

## IX. PLEA AGREEMENTS

### A. Rule 11

#### 1. General authority

At any time during an investigation, particularly after a putative defendant has been advised of his status or after a defendant has been indicted, his attorney may want to discuss a plea agreement. The burden of initiating such discussions usually rests on the defendant and his counsel, but Division attorneys may appropriately advise defense counsel that they are willing to engage in plea negotiations, because it is the policy of the Division that, absent unusual circumstances, criminal cases may be disposed of pursuant to plea agreements.

The disposition by plea agreement of criminal antitrust charges, like all other federal criminal charges, is authorized and governed by Rule 11(e)(1), Federal Rules of Criminal Procedure,<sup>1</sup> which provides that:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a

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<sup>1</sup>Rule 11(a)(2) provides for conditional pleas, which are fully described later in this chapter.

charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

Although the rule contemplates the possibility of a defendant conducting negotiations pro se, that eventuality is extremely unlikely in an antitrust context, and it is the practice of most prosecuting attorneys to enter into plea discussions only with counsel for a defendant. Also, the rule contemplates agreements by defendants to plead nolo contendere, but it is the policy of the Division that, except in highly unusual circumstances, nolo pleas will not be negotiated.

Under Rule 11(e)(1), a charge may be reduced to a lesser or related offense. There is no lesser-included offense in the Sherman Act,<sup>2</sup> so there is no possibility of reducing a charge, but there may be circumstances where it is appropriate for a defendant to plead guilty to a charge other than the one for which he has been indicted. Assuming a sufficient factual basis, a plea agreement could appropriately provide for the filing of a new charge, usually in an information, and the dismissal of the pending charge.

## 2. Types of plea agreements

### a. 11(e)(1)(A) agreements

The attorney for the Government may promise to move for dismissal of other charges. This situation would arise only when a defendant had been indicted on more than one count or named in more than one indictment, and the Government decides that a guilty plea on fewer than all of the pending charges is sufficient, or in a substitution of charges as mentioned above. In prosecutor's shorthand, this is known as an "A" type agreement, because it is authorized by Rule 11(e)(1)(A). In antitrust cases, "A" type agreements virtually always have substantive provisions that are similar to those found in "B" or "C" type agreements, as described below.

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<sup>2</sup>Arguably, § 14 of the Clayton Act (15 U.S.C. § 24) provides a lesser-included offense. However, the Division has never permitted a defendant to plead under this provision.

b. 11(e)(1)(B) agreements

The attorney for the Government may agree to recommend, or agree not to oppose the defendant's request for a particular sentence. Such an agreement is known as a "B" type, and is probably the most frequently used. In its purest form, the attorney for the Government will agree to recommend a particular sentence of incarceration or fine, or both, and defense counsel is free to oppose the recommendation and argue for a lesser sentence. The agreement could also provide for a non-specific recommendation of incarceration or fine. Further, the plea agreement may include a provision that the defendant will not oppose or argue against the Government's recommendation.<sup>3</sup> Thus, in effect, the plea agreement becomes a joint sentencing recommendation, binding upon the Government and the defendant, but not upon the court. Indeed, Rule 11(e)(2) provides that in a "B" type of plea agreement, the court shall advise the defendant that if the recommended sentence is not imposed, the defendant nevertheless has no right to withdraw his guilty plea. In other words, in a "B" type plea agreement, the defendant is bound to whatever sentence the court imposes, regardless of the Government's recommendation. Many courts are reluctant to give up their sentencing discretion and will accept "B" type agreements, but not "C" types.

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<sup>3</sup>It should be noted, however, that a defendant may not be precluded from furnishing background and character information to the court. See 18 U.S.C. § 3577. Also, some courts that do not accept "C" agreements view agreed-upon sentencing recommendations as, in effect, "C" agreements.

c. 11(e)(1)(C) agreements

The attorney for the Government and the attorney for the defendant may agree that a particular specific sentence is the appropriate disposition of the case. After presentation of this type of agreement, known as a "C" type or binding agreement, to the court, the court may either accept or reject it, or defer the decision to accept or reject until after it has had an opportunity to consider the presentence investigation report of the probation office. If the court decides to accept a "C" type agreement (or a combined "A" and "C" type), it shall inform the defendant on the record that the sentence to be imposed will be as provided in the agreement. However, if the court decides to reject a "C" type agreement, it must advise the parties of that fact on the record and, further, must advise the defendant that the court is not bound by the agreement, that the defendant may withdraw his plea of guilty, and that if he does not withdraw his plea, the disposition of the case may be less favorable to him than the sentence provided in the plea agreement.

A "C" type agreement has the advantage for the Government and the defendant of eliminating uncertainty from the sentencing process. However, as suggested above, "C" type agreements have the disadvantage that a great many courts will not accept them because it removes the court's sentencing discretion. In response to this problem, the practice of entering into a joint sentencing recommendation "B" type (or even a straight "B" type) agreement with the defendant has evolved. Such a procedure may save the negotiations and has, by and large,

been successful. Another alternative, that has also been successful is to include a provision in a "C" agreement that automatically converts the agreement into an agreed-upon "B" agreement should the court reject the "C" agreement.

### 3. Factors to consider before entering into plea agreements

The decision as to what type of plea agreement to negotiate with a defendant is obviously dependent on many variables, and it is impossible to state generally that any one type is preferable. It is, however, incumbent upon Government counsel to consider, among other things: whether the court is likely to accept or reject a "C" type agreement; whether a plea on one or more charges will result in an appropriate sentence; and whether the contemplated agreement is consistent with the practice of the local U.S. Attorney's Office.<sup>4</sup> Knowledge of these and other facts must be incorporated into the decision as to what kind of agreement to negotiate with a defendant and to recommend to the Assistant Attorney General.

The Department of Justice, in the Principles of Federal Prosecution, has provided the following check list of factors attorneys for the Government should consider before entering into plea agreements:

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<sup>4</sup>The Division has successfully used "C" agreements in some jurisdictions where the U.S. Attorney does not use or the courts do not generally accept "C" agreements. The U.S. Attorney, however, must be consulted before taking such an action.

- (a) the defendant's willingness to cooperate in the investigation or prosecution of others;
- (b) the defendant's history with respect to criminal activity;
- (c) the nature and seriousness of the offense or offenses charged;
- (d) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;<sup>5</sup>
- (e) the desirability of prompt and certain disposition of the case;
- (f) the likelihood of obtaining a conviction at trial;

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<sup>5</sup>The Division does not enter plea agreements with individual defendants who will not admit their guilt in open court during the plea and sentencing procedure. (Such pleas, called "Alford" pleas after North Carolina v. Alford, 400 U.S. 25 (1970), are discussed later in this chapter.) However, corporate defendants may be liable for the criminal acts of employees who have since died or are not subject to the corporation's control and, therefore, a corporate defendant may be unable to make an independent assessment of its own guilt, such as would support an admission. In those limited circumstances, the corporate defendant's agreement to accept as true the Government's version of the offense is enough.

- (g) the probable effect on witnesses;<sup>6</sup>
- (h) the probable sentence or other consequences if the defendant is convicted;
- (i) the public interest in having the case tried rather than disposed of by a guilty plea;
- (j) the expense of trial and appeal; and
- (k) the need to avoid delay in the disposition of other pending cases.<sup>7</sup>

Attorneys for the Government should also be aware of the additional plea bargaining requirements imposed by the Sentencing Reform Act of 1984 ("SRA"), Title II of Pub. L. No. 98-473, which applies to all criminal offenses committed or continuing on or after November 1, 1987. Sentences -- including sentences arrived at through plea agreements -- for crimes subject

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<sup>6</sup>The possibility of physical retaliation against a witness in an antitrust case is usually remote, but the danger of economic retaliation of one form or another is very real.

<sup>7</sup>In an ongoing antitrust grand jury investigation, this standard, or a variant of it, may be the most important factor to consider in favor of a plea agreement, because a plea may lead to the speedy resolution of other cases, including the filing of some which might never be made if the case is tried, particularly if the defendant should be acquitted, or if the statute of limitations runs out on other possible cases in the meantime.

to the SRA must be imposed pursuant to the Sentencing Guidelines promulgated by the United States Sentencing Commission.

In accordance with 28 U.S.C. § 994(a)(2)(E), the Commission has issued policy statements applicable to plea agreements as Part 6B of the Sentencing Guidelines. Guideline § 6B1.2 provides that courts may accept "A" type agreements if they determine, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the plea will not undermine the statutory purposes of sentencing, and that courts may accept "B" and "C" type agreements if the sentences are within the applicable Guideline range or depart from the Guidelines for justifiable reasons.

