U.S. Sentencing Commission May 4, 2012
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Re: Proposed Revision to the Sentencing Guidelines

Dear Commissioners:

I am hereby submitting for your consideration proposed amendments to the Sentencing Guidelines related to the treatment of antitrust compliance programs. I offer these comments as a practitioner in the compliance and ethics field and as one with a strong interest in the success of the Sentencing Commission's efforts to promote effective compliance and ethics programs in organizations. I have also been a practitioner in the antitrust field for more than thirty-five years.

Please feel free to contact me with any questions or if you wish additional background on this proposal.

Respectfully submitted,

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Making the Sentencing Guidelines Message Complete

I. Success of the Organizational Sentencing Guidelines

In 1991 the Sentencing Commission charted a new direction by using a carrot and stick approach to promote corporate self-policing through compliance and ethics programs. Twenty years later the Commission's work has proved to be a remarkable success. Compliance and ethics programs have become a widespread phenomenon in the corporate world.

The Sentencing Guidelines formula was simple and effective. The corporate world was given a structured but flexible template for compliance programs, and in exchange for adopting effective programs, those organizations faced reduced sentences.

The lead of the Commission has been followed in the US and around the world. Here in the US, the Criminal Division of the Department of Justice instructs its prosecutors to follow the Guidelines,[1] and requires companies that settle criminal cases to implement rigorous ethics and compliance programs – even those companies who voluntarily disclose violations to the Department. The SEC also considers compliance programs in its enforcement decisions.[2] Recently, when developing whistleblower rules under Dodd Frank, the SEC said:

> "Given the policy interest in fostering robust corporate compliance programs . . . . we also want to implement [the whistleblower rules] in a way that encourages strong company compliance programs."[3]

The SEC went on to shape the whistleblower rules to promote in-house compliance programs. The Delaware courts, in interpreting the highly-

[1] US Attorneys Manual, Section 9-28.800, Corporate Compliance Programs

[2] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act of 1934 Release No. 44969 / October 23, 2001, Accounting And Auditing Enforcement Release No. 1470 / October 23, 2001, *http://www.sec.gov/litigation/investreport/34-44969.htm* .

[3] Securities and Exchange Commission, 17 CFR Parts 240 & 249 [Release No. 34-63237; File No. S7-33-10] RIN 3235-AK78, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, pp. 34-35, http://www.sec.gov/rules/proposed/2010/34-63237.pdf

influential Delaware corporate law, have also made clear that compliance programs are a key responsibility of directors.[4]

Outside the US the Guidelines approach has gained acceptance as well. For example, the influence of the Guidelines can be seen in policies ranging from the Competition Commission of Singapore's penalty standards,[5] to the OECD Working Group on Bribery's Good Practice Guidance,[6] that have much in common with the Sentencing Guidelines standards.

When looking at the strategies of the various enforcement and regulatory agencies around the world, there are a variety of techniques for governments to promote serious ethics and compliance programs. They range from having open public hearings and forums on compliance programs,[7] to issuing instructions to enforcement personnel to consider such programs, to having formal penalty policies that take programs into account. Agencies will often provide models of rigorous programs by requiring those who admit wrongdoing to implement strong programs, as the Criminal Division of the Department of Justice does in cases such as those dealing with FCPA violations.

Both domestic and international experience demonstrate that there is a key role for governments to promote ethics and compliance programs.

However, the work of the Commission and so many other government officials is severely undermined when a different sector of the government sends an opposite message, telling organizations that even one violation means their efforts are nothing more than a "failed program." When such an agency tells companies they should have programs and then ignores those programs by its actions[8] and when it only gives lip service to effective ethics and compliance

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[4] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996); Stone v. Ritter, 911 A.2d 362 (Del. 2006).

[5] Competition Commission of Singapore, CCS Guidelines On the Appropriate Amount of Penalty section 2.13 (June 2007), http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf

[6] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, http://www.oecd.org/dataoecd/11/40/44176910.pdf

[7] As was done by the Federal Energy Regulatory Commission, see Federal Energy Regulatory Commission, Policy Statement on Compliance, 125 FERC para. 61,058 (Oct. 16, 2008), http://www.ferc.gov/whats-new/comm-meet/2008/101608/M-3.pdf .

