



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 10, 1992

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am writing to provide you with the views of the Antitrust Division concerning proposals under consideration by the Sentencing Commission that would significantly increase the likelihood that defendants convicted of antitrust violations will avoid spending any time in prison. This result would be contrary to the intent of the Sentencing Commission, as set forth in Application Note 5 and the Background to §2R1.1, that antitrust offenders receive short but certain prison sentences and that alternatives to incarceration such as community confinement not be used to avoid imprisonment of antitrust offenders. The proposals to which I refer would expand Zone A offenses in Criminal History Category I from offense level 6 to offense level 8 and expand Zone B offenses in Criminal History Category I from offense level 10 to offense level 11. The substantial adverse impact of these proposals would be even greater should the downward adjustment under §3E1.1 for acceptance of responsibility be increased from two offense levels to three offense levels.

As you know, the Department of Justice has for many years been advocating the deterrence value of short but certain prison sentences for persons who commit antitrust violations. However, prior to the adoption of the Sentencing Guidelines many judges were not disposed to impose prison sentences for antitrust violations.

The initial antitrust sentencing guideline promulgated by the Sentencing Commission sent a mixed signal on the issue of imprisonment for antitrust offenders. As noted above, the Commission stated its strong support for the concept that short but certain prison sentences coupled with substantial fines were the proper punishment for antitrust violations. At the same time, offense levels for antitrust violations were set at levels where alternatives to incarceration, as provided in §5C1.1, would very often be available.

Once the initial Sentencing Guidelines were issued, the Department used the strong statements of support in the antitrust guideline to press for prison sentences for antitrust offenders. Most Antitrust Division prosecutions are resolved through plea agreements, and defendants were generally willing to enter into pleas that called for actual incarceration. Then, on June 25, 1990, the Eleventh Circuit issued its decision in United States v. Pippin, 903 F.2d 1478. This case holds that the statements made by the Sentencing Commission in support of incarceration for antitrust offenders in the Background and Application Notes to §2R1.1 do not limit the discretion of judges to impose alternative sentences on antitrust offenders whose offense levels would otherwise make them eligible for an alternative sentence under §5C1.1.

Of the approximately 68 individuals sentenced for antitrust violations since Pippin, 31 have received a sentence of incarceration, 24 have been sentenced to some form of alternative punishment such as home detention or community confinement in lieu of prison, 3 have received a fine plus community service, 3 have received a fine only, 5 have been sentenced to perform community service only, and 2 have received no punishment of any kind. Of the approximately 40 of these cases that involved sentences under the Sentencing Guidelines, 23 defendants received prison sentences while 17 received an alternative sentence or fine only. In other words, fewer than half of the antitrust defendants sentenced after Pippin have received prison sentences, and fewer than 60 percent of those sentenced under the Guidelines have been sent to prison. Clearly, many judges still remain reluctant to sentence antitrust defendants to prison unless required to do so.

The Department reacted to this continuing use of alternative sentences for antitrust offenders by recommending that the Sentencing Commission raise offense levels for antitrust violations. In its November, 1991 revisions to the Sentencing Guidelines, the Commission did increase offense levels for antitrust violations, both to make them more commensurate with other types of white-collar offenses and to decrease the availability of alternative sentences.

The changes now being considered by the Sentencing Commission to raise the offense levels that fall within Zone A and B and possibly to increase the downward adjustment for acceptance of responsibility are contrary to the changes to §2R1.1 adopted by the Commission last year and will, particularly in the short run, have a significant deleterious impact on antitrust sentencing.

First, they will encourage judges who favor alternatives to incarceration for antitrust offenders. In light of Pippin and the apparent continuing inclination of many judges to avoid sending antitrust offenders to prison despite the Commission's express statements to the contrary in §2R1.1, any action that expands the authority of judges to impose alternative sentences on antitrust offenders could well be perceived as an endorsement of this practice.

