see Appendix C, amendment 627).

§5E1.2. Fines for Individual Defendants

(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

(b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.

(c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.

(2) Except as specified in (4) below, the maximum of the fine guideline range is the amount shown in column B of the table below.

(3) Fine Table

Offense Level	A Minimum	B Maximum
3 and below	$100	$5,000
4-5	$250	$5,000
6-7	$500	$5,000
8-9	$1,000	$10,000
10-11	$2,000	$20,000
12-13	$3,000	$30,000
14-15	$4,000	$40,000
16-17	$5,000	$50,000
18-19	$6,000	$60,000
20-22	$7,500	$75,000
23-25	$10,000	$100,000
26-28	$12,500	$125,000
29-31	$15,000	$150,000
32-34	$17,500	$175,000
35-37	$20,000	$200,000
38 and above	$25,000	$250,000.

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;

(4) any restitution or reparation that the defendant has made or is obligated to make;

(5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) whether the defendant previously has been fined for a similar offense;

(7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and

(8) any other pertinent equitable considerations.

The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(e) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(f) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(g) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

Commentary

Application Notes:

1. *A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.*

2. *In general, the maximum fine permitted by law as to each count of conviction is $250, 000 for a felony or for any misdemeanor resulting in death; $100, 000 for a Class A misdemeanor; and $5,000 for any other offense. 18 U.S. C. § 3571(b)(3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S. C. § 35 71(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571 (b) (2), (d).*

3. *The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.*

4. *The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.*

   Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.

5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S. C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S. C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S. C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S. C. § 1957(b) (2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S. C. § 1319(c), which authorizes a fine of up to $50, 000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act; and 2 U.S.C. § 43 7g(d) (1) (D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S. C. § 441f, a fine up to the greater of $50,000*

or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation.

6. *The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction).*

7. *In considering subsection (d)(7), the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 54); November 1, 1989 (see Appendix C, amendments 280, 281, and 302); November 1, 1990 (see Appendix C, amendment 356); November 1, 1991 (see Appendix C, amendment 384); November 1, 1997 (see Appendix C, amendment 572); November 1, 2002 (see Appendix C, amendment 646); January 25, 2003 (see Appendix C, amendment 648); November 1, 2003 (see Appendix C, amendment 656).

§5E1.3. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

Commentary

Application Notes:

1. *This guideline applies only if the defendant is an individual. See §8E1. 1 for special assessments applicable to organizations.*

2. *The following special assessments are provided by statute (18 U.S. C. § 3013):*

For Offenses Committed By Individuals On Or After April 24, 1996:

(A) *$100, if convicted of a felony;*
(B) *$25, if convicted of a Class A misdemeanor;*

(C) $10, if convicted of a Class B misdemeanor;
(D) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $50, if convicted of a felony;
(F) $25, if convicted of a Class A misdemeanor;
(G) $10, if convicted of a Class B misdemeanor;
(H) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals Prior To November 18, 1988:

(I) $50, if convicted of a felony;
(J) $25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-4 73, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 282 and 302); November 1, 1997 (see Appendix C, amendment 573).

§5E1.4. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

Commentary

Background: Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

In addition, the provisions of 18 U.S.C. §§ 3681-3682 authorizes the court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his

offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 18 U.S. C. § 3681 (c) (2).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302).

§5E1.5. Costs of Prosecution (Policy Statement)

Costs of prosecution shall be imposed on a defendant as required by statute.

Commentary

Background: Various statutes require the court to impose the costs of prosecution: 7 U.S. C. § 13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S. C. § 844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S. C. § 7201 (attempt to defeat or evade income tax); 26 U.S. C. § 7202 (willful failure to collect or pay tax); 26 U.S. C. § 7203 (willful failure to file income tax return, supply information, or pay tax); 26 U.S. C. § 7206 (fraud and false statements); 26 U.S. C. § 7210 (failure to obey summons); 26 U.S. C. § 7213 (unauthorized disclosure of information); 26 U.S. C. § 7215 (offenses with respect to collected taxes); 26 U.S. C. § 7216 (disclosure or use of information by preparers of returns); 26 U.S. C. § 7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. § 1302c-9 (improper FOIA disclosure); 43 U.S.C. § 942-6 (rights of way for Alaskan wagon roads).

Historical Note: Effective November 1, 1992 (see Appendix C, amendment 463).

