DEPARTMENT OF JUSTICE

CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION

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"THE EXPERIENCE AND VIEWS OF THE ANTITRUST DIVISION"

By

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I. INTRODUCTION

Compliance programs have long been a feature of the antitrust enforcement landscape.[1] Historically, outside counsel, corporate counsel and corporate executives have acknowledged the value of basic, practical rules governing employee conduct and the importance of personnel training designed to reduce the likelihood of violations. With the adoption of the guidelines for the sentencing of organizations found in Chapter Eight of the United States Sentencing Guidelines, effective November 1, 1991, compliance programs (in Guidelines parlance: "programs to prevent and detect violations of law") now play a more important role than ever -- not only in prevention and sentence mitigation, but also in providing the organization with the opportunity for obtaining favorable treatment from the government. With respect to sentence mitigation, credit for an effective compliance program can reduce an organization's maximum antitrust fine by more than 50 percent -- which, of course, can translate into many millions of dollars.

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[1] For prior discussions about compliance programs and antitrust enforcement, see "Antitrust Compliance Programs: Are They Worth It? Between Prevention and Sentence Mitigation--Don't Forget Amnesty and Other Forms of Favorable Treatment by the Government," paper by Robert G. Bloch, Chief, Professions and Intellectual Property Section, and Gary R. Spratling, Chief, San Francisco Field Office, Antitrust Division, State Bar of California Annual Golden State Antitrust and Trade Regulation Institute (September 9, 1993); "Corporate Compliance Programs, Antitrust Enforcement and the New Organizational Sentencing Guidelines: A Prosecutor's Perspective," remarks by Robert E. Bloch, before the American Bar Association Annual Meeting (August 10, 1992); "Antitrust Compliance Programs Under the Guidelines: Initial Observation From the Government's Viewpoint," article by Neil E. Roberts, Chief, Legal Policy Section, Antitrust Division, Corporate Conduct Quarterly, Summer 1992; "The Importance of Deterring Antitrust Crime: Corporate Compliance Programs and Federal Antitrust Enforcement," remarks by James F. Rill, then Assistant Attorney General, Antitrust Division, before the Symposium on Antitrust and Association Law (February 20, 1992); "Corporate Compliance Programs and Federal Antitrust Enforcement: A Cooperative Approach to Deterring Antitrust Crime," remarks by James F. Rill, then Assistant Attorney General, Antitrust Division, before the Symposium on Antitrust Enforcement (March 19, 1991).

While the Sentencing Guidelines lay out in some detail the manner in which "effective" compliance programs are to be taken into account at the sentencing stage of a prosecution, they do not resolve all of the issues concerning when a compliance program is sufficiently "effective" to justify sentence mitigation. In addition, compliance programs can have major benefits, and pose certain problems, for organizations quite apart from sentencing. However, the manner in which federal prosecutors take compliance programs into account at the other stages of a prosecution can vary from component to component within the Department of Justice.

Thus, the purpose of my presentation today is to address four compliance program issues from the perspective of an antitrust prosecutor: First, what effect do compliance programs have on the Antitrust Division's exercise of prosecutorial discretion? Second, what is the Antitrust Division likely to require in a compliance program before acquiescing in a reduction in an organization's culpability score and corresponding fine in antitrust cases? Third, is sentence mitigation sufficient in antitrust cases to justify the cost and effort of a compliance program, and the risk of the self-reporting and cooperation required for full credit? And finally, are there even more important potential benefits to the corporation from having an effective compliance program than sentence mitigation?

II. PREINDICTMENT EXERCISE OF PROSECUTORIAL DISCRETION

Let's look first at the Antitrust Division's perspective on compliance programs and how that perspective affects the way we are likely to exercise our prosecutorial discretion.

From the standpoint of the Antitrust Division, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to avoid prosecution for them. Thus, the existence of a compliance program has a very limited role in how we exercise our prosecutorial discretion. Once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute the offense.

During the preindictment phase of a grand jury investigation, we frequently hear from defense counsel the argument that an organization should be excused from criminal charges for an individual employee's conduct when the individual acted without the company's knowledge, authority or approval, and in violation of the company's compliance program; thus, the employee's unlawful conduct should not be imputed to the organization. We also hear a variation on this argument to the effect that the government should not indict when the company has initiated a compliance program immediately after it discovered its employee's unauthorized conduct; thus, the corporation claims it has already taken adequate steps to ensure that a violation will not recur. The Antitrust Division does not give much weight to either argument for several reasons.

First, the legal basis for these arguments is not sound. Organizational liability is grounded upon the theory of respondeat superior, which holds a company vicariously liable for the acts of its employees taken within the scope of their actual or apparent authority. The fact that an employee's unlawful act may be contrary to company policy as expressed in a compliance

program does not affect the company's vicarious liability for that act. This is a long-standing position of the Division, and it has been consistently upheld in the courts of appeals.[2]

Second, to the extent that federal prosecutors allow failed compliance programs to excuse antitrust violations, we undermine our own efforts to deter crime. Were we to credit failed compliance programs at the charging phase, there would be less incentive for companies to improve their compliance programs. Potential criminal responsibility provides a corporation's management, board and shareholders with powerful, continuing incentives to improve a compliance program and its implementation. The ultimate goal, after all, is a compliance program that prevents crimes.