In a March 13, 1989 memorandum, Attorney General Thornburgh (hereafter, "the Thornburgh Memorandum") set forth the Department's policy on plea bargaining under the Sentencing Guidelines. The policy discussed in this memorandum should be followed in all plea bargaining under the Guidelines. In essence, the policy requires that plea bargaining result in convictions that are consistent with the goals of the Guidelines -- *i.e.*, that are uniform for defendants guilty of similar crimes and that reflect the seriousness of the crime(s) committed. A detailed exposition of how attorneys for the Government should conduct the plea bargaining process for crimes covered by the SRA can be found in the Department of Justice's Prosecutors Handbook on Sentencing Guidelines, 41-50 (1987).

Although the foregoing list of standards is intended primarily as a guide to assist prosecutors in deciding whether to enter into a plea agreement in a particular case, many of them

are also factors that can impact substantively on the bargaining positions of the Government and the defendant in their plea negotiations. In other words, in considering these factors, the prosecutor should concurrently be evaluating not only whether to enter into a plea agreement, but what the terms of that agreement should be.

#### B. Plea Agreement Negotiations

Negotiations leading to a plea agreement are conducted in a similar fashion regardless of the type of agreement that is under consideration. The Division approves the commencement of such negotiations both before and after indictment. In either situation, it is absolutely crucial that the staff make clear to defense counsel that the result of their negotiations will be only a recommendation and that no agreement exists until it has been approved by the Assistant Attorney General.

Methods of negotiating are extremely subjective, and it is not possible to do more than make general observations about them. Similarly, procedures for negotiations require much flexibility if they are to be productive. The discussion that follows offers examples of procedures for and methods of negotiating plea agreements rather than hard-and-fast rules.

Generally, before plea negotiations begin, the staff and the chief discuss the desirability and feasibility of such negotiations. During those discussions, the parameters of the agreements that would be appropriate are usually decided, including the provisions that should

be considered non-negotiable, as well as provisions that would be negotiable. Operations may be consulted at this time. Ranges of jail time and/or fines<sup>8</sup> within which the negotiations should be centered, depending on whether a "B" or a "C" agreement is likely to result, are normally decided. The staff then may provide defense counsel with either a proposed draft agreement (with the amount of jail time and/or fine left blank) or a copy of a similar plea agreement already entered, for the purpose of further discussion. From then on, negotiations with defense counsel are generally conducted by lead counsel and staff. On occasion, the chief will participate directly if that appears likely to further the negotiations. The chief is kept informed of the progress of the negotiations, and his advice often is sought concerning questions that may arise and, of course, the final disposition of the matter that would be appropriate to recommend to the Assistant Attorney General.

The topics of negotiation are those enumerated above as factors to consider and the provisions that will ultimately be included in the plea agreement, which are fully described later in this chapter. In addition, the relationship of third parties to plea negotiations is an issue that sometimes arises because some putative defendants may be motivated to engage in plea agreement discussions by demands or promises of prospective civil plaintiffs. "Outsiders" are never participants in the plea negotiations as such negotiations are only conducted between the Government and the prospective defendant.

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<sup>8</sup>In assessing the appropriate level of fine for a defendant, staff attorneys should consult with the Corporate Finance Unit of EAG.

All plea discussions are privileged communications, and their subsequent use as evidence is strictly governed by Rule 11(e)(6), which provides that:

Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (a) a plea of guilty which was later withdrawn;
- (b) a plea of nolo contendere;
- (c) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in

a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

A substantially identical provision is included in Rule 410, Federal Rules of Evidence.

### C. Plea Agreement Interviews

The privilege protection of Rule 11(e)(6) applies not only to statements made by defense counsel, but to statements made by the defendant (or putative defendant) in the course of plea negotiations.<sup>9</sup> This provision is significant because whenever a plea agreement requires the defendant's cooperation, an interview with the defendant is usually necessary before the plea agreement becomes final. It is good practice for the staff to require the defendant and his attorney to sign a statement acknowledging the ground rules for such an interview.<sup>10</sup> The statement should recite that the proposed plea agreement is contingent upon the staff's belief that the defendant is truthful and candid in the interview. The statement also should contain a provision that the defendant's statements are protected as provided in Rule 11(e)(6), but that the Government reserves the right to use leads, or otherwise make indirect use of any information

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<sup>9</sup>Some courts have held that the Rule applies only to statements made during formal plea discussions. See Rachlin v. United States, 723 F.2d 1373, 1377 (8th Cir. 1983); United States v. Ceballos, 706 F.2d 1198 (11th Cir. 1983).

<sup>10</sup>See Appendix IX-1 for an exemplar.

developed during the interview, against the defendant, if no plea agreement is reached, and against others in any event. Failure to include such a reservation of rights might lead a court to grant equitable or de facto use immunity treatment to the defendant's statements -- a result definitely to be avoided. The statement should also include a provision reserving the right to use the results of the interview against the defendant to prosecute him for perjury.

The scope of the exclusionary provision of Rule 11(e)(6) and Fed. R. Evid. 410, as applied by the courts, is broader than may at first appear. Obviously, statements made by a defendant or his attorney in the course of unsuccessful plea discussions cannot be used as direct evidence against the defendant at trial. The law as to whether such statements may be used for impeachment is unclear.<sup>11</sup> It may be wise to include a provision that reserves the right of the Government to use such statements for impeachment in the plea interview agreements.

#### D. How and What to Charge

##### 1. Selection of charge or charges

One of the most important provisions in a plea agreement is the charge or charges to which the defendant agrees to plead guilty. In a grand jury investigation involving multiple

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<sup>11</sup>The Second Circuit, the only circuit to address this issue, held that such statements may not be used for impeachment. United States v. Lawson, 683 F.2d 688 (2d Cir. 1982).

offenses, such as bid-rigging or price fixing, there may or may not be evidence available to support more than one charge. In addition, the criminal conduct that violates the Sherman Act may be connected with offenses under other federal statutes, the most common being mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), false statements and entries (18 U.S.C. § 1001), and false claims (18 U.S.C. §§ 286, 287). In the latter situation, the prosecutor must consider the charge or charges to which the defendant must agree to plead. In some circumstances, the selection of charge may be a proper subject for negotiation with defense counsel.

The Principles of Federal Prosecution sets forth the standards that a selected charge must satisfy:

If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

- (a) that bears a reasonable relationship to the nature and extent of his criminal conduct;
- (b) that has an adequate factual basis;

- (c) that makes likely the imposition of an appropriate sentence under all the circumstances of the case; and
- (d) that does not adversely affect the investigation or prosecution of others.

The commentary, set forth below, explaining this principle is as applicable to antitrust crimes as to any other.

(a) Relationship to criminal conduct - The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his criminal conduct is not inflexible. There may be situations involving cooperating defendants in which [special] considerations . . . take precedence. Such situations should be approached cautiously, however. Unless the Government has strong corroboration for the cooperating defendant's testimony, his credibility may be subject to successful impeachment if he is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

(b) Factual basis - The attorney for the Government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11(f), Fed. R. Crim. P., a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea . . . (reference to nolo pleas deleted).

(c) Basis for sentencing - In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the Government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the Government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject (reference to restitution deleted).<sup>12</sup>

(d) Effect on other cases - In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution

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<sup>12</sup>Restitution will not normally be sought in antitrust cases. See ATD Manual IV-108 et seq., for a complete discussion of the Victim and Witness Protection Act.

of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

For crimes occurring or continuing on or after November 1, 1987, in addition to the Principles of Federal Prosecution, attorneys should also take into account Part 6B of the Sentencing Guidelines and the Prosecutors Handbook on Sentencing Guidelines in selecting charges for plea agreements.

Section 6B1.2(a) of the Sentencing Guidelines deals with plea agreements that involve dismissals of counts or agreements not to pursue potential charges. It provides that such agreements may be accepted if the court determines, on the record, that the remaining charges "adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." While the Department believes that prosecutors have greater flexibility in charge bargaining than in sentence bargaining, it takes this policy statement seriously, and believes that it translates into a

requirement that readily provable serious charges should not be bargained away: "The sole legitimate ground for agreeing not to pursue a charge that is relevant under the guidelines to assure that the sentence will reflect the seriousness of the defendant's 'offense behavior' is the existence of real doubt as to the ultimate provability of the charge."<sup>13</sup>

Ultimate provability considerations aside, it is important to recognize that, because of the way the Guidelines operate in practice, some relatively serious charges could be dismissed or never brought without unduly undercutting the assurance that the sentence will reflect the seriousness of the defendant's conduct. For example, a mail fraud count that might be brought in connection with an antitrust charge of bid-rigging likely would be grouped with the antitrust count under the grouping rules in § 3D1.2 such that the defendant's offense level would be determined by the highest level in the group. If the antitrust count carried the higher offense level, or if there were no significant difference between the two offense levels, dropping the mail fraud count would not appear to undermine the purposes of sentencing, as those purposes find expression in the Guidelines. Moreover, even if the offense level for the mail fraud count were somewhat higher than the level for the remaining antitrust count, the overlapping nature of the imprisonment ranges in the Sentencing Table could moot or at least mute any objection to a marginal decrease in the offense level that resulted from such charge bargaining.

