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

July 22, 2014

Attention: Public Affairs-Priorities Comment

Re: Proposed Revision to the Sentencing Guidelines

Dear Commissioners:

In response to the Commission's Request for Public Comment published in the June 1, 2014 Federal Register relating to "a study of antitrust offenses, including examination of the fine provisions in § 2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors)," 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. Summary

This filing makes the following points:

1. The Organizational Sentencing Guidelines policy to promote effective compliance and ethics programs in organizations has been an outstanding success.
2. Throughout the legal system generally and within the Department of Justice specifically, this policy has been endorsed and promoted.
3. The one anomaly has been the Antitrust Division, which asserts that antitrust violations are unique and has a one-size-fits-all policy of giving no consideration to any compliance program in any case for any company under any circumstances.
4. Based on the Antitrust Division's assertions, both the US Attorney's Manual and the Organizational Sentencing Guidelines have exceptions or special provisions so that antitrust compliance programs receive no credit or consideration.
5. There is no basis for the antitrust exception; none of the offered justifications holds up.
6. The antitrust exception is an anomaly that creates unexplainable inconsistency in the legal system and has undercut the development of effective antitrust compliance programs
7. The Sentencing Commission, through three simple changes, could help correct this flaw.

## II. 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 United States 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 Environmental and Natural Resources Division of the Department has promoted and recognized compliance programs in its enforcement decisions since even before the Organizational Guidelines took effect.[2] The Securities and Exchange Commission also considers compliance programs in its enforcement decisions.[3] For example, when developing whistleblower rules under the Dodd Frank Act, 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."[4]

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

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

[2] United States Department of Justice, Environmental and Natural Resources Division, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, July 1, 1991 http://www.justice.gov/enrd/3058.htm

> "It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion."
> . . .
>
> "The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit."

[3] 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* .

[4] 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.[5]

A very prominent recent example of this policy can be seen in the area of Foreign Corrupt Practices Act enforcement. In 2012 the Criminal Division and the SEC issued a joint guide on FCPA enforcement. This guide had an extensive discussion of compliance programs, providing detail on factors enforcers would consider in giving credit to compliance programs. As the Guide stated:

> "A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations.
>
> These considerations reflect the recognition that a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees," and they do not hold companies to a standard of perfection. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation."[6]

The approach to FCPA is particularly instructive, because the Antitrust Division has itself noted a significant degree of overlap between the two areas.[7]

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

[6] US Department of Justice and US Securities and Exchange Commission, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act 56 (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf

[7] See remarks of Gary Spratling, Deputy Assistant Attorney General, Antitrust Division, "International Cartels: The Intersection Between FCPA Violations and Antitrust Violations," at American Conference Institute, 7th National Conference on Foreign Corrupt Practices Act, Dec. 9, 1999, Washington, DC.:

> "The fact is that in today's global economy there is a recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act. A payment to a foreign official in violation of the FCPA may also be an

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,[8] to the OECD Working Group on Bribery's Good Practice Guidance,[9] that have much in common with the Sentencing Guidelines compliance and ethics program 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 compliance and ethics programs. They range from having open public hearings and forums on compliance programs,[10] to issuing instructions to enforcement personnel to consider such programs,[11] to having formal penalty policies that take programs into account.[12] 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 demonstrates that there is a key role for governments to promote ethics and compliance programs.

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act by an international bid-rigging, price-fixing, or market-allocation cartel in furtherance of its scheme injuring American businesses and consumers in violation of the Sherman Act."

. . . .

"We believe there are many potential overlaps between FCPA violations and international antitrust violations."

. . . .

"Multinational companies, through their corporate compliance programs, need to be alert to the potential overlap between FCPA violations and antitrust violations Corrupt payments to foreign government officials are often made to facilitate international bid-rigging conspiracies . . . ."

[8] 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

[9] 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

[10] 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 .

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

[12] See note 8, supra.

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 and directly conflicting 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 but then ignores those programs in its policies and by its actions[13] companies get the message that programs do not really count.

## III. The One Policy Gap

The success of the Sentencing Commission's leadership in promoting compliance and ethics programs has thus 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 a violation or cause a company to be first through the door to report a violation, it is simply a "failed program."[14] 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 massive 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 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 does reward good faith efforts by companies to prevent violations.[15]

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

[14] 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)

[15] Murphy, "The FTC and antitrust compliance programs," Compliance and Ethics Professional 49 (July/August 2012), available at http://www.joemurphyccep.com/wp-content/uploads/2012/08/Finalpublishedarticle_Murphy_ARTICLEcopy.pdf (addressing violations of orders and premerger notification requirements).

