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The American
Antitrust Institute

Oct. 20, 2003

The Honorable Mike DeWine, Chairman
Judiciary Committee, Subcommittee on Antitrust
United State Senate
Washington, DC 20510

The Honorable Herbert H. Kohl, Ranking Member
Judiciary Committee, Subcommittee on Antitrust
United State Senate
Washington, DC 20510

The Honorable F. James Sensenbrenner, Jr., Chairman
Judiciary Committee
United States House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr., Ranking Member
Judiciary Committee
United States House of Representatives
Washington, DC 20515

Re: Antitrust Enforcement Enhancements And Cooperation Incentives Bill

Dear Senators DeWine and Kohl and Congressmen Sensenbrenner and Conyers:

The American Antitrust Institute[1] ("AAI") respectfully writes this letter to provide you with our comments on the proposed Antitrust Enforcement Enhancements And Cooperation Incentives Bill ("Bill"). While the AAI supports the Bill's objectives and many of its specific provisions, we are not convinced that partially detrebling damages will enhance the Antitrust Division's leniency program, and we see some possible dangers in the proposed approach.

The twin purposes of this Bill are to increase the criminal penalties for antitrust violations, and also to increase the effectiveness of the leniency program administered by the U.S. Department of Justice's Antitrust Division ("Division") by increasing the number of firms that will notify the Division about illegal behavior and fully cooperate with the prosecution of these crimes. The Bill attempts to enhance the probability that firms will want to enter the leniency program by detrebling the amount that cooperating

[1] The American Antitrust Institute is a non-profit, independent, education, research, and advocacy organization. It is described in detail at www.antitrustinstitute.org.

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firms would have to pay in subsequent civil antitrust suits, and by ending their civil responsibility for the actions of their fellow co-conspirators.

We wholeheartedly endorse Section 3 of the Bill, which would increase the criminal penalties for antitrust violations.

The provisions of the Bill that would detreble civil liability for successful leniency applicants and end their joint and several liability for damages caused by their fellow conspirators[2] are, however, more problematic. We know of no evidence that would support making such a major change in a program that the Department of Justice regularly and rightly touts as successful.[3] These provisions rest upon a speculative prediction that they would result in a significant increase in the amount of illegal behavior that is detected and successfully prosecuted.

Civil antitrust suits are a critical element in the United States' program of maintaining competition in our economy. Historically there have been roughly ten private antitrust enforcement actions for every federal action that is filed. Consequently, Congress should be extremely careful about any changes in the law that may undermine private parties' decisions to initiate private enforcement efforts against cartels. We believe, however, that these provisions could lead to a period of uncertainty until the Courts determine the precise meanings of some provisions in the Bill, and that this uncertainty and the accompanying delays could undermine civil antitrust enforcement.

For example, the Bill's Section-By-Section analysis asserts that the Bill will not affect the liability of corporations who are not accepted into the leniency program. It asserts that the total civil damages paid by the cartel will not decrease because non-accepted corporations will have to pay any damages that, under the terms of the Bill, will no longer be owed by the firms that are accepted into the leniency program.

However, the Bill itself is silent on this crucial issue. Because joint and several liability is a common law rather than statutory creation, we fear that defendants who are not accepted into the leniency program would attempt to devise clever ways to assert in Court that they should not have to pay more in civil damages just because one of their co-conspirators was accepted into the program. Most civil cases that follow criminal cases end up in a settlement; it seems likely that any ambiguity as to exposure in litigation will inevitably lead to delays and to a reduced level of settlement. This Bill should be amended so that it clearly provides that the remaining co-conspirators will have to pay these additional damages. Making this crystal clear will also affect the calculations of

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[2] Currently each member of an antitrust conspiracy is liable for the damages that its co-conspirators cause. This longstanding antitrust doctrine is based upon the common sense notion that every member of a cartel helps to cause all of the damages caused by that cartel.