There is, of course, also the question of provability. The Prosecutors Handbook notes that the prosecutor is in the best position to assess the strength of the Government's case, and

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<sup>13</sup>Prosecutors Handbook at 46-47; see also Thornburgh Memorandum at 3-4.

enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence.<sup>14</sup> This discretion may be significant when plea bargaining occurs early in a grand jury investigation when relatively less proof of one or more possible charges may be available. However, prosecutors are warned against instructing investigators not to pursue leads, or making less than ordinary efforts to ascertain facts, simply to be in a position to say that they are unable to prove a sentencing fact.<sup>15</sup>

Notwithstanding the general prohibition against prosecutors bargaining away readily provable charges whenever doing so would affect, to any significant degree, the resulting guideline sentence, defendants may still gain significant benefits by entering into a plea agreement with the Government. First, a defendant who pleads guilty will in most instances receive a two-level downward adjustment to his or her offense level (USSG § 3E1.1) or, if an organization, a one-point decrease in its culpability score (USSG § 8C2.5(g)(3)). Second, when a defendant agrees to cooperate with the Government by providing information concerning unlawful activities of others, the Government may agree that self-incriminating information provided pursuant to the cooperation agreement that was not previously known to the Government shall not be used in determining the defendant's guideline range (USSG § 1B1.8). Furthermore, where the defendant has provided substantial assistance in the investigation or prosecution of another person, the Government may move for a departure from the Guidelines

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<sup>14</sup>Prosecutors Handbook at 47.

<sup>15</sup>Id. at 49.

under USSG § 5K1.1. Finally, even when the defendant is unable to provide the Government with substantial assistance in the investigation or prosecution of others, the Government may recommend, when appropriate, that a defendant entering into a plea agreement receive a sentence at or near the bottom of the applicable guideline range or receive an alternative sentence in lieu of imprisonment in whole or part.

The practices of the Division in implementing these principles require little additional comment. Except in perjury or false-declarations cases, the defendant usually must plead guilty to one or more Sherman Act counts, either alone or in conjunction with other charges. The selected charge or charges should be typical of the defendant's anti-competitive conduct (was the defendant a leader or a follower) and should usually be among the most serious (if there is a choice) in terms of egregiousness or impact, that the defendant committed and for which there is an adequate factual basis. Another factor that should be considered is how the selection of a charge will affect other cases yet to be prosecuted and whether a guilty plea is likely to lead to additional guilty pleas. In the most common situation, there will probably be enough evidence available to support only one, or at best a few charges, so the selection process will not be as complicated as this discussion may suggest. However, when the luxury of choice is present, the application of these principles will result in the proper exercise of that choice.

## 2. Indictment or information

Both the Principles of Federal Prosecution and the practices of the Division authorize plea agreement negotiations prior to the time that a putative defendant is indicted as well as after. If a plea agreement is reached before indictment, the initiation of the prosecution can be by the filing of a criminal information, with a waiver of indictment by the defendant.<sup>16</sup> The use of an information usually has certain advantages over an indictment for the Government and is desirable to the defendant as well.

An information is of benefit to the Government because its use obviates the resource commitment in time, expense and effort necessary to present an indictment to the grand jury. Depending upon the totality of circumstances, the presentation of an indictment to a grand jury can be an expensive and time-consuming task, particularly when the grand jury must be called to sit merely to consider the indictment. Also, the staff must spend time and effort preparing its presentation, including a summing-up of the relevant evidence and the presentation of relevant documents, as well as arranging to have all the documents and transcripts available for the grand jurors' consideration. Although such work is not particularly onerous, it is time-consuming, and the ability to avoid it is usually a benefit.<sup>17</sup> However, there may be other strategic considerations

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<sup>16</sup>See § E.2., infra.

<sup>17</sup>Some prosecutors believe that a grand jury that has been conducting an investigation is entitled to see the fulfillment of its labors in the form of an indictment presented to it.

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in specific factual settings that would lead a prosecutor to prefer an indictment over an information.

If pre-indictment plea discussions do not appear to be making progress, particularly if the defendant or his counsel is apparently dragging his feet or otherwise not negotiating in good faith, the staff should proceed with an indictment. On occasion, this will force the issue and put an end to delaying tactics and result in a post-indictment plea agreement.

There is no doubt that most defendants prefer to plead guilty to an information rather than to an indictment. There is no legal difference, so the reason for that preference may be largely emotional, i.e., an indictment simply sounds more serious than an information.

#### E. Provisions To Include In Plea Agreements

##### 1. Introduction

Once the staff and defense counsel have tentatively agreed upon the type of plea agreement ("B", "C", etc.), the length of incarceration or amount of fine that will be recommended by the Government or presented to the court as the agreed-upon disposition, the

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<sup>17</sup>(...continued)

Depending upon the personality of the particular grand jury, an explanation that an information is legally the same as an indictment, and that the information is as much the result of their efforts as an indictment will minimize any bad reaction.

geographic and industry scope of any defendant's cooperation provision and any non-prosecution provision, it falls upon the staff to draft the appropriate agreement. It is important to keep in mind that what is being drafted is a document intended to reflect the agreement tentatively reached, and that will vary with the circumstances of the investigation and the violation alleged. Therefore, the following discussion and hypothetical examples are offered only as helpful guides or starting points, based upon previous experience, and should not be viewed as inflexible boilerplate. The staff should draft a document that reflects the agreement tentatively reached with defense counsel and present that agreement to Operations, with appropriate explanation and support, for review and approval.

The agreement may be styled similar to a pleading in a criminal case against the defendant, because it will eventually be filed in the case. However, if the staff prefers, the agreement can take the form of an uncaptioned document or a letter to defense counsel subsequently adopted by the defendant, his counsel and counsel for the United States.

The introductory paragraph should be the same for all types of agreements. It simply recites that the United States and the defendant enter into the agreement, identifies the appropriate Rule(s) of Federal Criminal Procedure pursuant to which the agreement is entered and identifies the investigation out of which the agreement arises. For example:

The UNITED STATES OF AMERICA and the defendant, \_\_\_\_\_, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

2. Pre-indictment plea agreements

a. The sentencing provisions<sup>18</sup>

1) "C" agreements. The first paragraph(s) of a pre-indictment plea agreement ordinarily recites the defendant's agreement to waive indictment<sup>19</sup> and plead guilty to

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<sup>18</sup>What follows is a discussion of, and examples based on plea agreements entered in cases brought by the Division during the 1980's. These are samples only and should be modified as needed to satisfy particular factual situations. In addition, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596), which contains new fines and fine collection procedures and became effective on January 1, 1985, applies to offenses committed on or after that date through October 31, 1987. The Comprehensive Crime Control Act of 1984 (P.L. 98-473), contains the Sentencing Reform Act of 1984, which materially changes the sentencing procedures with respect to all federal crimes, and which applies to offenses committed on or after November 1, 1987. The Sentencing Reform Act was itself amended shortly after its effective date by the Sentencing Act of 1987, Pub. L. No. 100-182 and the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185. The provisions of those Acts materially affect the sentencing process in the federal courts, and necessitated revisions of, and additions to, the sentencing provisions in our plea agreements, particularly with respect to the maximum sentence possible, the timing of the payment of any fines imposed, the amount of interest on any unpaid balance and the collection process in general. These Acts and any further revisions of them should be carefully reviewed before drafting any plea agreement.

<sup>19</sup>The staff should be aware that if a court rejects a plea agreement, it might permit the  
(continued...)



derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States and the defendant agree that the appropriate disposition of the charge in this case is the imposition of a fine, payable to the United States, in the amount of \$\_\_\_\_\_, to be paid in \_\_\_\_\_ installments. The first installment of \_\_\_\_\_ shall be due and payable within 90 days of the date of sentencing in this case. The remaining \_\_\_\_\_ payments of \_\_\_\_\_ each shall be due and payable annually thereafter, together with accrued interest at the rate of \_\_\_\_ on the unpaid balance. In the event the court rejects the aforesaid agreed-upon disposition, this entire agreement shall be rendered null and void.