[8] The Antitrust Division has, at times, had representatives offer guidance on what should be in compliance programs, but has severely undercut this rhetorical message by making clear

programs, but then shows no interest in such programs, companies get the message that programs do not really count.

II. The One Policy Gap

The success of the Sentencing Commission's leadership in promoting compliance and ethics programs has been dimmed by one inexplicable exception – the Antitrust Division of the Department of Justice.

Alone in the Department of Justice, the Antitrust Division has determined that if a program does not prevent or cause a company to be first through the door to report a violation, it is simply a "failed program."[9] This Division has said it will not even consider the existence of a compliance program when it is making determinations of how to treat a company.

This is contrary to the policy of the rest of the Department and the clear guidance of the US Attorneys Manual. In the Manual there is only one exception and that is for antitrust cases. The Manual cites the Division's view that antitrust cases "go to the heart of the business." Do endemic securities fraud cases, such as we have seen in Enron and WorldCom, or bribery, false claims and dozens of other crimes not go to the "heart of the business"? This blanket rule against any credit or consideration stands out in contrast to the work of the Commission and the rest of the Department in supporting and encouraging effective programs. It is also contrary to what the other enforcer of antitrust law in the US, the Federal Trade Commission, has determined. The FTC's Bureau of Competition does not see this need to turn a completely blind eye to compliance efforts and rewards good faith efforts by companies to prevent violations.[10]

There is no reasonable argument for why the Antitrust Division alone is so different or what could justify two directly conflicting enforcement policies. These confusing and unsupportable policy inconsistencies undermine faith in the legal system.

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by its actions and other statements that compliance efforts do not matter to the Division when it really counts.

[9] Comments of Scott D. Hammond, Deputy Assistant Attorney General, at American Bar Association Section of Antitrust Law Spring Meeting, "Agency Update with the Antitrust Division DAAGs" (Washington, D.C., Mar. 30, 2011)

[10] Murphy, "An FTC View of Compliance Programs: Good Faith Efforts Can Mean No Penalties," 4 Corporate Conduct Quarterly 53, 66 (1996) (interview by the author) (addressing violations of orders and premerger notification requirements).

To make the circumstances even murkier, the Division has been involved in mixed cases that include offenses other than antitrust violations. Yet supposedly only antitrust cases have a special basis for ignoring compliance programs. So, in bid rigging cases also involving government contract fraud, or market allocation cases also involving mail fraud, or price fixing cases also involving foreign bribery, how does the Department treat the existence of an effective program? This circumstance has become so bizarre, that there is actually a plea bargain in which a company pled to FCPA and Sherman Act violations, with the agreement requiring a full-scale FCPA compliance program, but nothing relating to the Sherman Act violation.[11] It does not make sense in those mixed cases because it never made sense in any cases.

The Sentencing Guidelines have since 1991 followed suit with this confusing exception. From the first organizational guidelines there has been a special carve-out and limiting language just for antirust. The result, if not the initial intent, is that there is no realistic prospect of benefitting under the Sentencing Guidelines from having a compliance program in an antitrust case. The Sentencing Commission, by sanctioning this special treatment, appears to endorse the Antitrust Division's view that it is appropriate to ignore company self-policing efforts, regardless of how diligent they may be. The message is that companies will not benefit from having a compliance program in their dealings with the Antitrust Division.

The bottom line is that the antitrust carve-out seems to have reinforced the sense in the antitrust field that programs do not count. The Antitrust Division, unlike other government agencies, has shown no real signs of promoting compliance programs. It has held no hearings or proceedings to explore the area, no training for its staff on what should be in programs and has done nothing to promote the consideration of compliance programs through such multinational organizations as the OECD or the International Competition Network. In short, antitrust practitioners get no message that programs count, only that being first to apply for leniency is the one important mission.