IV. Is antitrust so different from all other forms of corporate crime that it should have its own rules?

Is there, in fact, a strong policy basis for a complete exemption of all antitrust violations from the rest of the Department of Justice's endorsement of the Sentencing Guidelines broad policy to recognize and promote compliance and ethics programs? Here are the reasons that have been given by Division spokespersons to justify their contrary approach, and how they hold up to scrutiny.

1. *Antitrust usually involves senior people.* The big, global cartels typically do involve senior managers. But "usually" or "often" or "typically" means that this is not always the case. In fact, there can be violations that occur outside of the executive suite; for example this appears to have been the case in the municipal bonds case. In a competitive market, any sales person in any location can agree with his or her counterpart to carve up customers or rig bids. Moreover, the participation of senior people is nothing special in corporate crime – it happens with depressing regularity in many areas of corporate crime. One need only remember the patterns in corporate accounting fraud to realize this. So there is nothing special here. Moreover, the involvement of senior people is not a reason to dismiss the role of compliance and ethics programs; quite the contrary, programs need to be enhanced to deal with this element of risk.

2. *Cartel violations are secret.* This is a surprising argument, but one that has been asserted. Of course cartels are secret. But what other corporate crimes are committed with fanfare and press releases? Any corporate criminal is going to operate in secret. There is nothing special about antitrust crimes on this point. Business crimes are not easy to uncover, which is why compliance and ethics programs need to be aggressive and use diligent tools.

3. *Cartels involve multiple players.* This is another point that has been made often, but is a distinction without a difference. First, cartels are not unique on this point. Certainly it is the nature of bribery that it involves two or more players. Moreover, most serious corporate crimes for which companies face liability involve more than one lone individual. But the other reason this argument does not make sense as a distinguishing factor is that the more people there are involved in a crime, the more likely there will be leaks and telltale signs of improper conduct. Moreover, spreading the misconduct among competing companies makes it even harder to hide. Competitors do not trust each other, so they have to police their cartels. Plus, they need ways to communicate. All this activity leaves signs and markers that can be picked up in diligent enforcement and compliance work. Compare this to a small group of employees inside one company who are intent on breaking the law,

such as in various forms of criminal fraud – it is much easier for these insiders to cover up than it is to hide something like an antirust violation across multiple companies.

4. *Antitrust goes to the heart of the business.* This point, which is the only rationale spelled out in the US Attorneys Manual, seems to be an amalgam of the other points rolled into one. But it is equally difficult to follow this rationale. There have certainly been some major, global cartels that involved senior management and the entire business of a one-commodity company. But cartels run a broad gamut. A cartel can be two junior sales people in Iowa rigging a bid on one corn husker. It can be two competing office managers dividing up the market in a single county. There is nothing in such cases that goes to "the heart" of anyone's business.[16] And other forms of crime, such as bribery or government contract fraud can go to the heart of a business; the Siemens bribery case is a clear example. The problem with the Antitrust Division's argument on points like this is that the Division has a no-exceptions, treat-all-cases-the-same policy; compliance and ethics programs never count, whether the violations go to the heart or just to the big toe.

5. *Leniency makes all the difference.* It has also been asserted that the Antitrust Division should not consider compliance and ethics programs because leniency makes this unnecessary and giving credit for programs would undercut leniency. This is another one that does not sound credible on its face. First, enforcers in other areas of law routinely promote voluntary disclosures. The Criminal Division of the Department of Justice gets a steady supply of them, even though it also credits compliance programs. Other agencies' leniency programs do not get in the way of their considering compliance programs. Moreover, it is hard to even imagine how giving credit for compliance programs would affect a company's decision to voluntarily disclose. The Antitrust Leniency Program is the only way those managers involved in the crime can escape jail time. The fact that the government considers compliance and ethics programs is not going to keep those managers out of federal prison. So how would a compliance program cause these managers not to do the only thing that can avoid prison – participate in the leniency program?

   The reality is that leniency is all grown up now. When leniency was an infant program in 1993 there might have been some basis for handling it with special care. But in 2013 this program is a full-blown hearty adult that has straddled the globe and clearly no longer needs a nursery to thrive.

[16] In antitrust cartel cases, unlike monopolization cases, there is no market share or market power threshold. So even one rigged bid or one allocation scheme in one county is a criminal Sherman Act violation, no matter how small it may be relative to the market or the cartel participants' overall business.

Here is my experience as a compliance professional. Cartels are bad business, but they are not unique on the face of the earth. Any corporate crime can be difficult to detect; however, corporate crime is impossible to detect if we do not even try. There are some fairly sophisticated tools available today that can help find and deter deliberate violations such as cartels, bribery, government contract fraud and accounting fraud. Each type of crime is different, but none is so different that it should be carved out from the compliance and ethics program picture.