It should be noted that the language quoted above provides for the payment of the fine over a period of time. If the fine is substantial or the defendant has particular hardships, we may agree to its payment in installments. However, in such a situation, the defendant must pay interest on the unpaid balance unless the court or the Attorney General waives it.<sup>21</sup> Normally, such interest is not waived. The provision calling for payment in installments and payment of interest should be included as part of the "appropriate disposition" language in a "C" agreement so that if the court accepts the plea agreement, those terms become a part of the court's sentence. The staff should check the court's Judgment and Probation/Commitment Order to be sure that it reflects the payment of interest as provided in the plea agreement.

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<sup>21</sup>See 18 U.S.C. § 3612(f)(h).

Paragraph 1 of a typical "C" plea agreement with an individual is set out below. Note that we ordinarily agree not to oppose the defendant's reasonable requests regarding the details of the service of his prison sentence. We do, however, insist that the sentence be one of actual imprisonment and not a community-service or work-release program.

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine in an amount equal to the largest of: (a) \$250,000; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime. The United States and the defendant agree that the appropriate disposition of the charge in this case is the imposition of a sentence of \_\_\_\_\_ days actual imprisonment, with no work release and a fine of \_\_\_\_\_. The United States agrees that it will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the

date on which he must report to begin service of his sentence. In the event the court rejects the aforesaid agreed-upon disposition, this entire agreement shall be rendered null and void, the defendant will be free to withdraw his plea of guilty (Rule 11(e)(4)), and the guilty plea, if withdrawn, shall not be admissible against the defendant in any criminal or civil proceeding (Rule 11(e)(6)).

2) Rejected "C" agreements. Obviously, if the court rejects a "C" agreement and refuses to impose the agreed-upon sentence, the entire agreement is void. In most cases, the defendant, nevertheless, will want to dispose of his or its criminal liability despite the court's refusal to accept the "C" agreement. Likewise, the Division will want to dispose of the case against the defendant and obtain his cooperation in continuing the investigation. This can be accomplished in several ways.

The staff can negotiate a "B" agreement in which the agreed-upon disposition becomes the sentencing recommendation. However, some judges also are opposed to the Government recommending a specific length of incarceration for an individual. If the staff is aware that a judge is unlikely to accept such a recommendation, it should consider obtaining authority to enter into a straight "B" agreement which recommends only that the individual be incarcerated without specifying the length of incarceration.

In some cases in which the court has rejected a "C" agreement and a "B" agreement had not been drafted, the defendant has simply persisted in his plea of guilty and been sentenced without an agreement with the Government. In those cases, we later (after sentencing) could compel the defendant's testimony pursuant to 18 U.S.C. § 6001. Also, under appropriate circumstances, we could tell the defendant that we would be willing to enter into a non-prosecution agreement with him in exchange for his cooperation. An example of such a post-sentencing non-prosecution and cooperation agreement follows:

AGREEMENT BETWEEN THE UNITED STATES

AND \_\_\_\_\_

WHEREAS, on \_\_\_\_\_, the United States and (the defendant) entered into a plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, which called for, among other things, the defendant's cooperation with the United States' investigation into bid-rigging on (type of) projects in (geographic location) and a commitment by the United States not to bring further criminal charges against the defendant under the federal antitrust laws (15 U.S.C. § 1 et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of that plea agreement arising out of any conspiracy, combination or scheme to

submit collusive, fraudulent or non-competitive bids in connection with any (type of) project bid or let in (geographic location); and

WHEREAS, on \_\_\_\_\_, United States District Court Judge \_\_\_\_\_ rejected the plea agreement pursuant to Federal Rules of Criminal Procedure, Rule 11(e)(4); and

WHEREAS, the defendant persisted in his plea of guilty to the charges contained in the Criminal Information filed against him on \_\_\_\_\_ and the court imposed a sentence of \_\_\_\_\_ based upon said guilty plea; and

WHEREAS, the United States desires the cooperation of the defendant in its continuing investigation of bid-rigging on (type of) projects in (geographic location); and

WHEREAS, the defendant desires to obtain a commitment by the United States not to bring further criminal charges against the defendant under the federal antitrust laws (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of that plea agreement arising out of any

conspiracy, combination or scheme to submit collusive, fraudulent or non-competitive bids in connection with any (type of) project bid or let in (geographic location);

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

[Here the staff should insert, with minor obvious alterations, the appropriate cooperation and non-prosecution paragraphs discussed in Section E(1)(b) below, and a paragraph reflecting the defendant's understanding that the agreement does not affect potential administrative actions or civil claims against the defendant which is discussed in Section E(1)(c) below.]

3) Agreed-upon "B" agreements. In some districts, the judges may be opposed to accepting "C" agreements, yet the staff may wish to limit the defendant's ability to argue for a lesser sentence.<sup>22</sup> We have been able to accomplish this by use of a modified or agreed-upon "B" agreement. In such an agreement, the court remains free to impose any sentence it wishes, up to the statutory maximum, but the defendant agrees not to argue for a sentence less than that recommended by the United States. In the case of a company, this may be accomplished by the following three paragraphs:

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<sup>22</sup>But see § A.2.b. n.3., *supra*.

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is the greatest of: a fine of \$1,000,000; twice the gross pecuniary gain derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a fine, payable to the United States, in the amount of \$\_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request that the defendant might make to pay any fine imposed against it in installments over a period of time not to exceed \_\_ years. However, the United States will recommend to the court that it not waive the interest in the amount of \_\_ per month, computed from the date of sentencing, be imposed on any part of the fine that is not paid within 90 days of the date of sentencing.

2. The defendant understands and agrees that the sentence recommended by the United States shall not be binding upon the court, and that, under this agreement, the court retains complete discretion to impose any sentence up to the maximum

provided by 15 U.S.C. § 1. Furthermore, the defendant understands and agrees that, as provided in Rule 11(e)(2) of the Federal Rules of Criminal Procedure, if the court does not impose the sentence recommended by the United States, the defendant nevertheless has no right to withdraw its plea of guilty.

3. The defendant agrees that it will not present evidence or arguments to the court in opposition to the sentencing recommendation made to the court by the United States, although both parties may present facts to the probation office and to the court to assist the court in determining the sentence to be imposed. The defendant agrees that any fine is to be paid to the Treasury of the United States and also agrees not to propose, recommend or advocate that any payment be made, or services rendered, to any person, organization, institution or agency in lieu of a fine or any part thereof.<sup>23</sup>

The sentencing paragraphs of an agreed-upon "B" agreement with an individual may read as follows:

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<sup>23</sup>The language in this sentence is mandatory in agreed-upon "B" and straight "B" agreements with corporations and simply states that the corporate defendant will not suggest that the court order that which, under our view of the law, the court has no authority to order. See United States v. John Scher Presents, Inc., 746 F.2d 959 (3d Cir. 1984); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982).

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine equal to the largest of: (a) \$250,000; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a sentence of \_\_\_ days actual imprisonment, with no work release and a personal fine of \_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the date on which he must report to begin service of his sentence.

2. [Same as for corporations with, of course, "his" or "hers" and "he" or "she" substituted for "its" and "it".]

3. The defendant agrees that he [she] will not present evidence or arguments to the court in opposition to the sentencing recommendation made to the court by the United States, although both parties may present facts to the probation office and to the court to assist the court in determining the sentence to be imposed.

4) Straight "B" agreements. In a straight "B" agreement, the defendant simply agrees to waive indictment and plead guilty, and the United States agrees to recommend that the court impose a certain sentence. The defendant is free to argue for a lesser sentence, except that the corporate defendant nevertheless agrees that it will not argue that payment be made to an entity other than the United States in lieu of a fine. (A corporate defendant also agrees not to argue that the court order it to render services in lieu of a fine.) In the case of a corporate defendant, this may be accomplished as follows:

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is the greatest of: a fine of \$1,000,000; twice the gross pecuniary gain

derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a fine, payable to the United States, in the amount of \$\_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request that the defendant might make to pay any fine imposed against it in installments over a period of time not to exceed five years. However, the United States will recommend to the court that it not waive the interest in the amount of \_\_\_ per month, computed from the date of sentencing, to be imposed on any part of the fine that is not paid within 90 days of the date of sentencing.

