DEPARTMENT OF JUSTICE

TRANSCRIPT OF TESTIMONY OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED 2005 AMENDMENTS TO §2R1.1

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JUDGE HINOJOSA: Thank you all very much, and we appreciate your time. We'll go on to the next panel, who have been very patient. The next panel consists of two individuals, Scott Hammond, who's the Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, and Robert McCampbell, who is the U.S. Attorney for the Western District of Oklahoma, and who is the Chair of the Attorney General Advisory Subcommittee on Sentencing. Mr. Hammond, did you want to go first, sir?

MR. HAMMOND: Yes, please. Thank you.

JUDGE HINOJOSA: We do appreciate your patience.

MR. HAMMOND: Well, I was going to say that it is a great pleasure to be here, but going second and listening to all those great questions and not having a chance to jump in immediately, I gotta tell you was a little rough, but I'm really happy to have this opportunity to address you, to talk about the division's proposal to amend 2R1.1, and to talk about what we understand to be the intent of the legislation, the 2004 Act, raising the statutory maximums.

Let me begin by talking about what Chairman Sensenbrenner said when the House passed the legislation because I think it goes to one of the issues that this Commission obviously is concerned about in terms of do we just adjust at the top, do we adjust also at the bottom, you know, what was the intention of Congress, because you won't see anywhere in the legislative history a mention that they were specifically only interested in raising it at the top. That's not what was at work here. What was at work here was exactly what Commissioner Howell was talking about, by closing the gap between antitrust and other white collar offenses, like fraud. So, Chairman Sensenbrenner said, in discussing the increased penalty provisions, that this should send an unmistakable message to those who consider violating the antitrust laws that if they are caught, they will spend much more time considering the consequences of their actions within the confinement of their prison cells. That message, I'm afraid, will not be received unless this Commission amends 2R1.1 along the lines requested in the department's proposal, and here's why. There are three components to the 2004 Act and these components, I submit to you, operate like a three-legged chair. The first component was the detrebling provision. It provides an incentive for companies to come forward and cooperate and self-report. Qualifying amnesty applicants, as you know, have their treble damage exposure limited to single damages and it removes joint and several liability. The second component was raising the statutory maximum fines tenfold, from 10 million to 100 million. The third component, of course, was tripling the statutory maximum sentences for individuals from three years to 10 years or more than tripling.

It's clearly no coincidence that Congress teamed up this detrebling provision with the increases to the statutory maximum sentences and statutory maximum fines. Their strategy, their calculated carrot and stick strategy was designed to deter and punish antitrust offense. Antitrust offense is now the first two components. The detrebling and the fines, they're self-effectuating. The Commission doesn't have to do anything for those two components to go into place. That is not the case, though, with the third component, raising the statutory maximum sentences.

Now, I've been with the division for 17 years and I can state unequivocally that jail sentences,

individual accountability and the threat of jail sentences, is clearly the greatest single deterrent to antitrust offenses, but you don't have to spend one day as an Antitrust Division prosecutor to know that that is true. Now, I will concede, as Mr. Felman pointed out, that antitrust defendants are the most educated, the most wealthy, the highest stature defendants that you will find. If we're going to deter these defendants from victimizing American businesses and consumers, we're going to have to do it with lengthy jail sentences. The short jail sentences that were put discussed in the commentary back in 1987 are not doing the job. Those short jail sentences that are mentioned in the commentary was a different time, a different age, when three years was the statutory maximum. If this three-legged chair, this 2004 Act, is going to stand, if it's going to work, we're going to have to implement the third component, the most important component of this deterrent package.