PART F - SENTENCING OPTIONS

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.*

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release.. .any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(1 1) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(1 1) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(1 1) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

Commentary

Application Notes:

1. *"Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.*

2. *Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 2002 (see Appendix C, amendment 646).

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. *"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring.*

2. *The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.*

3. *The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will be no "call forwarding" or "call waiting" services, or that there will be no cordless telephones or answering machines.*

Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, e.g., when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 271 and 302).

§5F1.3. Community Service

Community service may be ordered as a condition of probation or supervised release.

Commentary

Application Note:

1. Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 283 and 302); November 1, 1991 (see Appendix C, amendment 419).

§5F1.4. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

Commentary

Background: In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S. C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S. C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than $20,000 to give notice.

If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S. C. § 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 284 and 302).

§5F1.5. Occupational Restrictions

(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and

(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

Commentary

Background: The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(5), or supervised release, 18 U.S.C. § 3583(d). Pursuant to § 3563(b)(5), a court may require a defendant to:

> *[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.*

Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96-97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." Id. at 96. Section 5F1.5 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S. C. § 3563 (b) (5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. See 18 U.S. C. § 3742(a) (3). The government may appeal if the sentence includes a less limiting condition of probation than the minimum established in the guideline. See 18 U.S. C. § 3 742 (b) (3).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 285 and 302); November 1, 1991 (see Appendix C, amendment 428); November 1, 2002 (see Appendix C, amendment 646).

§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 862, may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.

Commentary

Application Note:

1. *"Federal benefit" is defined in 21 U.S.C. § 862(d) to mean "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States" but "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility."*

Background: Subsections (a) and (b) of 21 U.S. C. § 862 provide that an individual convicted of a state or federal drug trafficking or possession offense may be denied certain federal benefits. Except for an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. § 862 (a) (1) (for distribution offenses) and (b)(1) (for possession offenses), is at the discretion of the court. In the case of an individual convicted of a third or subsequent drug distribution offense, denial of benefits is mandatory and permanent under 21 U.S.C. § 862(a)(1)(C) (unless suspended by the court under 21 U.S.C. § 862(c)).

Subsection (b)(2) of 21 U.S.C. § 862 provides that the period of benefit ineligibility that may be imposed in the case of a drug possession offense "shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services."

Subsection (c) of 21 U.S.C. § 862 provides that the period of benefit ineligibility shall be suspended "if the individual (A) completes a supervised drug rehabilitation program after becoming ineligible under this section; (B) has otherwise been rehabilitated; or (C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program."

Subsection (e) of 21 U.S. C. § 862 provides that a period of benefit ineligibility "shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program."

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 305); November 1, 1992 (see Appendix C, amendment 464).

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background: Section 4046 of title 18, United States Code, provides --

> *"(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.*
>
> *(b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed six months, an inmate in the shock incarceration program shall be required to -*
>
> *(1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and*
>
> *(2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.*
>
> *(c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate. 18 U.S.C. § 4046."*

The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled "intensive confinement program"). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the "intensive confinement" portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 424). Amended effective November 1, 2002 (see Appendix C, amendment 646).

PART G - IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

§5G1.1. Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence --

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41-51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51-60 months under subsection (c).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 286).

§5G1.2. Sentencing on Multiple Counts of Conviction

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see §5G1 .1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

Commentary

Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category. Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—

(A) In General.—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S. C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment)

and 18 U.S. C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1. 1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. See, e.g., the Commentary to §§2K2. 4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S. C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1. 6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

(B) Multiple Convictions Under 18 U.S.C. § 1028A.—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S. C. § 1028A (b) (4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .".

In determining whether multiple counts of 18 U.S. C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

(i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S. C. § 1028A in a case in which an underlying offense for one of the 18 U.S. C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S. C. § 2332b(g) (5) (B).

(ii) Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S. C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S. C. § 3553 (a) (2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

(C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S. C. § 3624(e).

3. Career Offenders Covered under Subsection (e).—

(A) Imposing Sentence.—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) Examples.—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S. C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S. C. § 841 (b) (1) (C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262 -327). The court then imposes a sentence of 60 months on the 18 U.S. C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S. C. § 841 count. As required by statute, the sentence on the 18 U.S. C. § 924(c) count is imposed to run consecutively.

(ii) The defendant is convicted of one count of 18 U.S. C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S. C. § 841(b) (1)(C) (20 year statutory maximum). Applying §4B1. 1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S. C. § 924(c) count to run consecutively to the sentence on the 21 U.S. C. § 841 count.