2. The defendant understands and agrees that the sentence recommended by the United States shall not be binding upon the court, and that, under this agreement, the court retains complete discretion to impose any sentence up to the maximum provided by 15 U.S.C. § 1. Furthermore, the defendant understands and agrees that, as provided in Rule 11(e)(2) of the Federal Rules of Criminal Procedure, if the court does not impose the sentence recommended by the United States, the defendant nevertheless has no right to withdraw its plea of guilty.

3. The defendant agrees that any fine imposed against it by the court is to be paid to the Treasury of the United States and also agrees not to propose, recommend

or advocate that any payment be made, or services rendered, to any person, organization, institution or agency in lieu of a fine or any part thereof.

The sentencing paragraphs of a straight "B" agreement with an individual may read as follows:

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine equal to the largest of:

- (a) \$250,000; (b) twice the pecuniary gain derived from the crime; or
- (c) twice the pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a sentence of \_\_\_\_ days actual imprisonment, with no work release and a personal fine of \_\_\_\_\_. The United States further agrees that it

will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the date on which he must report to begin service of his sentence.

2. [Same as for corporations with, of course, "his" substituted for "its".]

3. The defendant agrees that any fine imposed against him by the court should be paid to the Treasury of the United States and also agrees not to propose, recommend or advocate that any payment be made to any person, organization, institution or agency in lieu of such fine or any part thereof.

Note that in a straight "B" agreement with an individual, the defendant remains free to argue for an alternative sentence, i.e., service to a community organization as a term of probation, but agrees not to argue that any fine imposed be paid to anyone other than the United States.

b. Cooperation and non-prosecution provisions

Following the sentencing paragraphs, the defendant and the United States agree upon the nature and scope of the defendant's cooperation and the scope of the Government's non-prosecution agreement. Ordinarily, the defendant agrees to cooperate fully with the federal antitrust investigations and prosecutions relating to the industry under investigation within the agreed-upon geographic area. Conditioned upon the fullness of that cooperation, the United States usually agrees not to prosecute the defendant further for violations of the antitrust (15 U.S.C. § 1), mail or wire fraud (18 U.S.C. §§ 1341, 1343) and false statements and entries (18 U.S.C. § 1001) statutes, committed prior to the date of the agreement. However, the Government's non-prosecution agreement with respect to these statutes should be limited to those violations arising out of, or in connection with, antitrust violations in the industry being investigated. The geographic scope of the non-prosecution agreement should be limited to where the defendant does business. In addition, the staff may want to limit the non-prosecution agreement to a specific list of violations (e.g., specific instances of bid-rigging to which the defendant has admitted.)<sup>24</sup> This may be accomplished in an agreement with an individual as follows:

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<sup>24</sup>Of course, the defendant should understand that if other crimes have been committed but not disclosed to us, he may be subject to further prosecution for the undisclosed crimes.

4. The defendant agrees that he will fully and candidly cooperate with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_, and in any litigation or other proceedings arising or resulting therefrom. The defendant understands and agrees that he is required to respond fully and truthfully to all inquiries of the United States about practices in the (type of) industry in the (geographic location). The defendant also understands and agrees that, upon reasonable notice, he will make himself available to attorneys and agents of the United States for interviews and otherwise give the United States access to the knowledge or information he may have concerning practices in the (type of) industry. Further, the defendant understands and agrees that, when called upon to do so by the United States, he is required to testify fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), about practices in the (type of) industry in the (geographic location).

5. Subject to the defendant's full and continuing cooperation, as described above, the United States agrees not to bring further criminal charges against the defendant under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail

or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of this plea agreement arising out of any conspiracy, combination or scheme to submit collusive, fraudulent or noncompetitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.<sup>25</sup>

Quite often, plea agreements with a corporate defendant and its most culpable officer(s) will be negotiated at the same time. Generally, the corporate defendant is anxious that its other officers not be prosecuted, and the staff will be desirous of obtaining the testimony of those less culpable -- and not likely to be prosecuted -- individuals at the company, who have some useful information regarding the matter under investigation. This may be accomplished as follows:

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<sup>25</sup>If the staff wishes specifically to tie the individual's non-prosecution agreement to the faithful performance of his obligation to cooperate, the following language can be added to paragraph 5 of the agreement:

In the event of a failure by the defendant to fulfill his obligations pursuant to paragraph 4 above, the United States shall be relieved of its agreement under this paragraph not to further prosecute the defendant.

However, the staff should consider whether such a provision may increase the impeachment value of the plea agreement without actually enhancing the cooperation obtained.

2. The defendant agrees that it will cooperate fully with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_ and in any litigation arising therefrom. Each officer or employee of the defendant (other than \_\_\_\_\_, who has entered a separate plea agreement with the United States) who may have knowledge which would be of substantial assistance to the currently ongoing grand jury investigation of bid-rigging on (type of) projects, within a reasonable time from the date of this plea agreement may provide the Antitrust Division staff a proffer generally outlining the substance of his knowledge. If, in the judgment of the staff, the proffer is full and candid, the staff agrees to request authority from the Assistant Attorney General in charge of the Antitrust Division to obtain a court order compelling such officer's or employee's testimony before an appropriate grand jury pursuant to 18 U.S.C. § 6001, et seq., which provides that no testimony or other information compelled under such an order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

This paragraph requires that the staff obtain a court order and compel the testimony, before the grand jury, of those corporate officers and employees offering useful information under this provision. Often, some corporate officers or employees will have information which may be of some value to the investigation, but which really does not warrant presentment to the grand jury. Also, it is often desirable to be able to re-interview witnesses as the investigation progresses without returning to the grand jury each time a question arises. If either situation is anticipated, the staff may wish to provide for non-prosecution, as opposed to immunity, for cooperating corporate officers or employees. This may be accomplished as follows:

2. The defendant agrees that it will cooperate fully with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_ and in any litigation arising therefrom. Each officer or employee of the defendant (other than \_\_\_\_\_, who has entered a separate plea agreement with the United States) who may have knowledge which would be of substantial assistance to the currently ongoing grand jury investigation of bid-rigging on (type of) projects, within a reasonable time from the date of this plea agreement may provide the Antitrust Division staff a proffer generally outlining the substance of his knowledge. If, in the judgment of the United States, the proffer is full and candid and internal Department clearance for the

individual is obtained, the United States agrees, upon the continued and full cooperation of such officer or employee, not to bring criminal charges against such person under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense, committed prior to the date of this plea agreement, and while such person was employed by the defendant arising out of any conspiracy, combination or scheme between the defendant and any other (type of) contractor to submit collusive, fraudulent, or non-competitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.

Even when the above provision is used, however, the staff should obtain Criminal Division clearance before extending this non-prosecution provision to any individual. Note also that whether the non-prosecution or immunity provision for other cooperating officials of the company is used, the provision usually is limited to present officers and employees for activities engaged in while in the employ, and on behalf, of the settling company.

Of course, in addition to non-prosecution or immunity assurances to cooperating corporate officers or employees, we usually include a non-prosecution agreement for the corporate defendant similar to the following:

3. Subject to the defendant's full and continuing cooperation, as described above, the United States agrees not to bring further criminal charges against the defendant under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of this plea agreement arising out of any conspiracy, combination or scheme to submit collusive, fraudulent, or noncompetitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.

The language in the paragraphs quoted above obligates only the named corporate defendant to cooperate and, likewise, protects from further prosecution only the named corporate defendant. It also provides for immunity or non-prosecution only for the named corporate defendant's cooperating officers and employees. On occasion, it may be appropriate to extend the cooperation obligation and the assurance of non-prosecution to the named corporate defendant's subsidiaries, parent or affiliates, and to extend the opportunity for immunity or non-prosecution to the cooperating officers and employees of those companies. If that is to be the case, it can be accomplished by minor, obvious revisions to the language quoted above. This

should be done explicitly, however, and care should be taken not to extend the agreement to corporations or individuals the staff does not want to "immunize."<sup>26</sup>

c. Civil liability and administrative actions

The defendant should acknowledge that the criminal plea agreement does not limit the defendant's civil liability or any administrative action which might be undertaken by some agency other than the Division. The defendant also should acknowledge the existence of plea agreements with its corporate employee(s) or his corporate employer, as appropriate, and acknowledge the completeness of the agreement. This may be accomplished as follows:

6. The defendant understands that it (he/she) may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, as a result of the guilty plea entered

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<sup>26</sup>The courts have traditionally relied by analogy on the principles of contract law in reviewing and enforcing plea agreements. See Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir. 1979). It has been held that plea agreements in which third parties are beneficiaries of promises by the Government are enforceable by the third-party beneficiaries. See United States v. C.F.W. Constr. Co., 583 F. Supp. 197, 202-03 (D.S.C.), aff'd, 749 F.2d 33 (4th Cir. 1984). Such provisions should be drawn to make the substantive offenses, time periods and geographic areas covered by the protection as narrow as possible. (The United States Attorney for every covered geographic area must be consulted prior to entering the agreement.) Generally, the Division gives non-prosecution or immunity assurances only to those third parties who have demonstrated a specific need for them through proffers or otherwise.

pursuant hereto, and that this plea agreement in no way limits the action, if any, such other agencies may take. In addition, the defendant understands that it (he/she) may be subject to civil and equitable claims, demands or causes of action by the United States and others, and that this plea agreement in no way affects these claims, demands or causes of action.