Now, I understand that in the ABA letter that Mr. Klawiter didn't emphasize it today, so I won't either, there was talk about more time, more hearings. We are greatly concerned about any delay in implementing this delay in amending to our 1.1 because it's so essential to this deterrent package, but I would submit to you, with all due respect, that there are three things that Congress has found that this Commission can find that are unequivocal. The first is that antitrust defendants are being undeterred. The current 2R1.1, as it stands now, is not sufficient to deter these crimes. Secondly, that there is an unjustifiable gap between the way currently 2R1.1 deals with antitrust offenses and how it punishes and deters antitrust offenses versus other white collar offenses, and third, that the antitrust offenses that we are prosecuting, detecting today are much more serious and egregious than was even imagined when the guidelines were promulgated in 1987.

Now, let me give you a few examples of why I say that. Let me begin with the first example. In the mid-1990s, we prosecuted a couple of ADM executives as well as their Asian competitors for fixing prices on a feed additive called lysine that is sold to farmers around the world. This cartel was so effective that the cartel members were able to sit in a hotel room and fix the price of lysine to every country around the world effective the very next day. Prices went up 70 percent in the first six months of the conspiracy and doubled over the course of the conspiracy.

Now, when Mr. Felman said earlier show me a case, show me a case, well, I didn't bring him a copy, but I did bring for you seven copies and they're in the box right behind you, seven copies of FBI undercover tapes, highlights taken from that investigation, that will show you the lysine cartel at work.

There's also some written materials. I gave it to you both in a DVD format and in a VCR format because I would appreciate it if you had the time to take a look at it. I promise you, if you look at those tapes, you will see with your own eyes what I will try to communicate to you today, and that is, antitrust fraud, antitrust crimes are fraud. It is theft by well-dressed thieves. Make no mistake about it, and you won't when you look at those tapes. I don't know Mr. Felman's defendant in the health care example at the time that he said he represented antitrust defendant. I do know we haven't prosecuted a health care criminal case in over 15 years. So, I don't know what the facts were in that case.

MR. FELMAN: He wasn't charged.

MR. HAMMOND: I'm quite certain about that, but the cases that we are charging and prosecuting are unmistakable fraud. I mentioned back in the mid-1990s, and I mentioned that case because the 7th Circuit -- I just wanted to read to you how they characterized that case because it's also going to -- I want to follow up on upward departures and the need for greater sentences. This is how the 7th Circuit addressed the facts of the ADM case.
"The facts involved in this case reflect an inexplicable lack of business ethics in an atmosphere of
general lawlessness that infected the very heart of one of America's leading corporate citizens. Top executives at ADM and its Asian co-conspirators throughout the early '90s spied on each other, fabricated aliases and fronted organizations to hide their activities, hired prostitutes to gather information from competitors, lied, cheated, embezzled, extorted, and obstructed justice." When that case was remanded back to the District Court and the District Court judge was instructed to apply aggravating adjustments to the role and offenses of the top ADM executives, they were sentenced to 33 and to 36 months for that conduct. Under the proposal that the department has made, those same defendants would, and I submit appropriately, be sentenced to incarceration periods of 57 and 63 months, only half still of the new statutory maximum. Now, when that case was discovered in the '90s, mid '90s, it was unlike anything we had ever seen before. I mean, it was literally bigger, more serious, harmed more consumers, had a greater effect on U.S. commerce than any antitrust crime that we had ever seen. I'm not going to sit here right now and tell you that it is commonplace for us to discover conduct like that since then, but there are numerous examples and I've provided some of them in the written materials that I gave to you, numerous examples of international cartels affecting vitamins, D-RAM, graphite electrodes, chemicals, that have shared all of those brazen characteristics to this cartel, but have affected even greater volumes of commerce and had an even greater impact on consumers.