(iii) The defendant is convicted of two counts of 18 U.S. C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S. C. § 113(a) (3) (10 year statutory maximum). Applying §4B1. 1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460-485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S. C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S. C. § 924(c) count; and

(III) a sentence of 100 months on the 18 U.S.C. § 113(a) (3) count. The sentence on each count is imposed to run consecutively to the other counts.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288); November 1, 1994 (see Appendix C, amendment 507); November 1, 1998 (see Appendix C, amendment 579); November 1, 2000 (see Appendix C, amendment 598); November 1, 2002 (see Appendix C, amendment 642); November 1, 2004 (see Appendix C, amendment 674); November 1, 2005 (see Appendix C, amendments 677 and 680).

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B 1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1 *Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*

2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3 (a) (1), (a) (2), or (a) (3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgement in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S. C. § 3584 (referencing 18 U.S. C. § 3553(a));

(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that

a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S. C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background: In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S. C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S. C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494); November 1, 1995 (see Appendix C, amendment 535); November 1, 2002 (see Appendix C, amendment 645); November 1, 2003 (see Appendix C, amendment 660).

PART H - SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.

The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2. 0 (Grounds for Departure).

In addition, 28 U.S. C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 357); November 1, 1991 (see Appendix C, amendment 386); November 1, 1994 (see Appendix C, amendment 508); October 27, 2003 (see Appendix C, amendment 651).

§5H1.1. Age (Policy Statement)

Age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1 .4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1993 (see Appendix C, amendment 475); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674).

§5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B 1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 2004 (see Appendix C, amendment 674).

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1997 (see Appendix C, amendment 569); November 1, 2004 (see Appendix C, amendment 674).

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1 .3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

Similarly, where a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B 1 .3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1997 (see Appendix C, amendment 569); October 27, 2003 (see Appendix C, amendment 651).

§5H1 .5. Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a departure is warranted.

Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 2004 (see Appendix C, amendment 674).

§5H1 .6. Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1 Circumstances to Consider.—

(A) In General.—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Background: Section 401(b) (4) of Public Law 108–2 1 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674).

§5H1 .7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (see Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (see subsection (d) of §5K2.0 (Grounds for Departures)).

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1 .8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. See Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, see §4A1 .3 (Departures Based on Inadequacy of Criminal History Category).

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note: Effective November 1, 1987.

§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

Historical Note: Effective November 1, 1987.

§5H1 .11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 386). Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.

Historical Note: Effective November 1, 1992 (see Appendix C, amendment 466). Amended effective November 1, 2004 (see Appendix C, amendment 674).

PART J - RELIEF FROM DISABILITY

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 55).

§5J1.1. Relief from Disability Pertaining to Convicted Persons Prohibited from Holding Certain Positions (Policy Statement)

A collateral consequence of conviction of certain crimes described in 29 U.S.C. §§ 504 and 1111 is the prohibition of convicted persons from service and employment with labor unions, employer associations, employee pension and welfare benefit plans, and as labor relations consultants in the private sector. A convicted person's prohibited service or employment in such capacities without having been granted one of the following three statutory procedures of administrative or judicial relief is subject to criminal prosecution. First, a disqualified person whose citizenship rights have been fully restored to him or her in the jurisdiction of conviction, following the revocation of such rights as a result of the disqualifying conviction, is relieved of the disability. Second, a disqualified person convicted after October 12, 1984, may petition the sentencing court to reduce the statutory length of disability (thirteen years after date of sentencing or release from imprisonment, whichever is later) to a lesser period (not less than three years after date of conviction or release from imprisonment, whichever is later). Third, a disqualified person may petition either the United States Parole Commission or a United States District Court judge to exempt his or her service or employment in a particular prohibited capacity pursuant to the procedures set forth in 29 U.S.C. §§ 504(a)(B) and 111 1(a)(B). In the case of a person convicted of a disqualifying crime committed before November 1, 1987, the United States Parole Commission will continue to process such exemption applications.

In the case of a person convicted of a disqualifying crime committed on or after November 1, 1987, however, a petition for exemption from disability must be directed to a United States District Court. If the petitioner was convicted of a disqualifying federal offense, the petition is directed to the sentencing judge. If the petitioner was convicted of a disqualifying state or local offense, the petition is directed to the United States District Court for the district in which the offense was committed. In such cases, relief shall not be given to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he or she has been rehabilitated since commission of the disqualifying crime and can therefore be trusted not to endanger the organization in the position for which he or she seeks relief from disability.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 56).