7. The United States and the defendant enter into this agreement with knowledge of the plea agreement between the United States and \_\_\_\_\_. Other than in that agreement, the United States has made no other promises to, or agreements with, the defendant. This plea agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the charges in this case.

In some cases, it may be appropriate to agree with the defendant that we will advise various administrative agencies of the value and timeliness of the defendant's cooperation. This is particularly appropriate where the defendant's cooperation is offered early in an investigation, prior to the development of incriminating evidence against the defendant, and the defendant's business or livelihood would be substantially adversely affected by administrative debarment. Ordinarily, we simply tell defendants that we will inform agency officials of the value of their

cooperation if asked. However, where more assertive action is appropriate, the following language has been used:

The United States agrees that it will inform the appropriate officials of the (federal agency) and any other federal agency with which the defendant has contracted, of the timeliness and value to the United States of the defendant's cooperation as provided for herein.<sup>27</sup>

d. Waiver of statute of limitations

In a few instances, it may be desirable to enter into a plea agreement in which the defendant pleads guilty to a conspiracy to which he has an arguable, or even a clear, statute of limitations defense. Such a plea agreement would require a valid waiver by the defendant of the statute of limitations defense, and this raises the issue of whether this defense is waivable by the defendant.

Several circuits have addressed the issue and concluded that the statute of limitations is an affirmative defense and, therefore, waivable.<sup>28</sup> However, the Sixth Circuit has concluded

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<sup>27</sup>In appropriate circumstances, staff should consider including state or local agencies in this provision.

<sup>28</sup>See United States v. Wild, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965); United States v. Levine, 658 F.2d 113 (3d Cir. 1981); United States v. Williams, 684 F.2d 296, 299-300 (4th (continued...))

that the statute of limitations is a jurisdictional bar to prosecution and may not be waived.<sup>29</sup> In addition, the Tenth Circuit considers the statute of limitations jurisdictional, but has not addressed whether it may be voluntarily waived by the defendant for his benefit.<sup>30</sup>

Plea agreements that require waivers of the statute of limitations generally should be avoided in the Sixth and possibly the Tenth Circuits. In any event, when entering a plea agreement that requires a waiver of the statute of limitations, the staff should be thoroughly familiar with the law on the subject in the circuit where the prosecution is to take place and realize that such a plea agreement might result in litigation. Plea agreements containing waivers of the statute of limitations should be entered only where the waiver is for the defendant's benefit and is given only after the defendant has fully discussed the matter with his attorney and the attorney has advised the defendant to waive the defense. This should be stated specifically in the plea agreement. The following language may be used to set forth a defendant's waiver of the statute of limitations:

The defendant further agrees to waive and not to raise any defense or other rights defendant may otherwise have under the statute of limitations with respect

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<sup>28</sup>(...continued)  
Cir. 1982), cert. denied, 459 U.S. 1110 (1983); Capone v. Aderhold, 65 F.2d 130 (5th Cir. 1933); United States v. Franklin, 188 F.2d 182 (7th Cir. 1951); United States v. Akmakjian, 647 F.2d 12 (9th Cir.), cert. denied, 454 U.S. 964 (1981).

<sup>29</sup>Benes v. United States, 276 F.2d 99 (6th Cir. 1960).

<sup>30</sup>Waters v. United States, 328 F.2d 739 (10th Cir. 1964).

to the criminal information referred to in Paragraph 1. The defendant further states that this waiver is knowingly and voluntarily made after fully conferring with, and on the advice of, defendant's counsel, and is made for defendant's own benefit.

3. Post-indictment plea agreements

So far, this chapter has focused on plea agreements in the pre-indictment setting. Often, however, plea agreements will be negotiated only after the return of an indictment against the defendant, and may involve the dismissal of counts or even the indictment itself. This is done pursuant to Rule 11(e)(1)(A). The introductory paragraph of such an agreement reads:

The UNITED STATES OF AMERICA and the defendant, \_\_\_\_\_, hereby enter into the following plea agreement pursuant to Rules 11(e)(1)(A) and (here insert 11(e)(1)(B) or 11(e)(1)(C) as appropriate) of the Federal Rules of Criminal Procedure.

If the defendant is to plead to an information and the pending indictment is to be dismissed, paragraph 1 of the plea agreement remains the same as in any pre-indictment agreement and the following paragraph is added to the agreement:

The United States agrees that once the court has accepted the defendant's (plea of guilty to the criminal information referred to herein, -- in a (B) agreement) or (plea of guilty and this plea agreement, and has imposed sentence against the defendant, as provided herein, -- in a (C) agreement) the United States, pursuant to Rule 11(e)(1)(A) and 48(a) of the Federal Rules of Criminal Procedure, will move to dismiss the indictment in (here cite the case pending against the defendant).

If the defendant is to plead to one or more counts of the pending indictment and the remaining counts are to be dismissed, the first sentence of paragraph 1 of the pre-indictment plea agreement will be changed to read as follows:

The defendant will (plead guilty) or (change his plea of not guilty to guilty) to Count \_\_\_ of the indictment in (here cite the case pending against the defendant) which charges a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date).

In addition, the following paragraph is added to the agreement:

The United States agrees that once the court has accepted the defendant's (plea of guilty to Count \_\_\_ of the indictment, -- in a (B) agreement) or (plea of guilty to Count \_\_\_ of the indictment and this plea agreement, and has imposed sentence against the defendant, as provided herein, -- in a (C) agreement) the United States, pursuant to Rule 11(e)(1)(A) and 48(a) of the Federal Rules of Criminal Procedure, will move to dismiss Counts \_\_\_ and \_\_\_ of the indictment in (here cite the case pending against the defendant).

#### 4. Conditional plea agreements

In 1983, Rule 11 of the Federal Rules of Criminal Procedure was amended to provide for the acceptance of conditional pleas. The amendment reads as follows:

11(a)(2) Conditional pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.<sup>31</sup>

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<sup>31</sup>The Advisory Committee notes concerning this amendment may be found in West Publishing Company's edition of the federal rules or at 97 F.R.D. 278.

This amendment is fairly straightforward. Its main requirements are that the issue to be appealed be reserved in writing, the court approve entry of the plea and the Government consent. Any appeals pursuant to a conditional plea must be brought in compliance with Rule 4(b), Fed. R. App. P., and relief via 28 U.S.C. § 2255 (habeas corpus) is not available. Even most constitutional objections (e.g., a claim of double jeopardy) may not be raised after a plea of guilty.<sup>32</sup>

The amendment was adopted to promote prosecutorial and judicial economy, and advance speedy trial objectives, by providing a process for avoiding trials that are undertaken primarily to preserve pretrial issues for which interlocutory appeals are not available (e.g., a motion to dismiss based on speedy trial grounds or a motion to suppress evidence). The amendment does not limit, in any fashion, the issues that may be appealed pursuant to a conditional plea, and instead relies on the provision that both the court and the Government must approve a conditional plea to ensure that the reserved issues are not frivolous.

In certain limited situations, conditional plea agreements can be an effective manner in which to conserve the Division's resources. They should be entered into only when the issues that are to be appealed will be dispositive of the case. For example, in two cases where conditional plea agreements were entered into, the issues to be appealed included: (1) whether the defendant was protected from indictment by a previous plea agreement; (2) whether the

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<sup>32</sup>United States v. Broce, 488 U.S. 563 (1989). Under very unusual circumstances, not likely to occur in the antitrust context, constitutional objections may be raised after a guilty plea. See Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974).

statute of limitations barred the indictment; (3) whether the indictment should be dismissed because provisions of the Speedy Trial Act allegedly had been violated; and (4) whether the indictment placed the defendant in double jeopardy. If the defendants were successful on any of these issues, the cases would have been dismissed. By entering into conditional plea agreements on these issues, the Division and the defendants avoided the time and expense of trial. It would not be to the Division's advantage, however, to enter into a conditional plea agreement that included an issue to be appealed which was not dispositive of the case. In such an instance, if the defendant were successful on the non-dispositive issue, the Government would be faced with the possibility of having to try the case at a considerably later date with stale evidence.