[3] There is no doubt that the Division's current leniency program has helped uncover many crimes. It currently provides tremendous incentives for individuals and firms who assist the Division in its enforcement efforts, and it is commonly utilized. There is no reason to believe that it needs reform. "If it ain't broke, don't fix it." Where is the evidence that something is "broke"?

conspirators when they enter a conspiracy and will play a role in the evaluation of whether a conspirator should be the first to turn state's evidence.

Second, if the remaining conspirators not in the leniency program are bankrupt this Bill could mean that consumers will not recover their overcharges. The Bill should be amended to prevent this.

Third, the Division's current practice is to permit only one member of each cartel formally to enter into the Division's leniency program. As an informal matter, however, the second firm to cooperate with the Division often receives lenient treatment as well. In fact, it is relatively common for several members of a cartel to receive penalties that have informally been discounted, in return for settling with or cooperating with the Division.

We are concerned that in the future the Division might amend its current policy, and decide to sign leniency agreements with several members of the same cartel**.** However, any further reduction in the number of co-conspirators responsible for paying these damages would be risky. Not only would there be a greater chance that one or more of the remaining co-conspirators would be bankrupt, or so weakened by the damages payout that a court might relieve them of some payment responsibility. We are also concerned about the psychological impact of the remaining co-conspirators' argument that it would be "unfair" for them to be forced to make up the damages of those firms accepted into the leniency program. Despite the language of the statute (which surely would be challenged as ambiguous) a judge or jury might agree that it seemed unfair for the remaining co-conspirators to pay "disproportionately" large damages, especially if the firms accepted into the leniency program were the largest and most culpable members of the cartel. As an informal matter this could result in a lower damages total, such that the policy goal of making victims whole would not be attained.

If the Division in the future were to decide to enter into formal leniency agreements with multiple members of a cartel, this Bill could have the effect of undermining both the deterrence and compensation effectiveness of the current system of civil antitrust remedies. To prevent this from occurring, if this legislation goes forward it should be amended to provide that detrebling could only apply to one firm in a conspiracy.

We believe that a better way to increase the efficacy of the leniency program would be to significantly increase corporate and individual criminal antitrust penalties (except for the firms in the leniency program). This would enhance the pressure on corporations and individuals to come forward. For example, we endorse the provisions in Section 3 of this Bill, which would increase the maximum penalties for antitrust violations. Even if the current Bill is defeated, the provisions in Section 3 should be enacted. We also believe that Congress should significantly increase the criminal fines for individuals involved in corporate antitrust violations. Moreover, Congress should

also strengthen the available civil remedies. For example, prejudgment interest should be awarded in civil antitrust suits.[4]

We also believe that this Bill's novel proposal to detreble some civil antitrust damages and eliminate joint and several liability for a leniency applicant could become precedent that could lead to legislation more generally intended to detreble civil antitrust damages and/or end joint and several liability in ways that would seriously undermine antitrust law enforcement. The present Bill could inadvertently send a message that trebling is merely arbitrary and therefore might reasonably be lowered in the future. The fact is, because of substantial limitations in the calculation of damages (including the absence of prejudgment interest) and the risk that only a small portion of secret conspiracies will be stopped, virtually all antitrust cases, even after 'trebling,' end up with less than actual single damages being paid.[5]

We truly appreciate your willingness to take our views into account. If there is any additional information that we could provide to you, in writing or verbally, we would be delighted to do so.

Sincerely yours,

Robert H. Lande
Senior Research Scholar

Albert A. Foer
President

[4] Prejudgment interest is not currently awarded in antitrust suits. Since antitrust suits typically take years to resolve, this means that antitrust's "treble" damages effectively are significantly less than threefold. Yet, antitrust damage awards should be high to help deter antitrust violations.

[5] See Robert H. Lande, Are Antitrust Treble Damages Really Single Damages? 54 Ohio State Law Journal 115 (1993).