PART K - DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. *Under circumstances set forth in 18 U.S. C. § 3553(e) and 28 U.S. C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*

2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*

3. *Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S. C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 290).

§5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 291).

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2. OTHER GROUNDS FOR DEPARTURE

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 358).

§5K2.0. Grounds for Departure (Policy Statement)

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S .C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) PROHIBITED DEPARTURES.—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in § §5H1 .10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1 .12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1 .1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may

be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B 1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e., a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S .C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

"Circumstance" includes, as appropriate, an offender characteristic or any other offense factor.

"Depart", "departure", "downward departure", and "upward departure" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement.—

(A) Departures Covered by this Policy Statement.—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S. C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines.—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1. 3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3. 1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a).—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S. C. § 3553(b) (1), or an aggravating circumstance in a case under 18 U.S. C. § 3553(b) (2)(A) (i), of a kind not adequately taken into consideration in the guidelines.

(i) Identified Circumstances.—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) Unidentified Circumstances.—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—

(i) In General.—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S. C. § 3553(b) (1), or an aggravating circumstance in a case under 18 U.S. C. § 3553 (b) (2) (A) (i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) Examples.—As set forth in subsection (a) (3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2. 7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

4. Downward Departures in Child Crimes and Sexual Offenses.—

(A) Definition.—For purposes of this policy statement, the term "child crimes and sexual offenses" means offenses under any of the following: 18 U.S. C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure.—

(i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S. C. § 3553 (b) (2) (A) (ii) (I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).

(ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S. C. § 3553 (b) (2) (A) (ii) (II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (See Historical Note to §1A1.1 (Authority)). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S. C. § 991 (b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with

appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

"(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;

(B) a policy statement authorizing a departure pursuant to an early disposition program; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of ...section 5K2. 0 ".

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.

Section 401 (b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57); November 1, 1990 (see Appendix C, amendment 358); November 1, 1994 (see Appendix C, amendment 508); November 1, 1997 (see Appendix C, amendment 561); November 1, 1998 (see Appendix C, amendment 585); April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651).

§5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

Historical Note: Effective November 1, 1987.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2. 1.

Historical Note: Effective November 1, 1987.

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Historical Note: Effective November 1, 1987.

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

Historical Note: Effective November 1, 1987.

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

Historical Note: Effective November 1, 1987.

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

Historical Note: Effective November 1, 1987.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

Historical Note: Effective November 1, 1987.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Historical Note: Effective November 1, 1987.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

Historical Note: Effective November 1, 1987.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

Historical Note: Effective November 1, 1987.

§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, 674).

§5K2.13. Diminished Capacity (Policy Statement)

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement—

"Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Background: Section 401(b) (5) of Public Law 108–2 1 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1998 (see Appendix C, amendment 583); April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674).

§5K2.14. Public Welfare (Policy Statement)

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5K2.15. [Deleted]

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 292), was deleted effective November 1, 1995 (see Appendix C, amendment 526).

§5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 420). Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note:

1. *"Crime of violence" and "controlled substance offense" are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).*

Historical Note: Effective November 1, 1995 (see Appendix C, amendment 531). Amended effective November 1, 2006 (see Appendix C, amendment 691).

§5K2.18. Violent Street Gangs (Policy Statement)

If the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. § 521 applies, but no violence is

established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

Historical Note: Effective November 1, 1995 (see Appendix C, amendment 532).

§5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S. C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo.

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 602).

§5K2.20. Aberrant Behavior (Policy Statement)

(a) IN GENERAL.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 1 09A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) REQUIREMENTS.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) PROHIBITIONS BASED ON THE PRESENCE OF CERTAIN CIRCUMSTANCES.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1 .3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

"Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S. C. § 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. Repetitious or Significant, Planned Behavior.—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. Other Circumstances to Consider.—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401 (b)(3) of Public Law 108–2 1 directly amended subsection (a) of this policy statement, effective April 30, 2003.

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 603). Amended effective April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651).

§5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or

underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 604). Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

Commentary

Background: *Section 401 (b) (2) of Public Law 1 08–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.*

Historical Note: Effective April 30, 2003 (see Appendix C, amendment 649). Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1 .3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Historical Note: Effective November 1, 2003 (see Appendix C, amendment 660). Amended effective November 1, 2004 (see Appendix C, amendment 674).

§5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716, an upward departure may be warranted.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, "official insignia or uniform" has the meaning given that term in 18 U.S. C. § 716(c) (3).