Now, having just highlighted some of those international cases, I'd be remiss if I left you with the
impression that we're only prosecuting international cases or that's where the harm is in antitrust crimes. Just this past week, we filed a 22-count indictment in the Northern District of California charging six companies and five individuals with defrauding the E-Rate Program. The E-Rate Program is a program that is used to provide Internet access, telecommunications services, computer and telecommunications networks to disadvantaged schools and libraries. There are 11 antitrust counts and there are 11 wire fraud and mail fraud counts. Okay. So, what we talked about, that Commissioner Howell was very concerned about. Those counts and the conduct itself areintertwined. The harm that they cause is indistinguishable. The guideline calculations, though, for the antitrust and the mail and wire fraud is radically different. It makes no sense. It makes no sense. We've had a number of cases like this, where we have had fraud counts and antitrust counts where it just isn't right that you have guideline calculations that are so disparate. Let me give you even what I think is the most perverse example of this. In order to have a Sherman Act violation, you have to have an agreement. An attempt to fix prices or an attempt to rig bids is not a violation of the antitrust laws. It can, however, be a wire fraud violation or mail fraud violation, if you use the wires or the mails. So, you can have a situation

in which we would prosecute an attempt to fix prices that would result in two or three or four times greater jail sentences than if they had actually consummated the agreement, carried it out, and victimized the consumers. That's the situation that we have right now and that's exactly what Congress has tried to eliminate and tried to narrow through the Act to raise the statutory maximums. Now, let me just say a few things about our proposal. I know you've got my written remarks on it, and I'd be happy to answer all your questions, but I wanted to point out a few things.

First of all, please be careful when doing the math with this, as I know you will be, but it can be confusing. Earlier, we heard about unprecedented 11 level adjustments, all right, under our proposal. Well, I guess what that's comparing to is under the old guidelines, if you began with a 10 and you added the highest adjustment of seven points for commerce over 100 million, you got to 17. We've suggested that the highest volume of commerce adjustment level should be at one billion. So, if you're going to compare a $101 million in commerce versus a $1.1 billion in commerce, well, I guess then that's an 11 level adjustment. I would suggest, instead of doing that math, that you compare what we would have if you have more than 80 million but less than 160 and you want to compare that to more than 100 million, under the old guidelines, you would have a three level adjustment, not an 11 level adjustment, but a three level adjustment. It's also a great exaggeration to suggest that all sentences are being doubled. That's not at all accurate. As you go through the table, particularly as you go with increasing volumes of commerce, you see you go from 100 percent the base offense level quickly to 66 percent to 50 percent to 33 percent. It varies over the scope of the table. I would submit to you that this is a modest proposal that the division has made. Why do I say it's modest? Well, let's first look at the high end. In order to get to where Congress says we should be at a 10-year maximum for the most egregious conduct, you would have to have an antitrust conspiracy in which the defendant's participation alone, not the scope of the entire conspiracy, but through the defendant's company's participation involved over $1 billion, and that still doesn't get you to the top. You would still have to have a Chapter 3 adjustment like a role in the offense. If you were the ringleader, if you started it at 13 under our proposal and you added 15 because that defendant's participation involved over a billion dollars, and then you still added plus four for role in the offense, then you will get to 32 and then you will be in an offense range which will allow for the statutory maximum. That same billion dollar conspiracy, a billion dollar conspiracy where the defendant accepts responsibility and gets a three level adjustment, can bring you under five years, half of the statutory maximum, less than half of the statutory maximum.

I say that this proposal is modest for another reason and again I'll draw your attention to the comparison. At $1 million, when you compare that with the $200,000 loss, our proposal provides 2R1.1 is still four levels below the comparable fraud provision. When you get past that, for crimes involving more than $5 million of commerce, the gap is still six to eight levels difference. There still is a six to eight level difference between our proposal and the equivalent 2B1.1 loss provisions. We are asking you to do what Congress has tried to do which is narrow the gap between the way antitrust offenses and fraud offenses are treated under the law. We ask that you narrow that gap as to how they're treated under the guidelines.

I'm mindful of the fact that we've been running late, so I'm going to stop here and would certainly, after you've had a chance to hear from Mr. McCampbell or whenever you'd like, to welcome any questions that you have.

JUDGE HINOJOSA: Thank you, sir.