Second, the changes made to the antitrust guideline last year may raise offense levels only for antitrust offenses committed or continuing on or after November 1, 1991. See United States v. Michelle Bell, Crim. No. 91-2016 (N.D. Iowa, March 30, 1992). Under this assumption, and given the difficulty of detecting antitrust violations, most antitrust prosecutions over the next few years will not be subject to the new, November, 1991 antitrust guideline. Indeed, at least some cases are likely to be brought under the pre-November, 1991 version of §2R1.1 right up to the expiration of the 5-year statute of limitations period on November 1, 1996. However, unless the Sentencing Commission expressly directs otherwise, any changes designed to increase the availability of alternatives to incarceration and increase the downward adjustment for acceptance of responsibility will likely apply to all sentences imposed after November, 1992. Thus, for as long as 4 years defendants could be sentenced under the pre-November, 1991 antitrust guideline and the post-November, 1992 guidelines concerning alternatives to incarceration and acceptance of responsibility.

The implications of this possibility are startling. Since the adoption of the Sentencing Guidelines, 13 out of 47 individuals that have been sentenced under the Guidelines for antitrust offenses have received offense levels of 10 or less before adjustment for acceptance of responsibility. Assuming an increase in Zone A to offense level 8, not only would none of these 13 defendants--almost 28 percent of the total number of antitrust defendants sentenced under the Guidelines--have been required to spend a day in jail, none of them would even have been required to spend a day in a half-way house or home detention. Thirty-one out of the 47 individuals that have been sentenced under the Guidelines for antitrust offenses have received offense levels of 11 or lower before adjustment for acceptance of responsibility. Assuming a 3-level downward adjustment for acceptance of responsibility and an increase in Zone A to offense level 8, almost two-thirds of the total number of antitrust defendants sentenced under the Guidelines would have been eligible for straight probation.

The highest offense level ordinarily applicable to an antitrust defendant under the pre-November, 1991 guideline is a

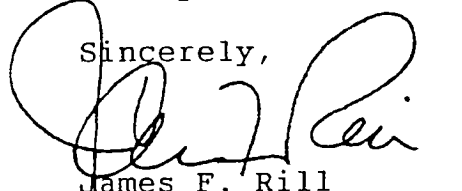
13, which applies to a bid-rigger whose violation affects more than \$50 million in commerce. Today, such a defendant faces a minimum of 12 months imprisonment. If he receives a 2-level downward adjustment for acceptance of responsibility, this defendant, according to §5C1.1(d), must still serve at least 4 months in prison under a Zone C split sentence at offense level 11.

Under the proposal being considered by the Sentencing Commission to expand Zone B to offense level 11, this same defendant, by accepting responsibility for the offense, would be eligible for an 8 month alternative sentence of home detention or community confinement in lieu of prison. In other words, no antitrust defendant that accepts responsibility for an offense would ever necessarily be required to spend a day in prison. A 3-level downward adjustment for acceptance of responsibility would result in an offense level of 10, which could result in an even lower Zone B sentence of 6 months alternative confinement.

This would be a giant step backward for antitrust enforcement. More than 4 years after adoption of the Sentencing Guidelines many judges still do not believe that antitrust violations merit jail sentences. These proposed changes would severely undercut, for years to come, the ability of the Department to incarcerate antitrust offenders. Thus, should the Sentencing Commission adopt proposals to expand Zone A and B sentences and/or to increase the adjustment for acceptance of responsibility, I urge the Commission in the strongest terms to explicitly limit the application of such amendments to antitrust offenders sentenced under the November 1, 1991 antitrust guideline.

Even in the long run, these proposed changes will reduce the impact of the November, 1991 antitrust guideline changes and make incarceration of antitrust offenders more difficult. The historic reluctance of judges to incarcerate antitrust offenders can only be strengthened by providing greater opportunities to impose alternative sentences in lieu of prison.

Sincerely,

A handwritten signature in black ink, appearing to read "J. F. Rill", with a large, stylized loop at the end.

James F. Rill
Assistant Attorney General