Historical Note: Effective November 1, 2007 (see Appendix C, amendment 700).

* * * * *

3. EARLY DISPOSITION PROGRAMS

Historical Note: Effective October 27, 2003 (see Appendix C, amendment 651).

§5K3.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401 (m) (2) (B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21).

Historical Note: Effective October 27, 2003 (see Appendix C, amendment 651).

2006 Federal Sentencing Guidelines

Chapter 8 - PART C - FINES

§8C2.4. Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.

(c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

Offense Level	Amount
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000
27	$4,800,000

28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000
35	$36,000,000
36	$45,500,000
37	$57,500,000
38 or more	$72,500,000.

Commentary

Application Notes:

1. "Pecuniary gain," "pecuniary loss," and "offense" are defined in the Commentary to §8A 1.2 (Application Instructions - Organizations). Note that subsections (a)(2) and (a)(3) contain certain limitations as to the use of pecuniary gain and pecuniary loss in determining the base fine. Under subsection (a)(2), the pecuniary gain used to determine the base fine is the pecuniary gain to the organization from the offense. Under subsection (a)(3), the pecuniary loss used to determine the base fine is the pecuniary loss from the offense caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly.

2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1. 1 (Theft, Property Destruction, and Fraud). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

3. In a case of an attempted offense or a conspiracy to commit an offense, pecuniary loss and pecuniary gain are to be determined in accordance with the principles stated in §2X1. 1 (Attempt, Solicitation, or Conspiracy).

4. In a case involving multiple participants (i.e., multiple organizations, or the organization and individual(s) unassociated with the organization), the applicable offense level is to be determined without regard to apportionment of the gain from or loss caused by the offense. See §1B1.3 (Relevant Conduct). However, if the base fine is determined under subsections (a)(2) or (a)(3), the court may, as appropriate, apportion gain or loss considering the defendant's relative culpability and other pertinent factors. Note also that under §2R1. 1(d)(1), the volume of commerce, which is used in determining a proxy for loss under §8C2.4(a)(3), is limited to the volume of commerce attributable to the defendant.

5. Special instructions regarding the determination of the base fine are contained in §§2B4. 1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1. 1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5. 1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); and 2R1. 1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally,

knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2. 5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 2001 (see Appendix C, amendment 634); November 1, 2004 (see Appendix C, amendments 666 and 673).

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(2006/C 2 10/02)

(Text with EEA relevance)

INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003 ([1]), the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.

2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion ([2]) within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 2 3(2), second and third subparagraphs, of Regulation No 1/200 3.

3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines ([3]). After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.

4. The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles ([4]). For this purpose, the Commission must ensure that its action has the necessary deterrent effect ([5]). Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

(1) Council Regulation (EC) No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).
(2) See, for example, Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.
(3) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 6 5(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).
(4) See, for example, *Dansk Rørindustri A/S and others v Commission*, cited above, paragraph 170.
(5) See Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.

7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.

8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.

10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).

11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).

1. **Basic amount of the fine**

12. The basic amount will be set by reference to the value of sales and applying the following methodology.

A. *Calculation of the value of sales*

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ([1]) relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales').

14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.

15. In determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures.

16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

17. The value of sales will be determined before VAT and other taxes directly related to the sales.

18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

B. *Determination of the basic amount of the fine*

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

([1]) Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements ([2]), which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.

26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

2. **Adjustments to the basic amount**

27. In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

([2]) This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

A. *Aggravating circumstances*

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

— where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;

— refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

— role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. *Mitigating circumstances*

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. ([1])

([1]) This is without prejudice to any action that may be taken against the Member State concerned.

C. *Specific increase for deterrence*

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

D. *Legal maximum*

32. The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 2 3(2) of Regulation No 1/2003.

33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

E. *Leniency Notice*

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

F. *Ability to pay*

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

FINAL CONSIDERATIONS

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.

38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 2 3(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 ([1]).

([1]) Article 15(2) of Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty (OJ 13, 21.2.1962, p. 204).

COMMISSION REGULATION (EC) No 622/2008

of 30 June 2008

amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([1]), and in particular Article 33 thereof,

Having published a draft of this Regulation ([2]),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ([3]) lays down rules concerning the participation of the parties concerned in such proceedings.