We should be as concerned about preventing antitrust crimes as we are about all other forms of corporate crime, and should recognize and promote effective compliance and ethics programs in antitrust as least as much as in other areas of criminal law. There is no reasonable argument for why the Antitrust Division alone is so different or what could justify two directly conflicting enforcement policies within the same Department of Justice. These confusing and unsupportable policy inconsistencies undermine faith in the legal system.

To make the circumstances even murkier, the Antitrust 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 and ethics 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.[17] It does not make sense in those mixed cases because it never made sense in any cases.[18]

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[17] United States v. Bridgestone Corp., case 4:11-cr-00651, Plea Agreement, (SD Tex. Oct. 5, 2011) at http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/10-05-11bridgestone-plea.pdf; see 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.

[18] The Division did recently propose an antitrust compliance program as a result of a conviction in a criminal case. While the proposed program showed an unusual degree of attention to the topic for the Antitrust Division, clear gaps in the proposal also seemed to reflect an absence of experience in dealing with compliance programs. For example, there was no reference to any form of compliance auditing, although prior Division spokespersons have always specifically called for this program step in their public statements, and the company was required to disqualify absolutely any potential new hire for a competitively sensitive position if the person was under indictment for an antitrust violation, notwithstanding the fact that indictments are not proof of a violation and the Equal Employment Opportunity Commission policy that arrests are irrelevant and that even convictions should not ipso facto prevent hiring without further analysis. See *United States v. AU Optronics Corporation* et al, Cr-09-0110 Si, Declaration Of Heather S. Tewksbury, N.D.

The Sentencing Guidelines have since 1991 also been subject to this confusing antitrust exception, albeit in a more discreet way. 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 a company benefitting under the Sentencing Guidelines from having a compliance and ethics 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 an antitrust compliance and ethics program in their dealings with the Antitrust Division or in judicial proceedings.

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 or published exposure drafts relating to antitrust compliance programs, it has provided 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.[19] In short, antitrust practitioners get no message that programs count for anything in dealing with the government.

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 study of the area. But there are indications that antirust compliance programs have atrophied in this environment. Antitrust compliance was once an innovative model in the compliance field. But today it may have lost that edge.[20]

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Cal., September 20, 2012, Exhibit C,
http://www.justice.gov/atr/cases/f286900/286934_7.pdf

[19] These are all steps that have been taken by other enforcement agencies, both in the US, and globally by other competition law enforcement agencies.

[20] 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,

My own personal observation is that antitrust compliance has become a backwater in compliance. Whereas when I started practice over three decades ago, it was an area of leadership and development, today there is a sense of ennui and hopelessness. The focus seems to be on the old-fashioned approach of simply preaching and paper. The negative policy of the Antitrust Division makes it much harder for compliance officers to make their case for dedicating more resources to company compliance programs. But this is not just the impression of practitioners. A recent survey by the Society of Corporate Compliance and Ethics brought out alarming results: an astonishing 64% of responding companies did not even do antitrust compliance auditing that would meet the minimum standards of the Sentencing Guidelines compliance program standards. And in the same survey, the overwhelming majority of respondents pointed to the importance of government recognition of programs as a motivating factor.[21] And I am 100% sure they all knew the details of the antitrust penalties and the leniency program, so it is difficult to argue that merely relying on penalties and leniency will improve compliance programs. What is even more remarkable is that the survey base, because it went through SCCE, was composed of companies that would already be doing the most advanced types of compliance work. So if 64% of this group did not do the minimum level of compliance audits, it is likely that in the corporate world in general an even smaller percentage take this basic compliance step.

In practice, I see much more attention to FCPA compliance, where the government focuses on compliance programs, and a draining away of attention, creativity and resources from antitrust where, to the Antitrust Division, compliance and ethics programs are ignored as irrelevant. If the Antitrust Division simply adjusted its policy to be clear that it would consider compliance programs the same way the rest of the Department of Justice does, it would then have the leverage necessary to influence companies to up their compliance game. This is essential if we are ever to get companies to put real diligence into their antitrust compliance programs and move beyond paper and preaching.

Today many antitrust compliance programs 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

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Corporate Compliance and What Practitioners Really Think About Enforcement, 78 *Antitrust Law Journal* 201 (2012*)*, http://www.americanbar.org/content/dam/aba/publishing/antitrust_law_journal/at_alj_ii_sokol.authcheckdam.pdf (noting that antitrust compliance appears not to be embedded in companies).

[21] See Murphy, "Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be", http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/ (June 20, 2012).

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.

## V. 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 compliance and ethics programs. This filing recommends the Commission remove this impediment to compliance and ethics 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 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 antitrust 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 and ethics 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 and ethics programs.

Language to implement these changes is attached as Appendix A

Respectfully submitted,

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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 and approve major 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."