If the Sentencing Commission's recognition and promotion of effective compliance programs has revolutionized the field, what has been the result of the Antitrust Division's opposite policy? Because of the lack of interest in compliance programs in this area there appears to be little if any study of the area. But there are indications that antirust compliance programs have atrophied in this environment. Antitrust compliance was once an innovative

[11] Jeffrey M. Kaplan, *The Justice Department, Miss Havisham, and a Wish for the New Year*, The FCPA Blog (Dec. 28, 2011, 7:28 AM), http://www.fcpablog.com/blog/2011/12/28/the-justice-department-miss-havisham-and-a-wish-for-the-new.html.

model in the compliance field. But today it may have lost that edge.[12] Now it may be mostly lawyer lectures and compliance manuals. In this silo there is little if anything about the essential role of the chief ethics and compliance officer. There is little if anything on audits to detect criminal conduct. There is little if anything on the use of incentives. These and other innovative and important tools incorporated in the Sentencing Commission's work may have gone by the board in the antitrust field because of the Antitrust Division's apathy towards preventive compliance programs..

It is impossible for compliance and ethics professionals to explain to managers and clients what appears to be a completely irrational carve-out. The enormous boost that the Sentencing Guidelines have given compliance in every other area is mostly lost in antitrust.

III. Going Forward With Rational Public Policy

It is time to clean up this glaring anomaly in the Sentencing Guidelines. It is time for this odd experiment in inconsistent policy to end. The Guidelines should be consistent and firm in supporting effective ethics and compliance programs. This filing recommends the Commission remove this impediment to compliance program development in three simple steps:

1) Delete the anomalous 75% barrier to giving companies full credit for their compliance efforts as set forth in section 2R1.1(d)(2). This has served to ensure that no matter what mitigating steps a corporation has taken, including implementation of an effective compliance and ethics program, its fine can never be less than 75% of the total amount otherwise set under the Guidelines.

2) Revise the substantial authority personnel examples so they are not inflated to cover any possible antitrust violator no matter how low his or her position. Under the Guidelines, there is a presumption that a compliance program was not effective if a person with substantial authority was involved in the violation. The

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[12] Murphy, Promoting Compliance With Competition Law: Do Compliance and Ethics Programs Have a Role To Play? (June 2011), prepared for the OECD Competition Committee, paragraphs 20-25, 38-41, http://www.oecd.org/dataoecd/12/13/48849071.pdf ; see comment by Jeffrey Kaplan, The FCPA Blog, http://www.fcpablog.com/blog/2011/10/26/the-sentencing-guidelines-field-notes-on-a-20-year-experimen.html , ("Based on my twenty years in the field, antitrust compliance efforts — at least relative to those for other risk areas — seem to have receded in importance during the time of the Guidelines experiment."); D. Daniel Sokol, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement, 78 *Antitrust Law Journal* [forthcoming](noting that antitrust compliance appears not to be embedded in companies).

Division has taken the position that those with authority to engage in an antitrust violation are, ipso facto, within this definition. By changing the examples provided in the definition it will be made clearer that not everyone who may participate in an antitrust violation is automatically a substantial authority person. The person's authority truly needs to be "substantial."

3) Make clear that companies can get credit for meeting the standards as they were revised in 2010, notwithstanding the operations of the leniency program. With the revisions that occurred in 2010 the Commission made it possible for a company to obtain credit for an effective compliance and ethics program even if a high-level person was involved. However, there are four conditions for receiving this benefit. Two of these qualifications are:

> (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
> (iii) the organization promptly reported the offense to appropriate governmental authorities; . . .

The Antitrust Division views this as no change at all, taking the position that unless a company was first into the Leniency program it could not meet this test. Given the Division's negative record regarding compliance programs, however, it should be clear that this is simply not the case. Thus, a compliance and ethics program could discover cartel activity within the company, investigate this and report the violation, without ever knowing that the Division had already accepted a co-conspirator into its leniency program. In the special circumstances of the Division's leniency program, the Guidelines standards should recognize this scenario and permit companies to obtain the promised benefit of their compliance programs.

Language to implement these changes is attached as Appendix A

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Appendix A

Amend Section 8A1.2, app. Note 3(C) to read as follows (changes underlined):

(C)"Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a manager supervising an organization's sales force), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to establish the organization's prices for product or service lines, or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

Amend section 2R1.1(d) by deleting item (2)

Amend section 8C2.5(f)(3)(C) by adding the following new item:

"(v) except that in any case under section 2R1.1, items (ii) and (iii) of this section (f)(3)(C) may be satisfied notwithstanding the prior qualification of any other party for leniency under the Corporate Leniency Policy of the Antitrust Division of the Department of Justice."