(2) Parties to the proceedings may be prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability in respect of such participation, if they can reasonably anticipate the Commission's envisaged findings as regards their participation in the infringement and the level of potential fines and agree with those findings. It should be possible for the Commission to disclose to those parties, where appropriate, the objections which it intends to raise against them on the basis of the evidence in the file and the fines that they are likely to incur. Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability.

(3) When the Commission reflects the parties settlement submissions in the statement of objections and the parties replies confirm that the statement of objections corresponds to the contents of their settlement submissions, the Commission should be able to proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/200 3 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

(4) A settlement procedure should therefore be established in order to enable the Commission to handle faster and more efficiently cartel cases. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. Therefore, the Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including any unreasonable delays, such as delays associated with the resources required to provide access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent may also be considered.

(5) Complainants will be closely associated with settlement proceedings and be duly informed of the nature and subject matter of the procedure in writing to enable them to provide their views thereon and thereby cooperate with the Commission investigation. However, in the particular context of settlement proceedings, providing systematically a non-confidential version of the statement of objections to complainants would not always serve the purpose of enabling complainants to cooperate with the Commission's investigation and may occasionally discourage the parties to the proceedings from cooperating with the Commission. To this end, the Commission should not be obliged to provide a non-confidential version of the statement of objections to complainants.

(1) OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).
(2) OJ C 50, 27.10.2007, p. 48.
(3) OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

(6) Regulation (EC) No 773/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 773/2004 is amended as follows:

1. Article 2, paragraph 1 is replaced by the following:

'1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 2 7(4) of that Regulation is published, whichever is the earlier.'

2. In Article 6, paragraph 1 is replaced by the following:

'1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The Commission shall also set a time limit within which the complainant may make known its views in writing.'

3. In Article 10, paragraph 1 is replaced by the following:

'1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.'

4. The following Article 1 0a is inserted:

Article 10a

Settlement procedure in cartel cases

1 After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the Commission on their behalf. When setting the time limit referred to in the first subparagraph, the Commission shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the Commission of:

(a) the objections it envisages to raise against them;

(b) the evidence used to determine the envisaged objections;

(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

(d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/200 3.

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.

5. Article 11(1) is replaced by the following:

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

6. Article 12 is replaced by the following:

Article 12

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

2. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions. In Article 15, the following paragraph 1a is inserted:

1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 1 0a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions.

3. Article 17 is amended as follows:

(a) paragraph 1 is replaced by the following:

1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

(b) paragraph 3 is replaced by the following:

3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.

Article 2

This Regulation shall enter into force on 1 July 2008.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 June 2008.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION REGULATION (EC) No 773/2004

of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([1]), and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.

(2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.

(3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.

([1]) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.

(5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.

(6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.

(7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.

(8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.

(9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so,

it should inform the complainant of the identity of that authority.

(10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.

(11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.

(12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

(13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings that submit or have submitted documents or statements to identify confidential information.

(1) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

(2) In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.

(3) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ([1]), which should therefore be repealed.

(17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector ([2]) should therefore be repealed.

(18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 ([3]) should therefore be repealed,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Subject-matter and scope

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II

INITIATION OF PROCEEDINGS

Article 2

Initiation of proceedings

1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.

(2) OJ L 354, 30.12.1998, p. 22.

3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III

INVESTIGATIONS BY THE COMMISSION

Article 3

Power to take statements

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/ 200 3, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4

Oral questions during inspections

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.

2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV

HANDLING OF COMPLAINTS

Article 5

Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

Article 6

Participation of complainants in proceedings

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7

Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by

([1]) OJ L 354, 30.12.1998, p. 18.OJ L 354, 30.12.1998, p. 22.

decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8

Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9

Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/200 3, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V

EXERCISE OF THE RIGHT TO BE HEARD

Article 10

Statement of objections and reply

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, 28 paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

Hearing of other persons

Article 11

Right to be heard

1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12

Right to an oral hearing

The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

Article 13

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.

2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.

3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

Article 14

Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.

3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.

6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI

ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15

Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

Time-limits

1. In setting the time-limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2) and Article

Article 16

Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

3 Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

(a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

(b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

(c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII

GENERAL AND FINAL PROVISIONS

Article 17

16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

3. The time-limits referred to in Article 3(3), Article 4(3) and Article 16(3) shall be at least two weeks.

4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

Article 18

Repeals

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 338 5/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

Article 19

Transitional provisions

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

Article 20

Entry into force

This Regulation shall enter into force on 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 April 2004.

For the Commission
Mario MONTI
Member of the Commission

ANNEX

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. **Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. **Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. **Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. **Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.