In deciding whether to enter into a conditional plea agreement, care also should be exercised in determining whether a sufficient factual basis exists in the record to support the Division's position on appeal. In addition, thought should be given as to what sort of cooperation, if any, is desired from the defendant.<sup>33</sup>

Since the amendment speaks only of adverse determinations of pretrial motions being appealed, it would seem that conditional plea agreements normally would be entered into only after indictment. However, there is no specific prohibition against entering into an agreement prior to indictment or the filing of an information. Also, while the rule provides for the entry of

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<sup>33</sup>The Division's Appellate Section should be consulted before entering into a conditional plea agreement.

a conditional plea of nolo contendere, the Division's policy against a standard plea of nolo would apply to a conditional plea of nolo.

An 11(a)(2) conditional plea agreement generally has the same provisions as a standard plea agreement and normally would be joined with an 11(e)(1)(B) or 11(e)(1)(C) provision to include some sort of sentencing recommendation. It might also be coupled with an 11(e)(1)(A) provision to dismiss other counts of an indictment.

When drafting a conditional plea agreement, many of the same paragraphs found in a standard plea agreement may be used but should be modified accordingly. Thus, the introductory paragraph should make reference to the fact that this is a conditional plea agreement pursuant to Rule 11(a)(2). Similarly, the first numbered paragraph should make reference to the fact that the defendant will enter a conditional plea of guilty pursuant to Rule 11(a)(2). For example:

1. \_\_\_\_\_ will enter a conditional plea of guilty, pursuant to Rule 11(a)(2), to Count One of the Indictment in this case, which charges a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig bids on a (type of) project (identifying number), let by the (letting authority) on (date).

The next numbered paragraph should set forth with great specificity the issue which is to be appealed. If there are several issues, each one should be set forth with particularity. In

addition, a waiver of any other issues may be specifically included in the paragraph. For example:

2. \_\_\_\_\_ reserves the right to take an appeal from the judgment on the issue of \_\_\_\_\_. However, the defendant waives his/its right to appeal any other issue that arose at the pretrial stage of the captioned case or that might have arisen at trial.

The next paragraph then should set forth a statement that the defendant understands that he/it may withdraw the guilty plea only if he/it prevails on appeal. For example:

3. \_\_\_\_\_ has been fully advised and understands that if he/it prevails on appeal, he/it shall be allowed to withdraw his/its guilty plea. If \_\_\_\_\_ does not prevail on appeal, he/it has no right to withdraw his/its plea of guilty.

A conditional plea agreement also may contain the other provisions normally found in a plea agreement and discussed above. If a particular sentence is recommended, the agreement should address when that sentence should be imposed with respect to the appeal. If there is a non-prosecution provision, the agreement should address what happens to that provision if the defendant's appeal is successful and the plea is withdrawn. Similarly, if the agreement contains a provision for the Division to dismiss other counts in the indictment, consideration should be

given to not dismissing these counts until after the appeal is final. However, if a count is not dismissed until the appeal is final, care must be taken to be sure that the provisions of the Speedy Trial Act are met. Finally, as discussed above, if the plea agreement requires cooperation by the defendant, consideration should be given as to when this cooperation is to begin and what will happen if the defendant's appeal is successful.

F. Procedure for Obtaining Approval

1. Within the Division

After a proposed plea agreement acceptable to the staff, section or field office chief and defense counsel has been reached, the agreement, of course, is (or already has been) reduced to writing. The proposed agreement, with a copy of a proposed information (or indictment, if applicable), press release and a supporting memorandum are forwarded to the Office of Operations, under a cover memorandum from the section or field office chief.

The supporting memorandum is substantially similar in purpose and form to a fact memorandum in support of an indictment and should include all information relevant to the proposed plea agreement. In the pre-indictment plea agreement situation, the memorandum obviously will need to include more information than post-indictment, since in the latter

situation, there will already exist a fact memorandum, a copy of which can be attached to the plea agreement memorandum if necessary.

To evaluate a proposed plea agreement, the Office of Operations needs the following information in the memorandum:

- (a) complete background information on individual defendants, including age, health, corporate position and anything else of relevance;
- (b) complete background information on corporate defendants, including sales figures, net worth and all other relevant financial data;
- (c) a description of all criminal conduct in which the defendant is known or believed to have engaged;
- (d) a detailed description of the evidence available to support the charge(s) to which the defendant has agreed to plead guilty;
- (e) a description and explanation of the terms of the proposed plea agreement, with particular emphasis on the proposed sentence;

(f) an explanation of the relative role of the defendant in the conspiracy and how the agreement will effect the investigation and other pending or future prosecutions;

(g) an assessment of the defendant's civil liability and the impact of the proposed plea agreement on that liability; and

(h) a full description of anything unusual about the plea agreement or factors that relate to it.

With respect to point (e) above, for crimes continuing or occurring on or after November 1, 1987, the memorandum must contain an analysis of the Sentencing Guidelines implications of the plea agreement. If charge bargaining has occurred, the memo should make clear how the remaining charges satisfy the Sentencing Commission's and the Department's requirements.<sup>34</sup> If the plea agreement is a "C" type agreement, or a "B" type agreement where the Government will be making a specific sentencing recommendation to the judge, the staff should set forth either their analysis of why the sentence falls within the applicable guideline range for the particular charges at issue or their reasons for recommending a departure from the Guidelines.

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<sup>34</sup>See § D., *supra*.

Section 6B1.3(b) and (c) of the Sentencing Guidelines express the Commission's views regarding the acceptance of plea agreements insofar as they reflect sentence bargaining. Both recommended sentences under Rule 11(e)(1)(B) and agreed sentences under Rule 11(e)(1)(C) must either be within the applicable guideline range or only depart from that range "for justifiable reasons."

The Criminal Division has noted that (1) the Sentencing Reform Act permits downward departures only when mitigating circumstances that were not adequately taken into account by the Commission in formulating the Guidelines exist and should result in a different sentence, and (2) it is not possible to argue that the Commission has not adequately taken the value of a plea agreement into consideration.<sup>35</sup> Nonetheless, sentence bargaining is still a valuable enforcement tool. First, bargaining "within guidelines" is possible with respect to the acceptance-of-responsibility adjustment, to where within the applicable imprisonment and fine ranges a defendant's sentence should be set and to any available alternative sentences. The imprisonment and fine ranges in Division cases are, relatively speaking, quite broad. Moreover, it is possible to agree on legitimate grounds for departure, including particularly "substantial assistance to the authorities."<sup>36</sup>

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<sup>35</sup>See Prosecutors Handbook at 42; see also 18 U.S.C. § 3553(b).

<sup>36</sup>See Guidelines § 5K1.1.

The section or field office chief will provide a cover memorandum, briefly highlighting the important points in the staff's recommendation and explaining his reasons for concurring or not concurring in the recommendation.

2. Within the Department

At the same time that the proposed plea agreement package is forwarded to the Office of Operations, the staff should consider sending copies of the proposed agreement to all U.S. Attorneys in whose jurisdictions the agreement (particularly the non-prosecution provision) will have any effect. The agreement should be accompanied by a letter from the lead attorney on the investigation explaining the proposed agreement and inviting the U.S. Attorney to address any questions, comments or objections to the lead attorney or, if more appropriate, to the Director of Operations. Most U.S. Attorneys do not object to the Division's plea agreements, but occasionally, certain U.S. Attorneys have strong views on certain types of agreements or provisions in them.

## G. Presenting the Plea Agreement to the Court

The procedures for tendering plea agreements to the court vary from district to district and from judge to judge.<sup>37</sup> It is advisable to consult with an Assistant United States Attorney on the local practice in each district. In the case of a pre-indictment plea agreement, the process normally is begun by the filing of a criminal information. Depending on the district, it may be filed in the clerk's office or submitted in open court to a magistrate or district judge. If the defendant has already been indicted and has pled not guilty, it is usually only necessary to request the judge handling the case to schedule a change-of-plea hearing.

Two hearings normally are required to dispose of a case by plea agreement. At the first hearing, the defendant states his intention to plead guilty, and the terms of the plea agreement are presented to the court. If it is a pre-indictment agreement, the defendant must, under Fed. R. Crim. P. 7(b), waive, in open court, prosecution by indictment (usually by signing a form) after he has been advised of the nature of the charges and of his rights. Rule 11(e)(2) requires that at the time the plea is offered, all of the terms of the plea agreement be disclosed on the record in open court (or in camera on a showing of good cause). As with any plea of guilty,

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<sup>37</sup>Before presenting any plea agreement with a corporation to the court, the staff should obtain a resolution of the board of directors approving the agreement and authorizing the corporate representative signing the agreement to do so on behalf of the corporation and authorizing that individual or counsel to enter a plea of guilty. This ensures that there will be no question later about the validity of the agreement. Many judges require that such a resolution be made a part of the record before accepting a corporate guilty plea tendered pursuant to a plea agreement.

the court must ensure that there is a factual basis for the plea (Rule 11(f)). The court also must determine that the plea is voluntary and advise the defendant of his rights under Rule 11(c) and (d).

If the plea agreement is a "B" type, judges normally will accept the change of plea at the first hearing. However, before doing so, the court, under Rule 11(e)(2), must advise the defendant that if the court does not accept the recommendation or request set out in the agreement, the defendant has no right to withdraw his plea. After accepting the guilty plea, the court will order a presentence investigation and report, pursuant to Fed. R. Crim. P. 32(c)(1), unless the court finds on the record that there is already sufficient information for the meaningful exercise of sentencing discretion. (It is unusual for a judge to impose sentence on a "B" type agreement without benefit of a presentence report.) If the defendant's guilty plea is not formally accepted at the first hearing, Rule 32(c)(1) requires that the judge obtain the written consent of the defendant to inspect the presentence report.

When a presentence investigation has been ordered, the judge probably will allow several weeks for its completion before holding the sentencing hearing. The procedures for imposing sentence under a "B" type agreement are essentially the same as for any guilty plea. Of course, the Government (and defendant, if applicable) must strictly comply with any provisions of the plea agreement regarding arguments or recommendations to be made, or not to be made, to the court at sentencing.

The procedures for accepting a pre-indictment "A" type or "C" type agreement are different in some respects from those for a "B" type. The filing of the information, waiver of indictment, disclosure of the terms of the agreement, providing of a factual basis and the advice to and questioning of the defendant under Rule 11(c) and (d) are basically the same for all three types of agreements. However, since "A" and "C" type agreements provide for the ultimate disposition of the case, the court must decide whether to accept the agreement, as is, or reject it entirely. That being the case, some judges defer formal acceptance of the guilty plea until they have read the presentence report and decided whether the disposition provided for in the agreement is appropriate. If acceptance of the plea is deferred, the court, under Rule 32(c)(1), must obtain the written consent of the defendant to inspect the presentence report.

Rule 11(e)(3) provides that if the court accepts the "C" agreement, the court shall inform the defendant that it will impose the sentence provided for in the agreement. If the agreement is rejected, the court must inform the parties of this fact, advise the defendant in open court (or in camera on a showing of good cause) that the court is not bound by the agreement, allow the defendant to withdraw his plea and inform him that if he persists in his guilty plea, the disposition of the case may be less favorable than the one in the plea agreement (Rule 11(e)(4)). Some plea agreements involving multiple counts may contain "B" type agreements as to some counts and "A" or "C" type agreements as to others. In that case, the judge must carefully explain to the defendant the various dispositions provided in the agreement and his rights

regarding withdrawal of his guilty plea if the agreement is rejected.<sup>38</sup> After a guilty plea has been accepted, the judge must comply with the standard Rule 32 sentencing procedures.

When a post-indictment plea agreement is involved, the first step usually is to request a hearing before the judge to whom the case has been assigned once the parties have finalized the agreement. After that, the procedures for accepting the plea agreement and imposing sentence are the same as for a pre-indictment agreement. Rule 11(e)(5) provides that the plea agreement should be disclosed at the arraignment or at such other time, prior to trial, as may be fixed by the court. This provision enables the court to require that the agreement be disclosed sufficiently in advance of trial so that the scheduling of criminal cases can be handled efficiently.

The statements made by the defendant during a plea agreement hearing may not be used against him in any civil or criminal proceeding if the guilty plea is later withdrawn, with two exceptions. Rule 11(e)(6) prohibits the use of such statements unless (1) another statement made during the same hearing has been introduced and, in fairness, the defendant's statement ought to be considered with it, or (2) the statement was made under oath, on the record, with defense counsel present and is offered in a prosecution for perjury or making false statements. If an "A" or "C" type agreement is rejected and the defendant withdraws his guilty plea, the withdrawn plea may not be used against him.

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<sup>38</sup>See Advisory Committee Note to 1979 Amendment to Rule 11.

## H. Other Issues

### 1. Enforcement of plea agreements

As the Supreme Court has recognized, plea bargaining is "an essential component of the administration of justice."<sup>39</sup> Although plea bargaining is a part of the criminal justice system, the courts generally have viewed plea bargains as contractual in nature and "subject to contract-law standards."<sup>40</sup> Yet, while the courts rely heavily on contract principles, they also view the matter as one of fairness to the defendant.<sup>41</sup> As the Supreme Court stated in Santobello in discussing plea bargaining:

. . . [A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.<sup>42</sup>

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<sup>39</sup>Santobello v. New York, 404 U.S. 257, 260 (1971).

<sup>40</sup>United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980).

<sup>41</sup>See, e.g., Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir. 1979).

<sup>42</sup>404 U.S. at 262.

Courts require that the prosecution meticulously carry out the plea agreement.<sup>43</sup> Moreover, the prosecution need not intentionally violate a plea agreement for any ensuing sentence to be void.<sup>44</sup>

What constitutes a promise or agreement will by necessity turn on the individual facts of each case. Disputes as to the terms of a plea agreement are to be resolved by objective standards, and the nature and extent of any agreement are questions of fact to be resolved by the district court to whom the plea was originally submitted.<sup>45</sup> Once it has been determined that a plea agreement has been violated, the issue then shifts to the appropriate remedy. The fashioning of an appropriate remedy is a matter of discretion for the court according to the circumstances of the case.<sup>46</sup> Appropriate remedies include allowing a defendant to withdraw a guilty plea,<sup>47</sup> directing specific performance of the agreement,<sup>48</sup> or ordering the imposition of a specific sentence where the aforementioned remedies would be meaningless or infeasible.<sup>49</sup>

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<sup>43</sup>United States v. Bowler, 585 F.2d 851 (7th Cir. 1978).

<sup>44</sup>Knight v. United States, 611 F.2d 918, 921 (1st Cir. 1979).

<sup>45</sup>United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979).

<sup>46</sup>United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978).

<sup>47</sup>United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975).

<sup>48</sup>United States v. Runck, 601 F.2d 968, 970 (8th Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

<sup>49</sup>Correale v. United States, 479 F.2d 944 (1st Cir. 1973).

## 2. Nolo contendere and Alford pleas

Since it is Division policy to oppose the acceptance of nolo contendere pleas, except in unusual circumstances, a dilemma sometimes is created for the defendant who wishes to dispose of his criminal liability and is willing to agree to the sentence sought by the Government, but who is only willing to plead nolo. It should be made clear to the defendant that if he persists in refusing to plead guilty, he will not be able to enter into any type of plea agreement with the Division and, as a result, may be risking a more severe sentence. In certain rare situations, the Division may consider entering into negotiations with a defendant over an appropriate sentence after the defendant's nolo plea already has been accepted by the court. In that context, a true plea agreement is impossible, since the plea has already been accepted. If an agreement is reached, it becomes nothing more than a joint sentencing recommendation, which is not binding on the court.

An Alford plea is one in which the defendant pleads guilty, but continues to maintain his innocence. In North Carolina v. Alford, 400 U.S. 25 (1970), the defendant, who was charged with first degree murder, agreed with the prosecution that he would plead guilty to a reduced charge of second degree murder. However, at the plea hearing, he tendered his guilty plea but denied his guilt. The State then demonstrated a strong factual basis for the plea, and the plea was accepted by the court. The Supreme Court held that the judge could have refused the plea in that

situation, but acted properly in accepting it, in view of the factual basis presented and the showing that the plea was a voluntary decision by the defendant.

Every effort should be made to avoid entering into a plea agreement with a defendant who is likely to refuse to admit his guilt. If the prosecutor has any reason to suspect that the defendant may protest his innocence at the plea hearing, the prosecutor should be prepared to demonstrate a convincing factual basis for the offense. In some cases, such as where the plea agreement requires the full cooperation of the defendant, or the defendant's protestations of innocence were completely unexpected, it may be more appropriate to argue that the defendant has not upheld his part of the bargain and ask the court for leave to withdraw from the agreement.