Third, decisions by the Antitrust Division not to prosecute based on our own perceptions of the adequacy of an organization's compliance program are potentially inconsistent with the Sentencing Reform Act's goal of eliminating unwarranted disparity in charging and sentencing. The Sentencing Commission has carefully considered what role compliance programs should play in the criminal enforcement process. This is also true with respect to the post-violation adoption of a compliance program by an organization. The Sentencing Guidelines already require organizations with 50 or more employees that lack effective compliance programs at the time of sentencing to be put on probation, and recommend that such organizations be required to

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[2]See United States v. Basic Construction Co., 711 F.2d 570, 573 (4th Cir.) (per curiam), cert. denied, 464 U.S. 956 (1983); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); accord United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989). See also American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

develop compliance programs under court supervision.[3] Thus, organizations that adopt post-violation compliance programs derive a benefit under the Guidelines of avoiding probation or having a compliance program imposed as a condition of probation. This appears to us to be a more appropriate manner of crediting the post-violation adoption of a compliance program than avoiding prosecution altogether.

III. ONCE PROSECUTED, COMPLIANCE PROGRAMS MAY REDUCE AN ORGANIZATION'S FINE

Although a compliance program will rarely prevent an organization from being prosecuted if it commits an antitrust violation, a sound compliance program may serve to reduce an organization's criminal fine range once it is convicted.

Organizational antitrust fines are derived under Chapter 8C of the Sentencing Guidelines by first determining a base fine amount -- which for antitrust violations will usually be 20 percent of the volume of commerce done by the organization that was affected by the violation. This base amount is multiplied by minimum and maximum multipliers set out in a table in §8C2.6 of the Guidelines to arrive at the fine range for the offense. (There is a special provision for the minimum and maximum multipliers for antitrust violations; I will discuss that provision and provide a more complete explanation of antitrust fine calculations later.) Which minimum and maximum multipliers are used depends on an organization's "culpability score" as determined under §8C2.5, and the culpability score depends in part on the existence of an effective -- and I emphasize the word "effective" -- program to prevent and detect violations of the law. An effective compliance program can reduce an organization's culpability score by 3 points and, hence, correspondingly reduce its criminal fine.

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[3] USSG §§8D1.1(a)(3), 8D1.4(c).

IV. MINIMUM COMPLIANCE PROGRAM REQUIREMENTS TO ENSURE FULL CREDIT FOR ORGANIZATIONS

A. Sentencing Commission Requirements

The Sentencing Commission set out in considerable detail what sort of program will qualify as an "effective" compliance program to reduce an organization's criminal fine range. It has described seven due diligence criteria under which to evaluate whether a compliance program has been reasonably designed, implemented and enforced.[4] The seven criteria are:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct;

(2) Specific individual(s) within the high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures;

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities;

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required;

[4] USSG §8A1.2, comment. (n.3(k)).

(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing, monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution;

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific; and

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law.

Even where a compliance program meets the seven criteria, it cannot be used to reduce an organization's culpability score if an individual within "high-level personnel" of the organization, an individual within "high-level personnel" of a unit of the organization within which the offense was committed where the unit had 200 or more employees, or an employee responsible for the administration or enforcement of the compliance program, participated in, condoned or was willfully ignorant of the offense.

Participation in an offense by an individual within an organization's "substantial authority personnel" (defined differently than "high-level personnel") results in a rebuttable presumption that the organization did not have an effective compliance program. Also, an organization may

not use its compliance program to reduce its culpability score if, after becoming aware of the offense, the organization unreasonably delays reporting it to the appropriate government authorities.

The Sentencing Commission describes the seven criteria as the "minimum . . . types of steps" that must be taken by an organization to claim credit for a compliance program. That, of course, raises the question: What, if any, additional steps do government antitrust enforcers believe should be taken by an organization in order to receive credit?

B. Likely Antitrust Division Requirements

The Antitrust Division's views and policies concerning credit for compliance programs are evolving and will continue to evolve as we gain experience with application of the Guidelines to compliance programs in particular factual settings. However, James F. Rill, former Assistant Attorney General of the Antitrust Division[5] and, more specifically, Neil E. Roberts, former chief of our Legal Policy Section,[6] have made some predictions about likely Antitrust Division requirements that we will want to see before agreeing that an organization's compliance program warrants sentence mitigation. I believe these predictions have real merit and I want to pass them on to you today.

First, the Division is likely to take quite seriously the Guidelines disqualification from compliance program credit of any organization whose "high-level personnel" (including individuals responsible for the administration of the compliance program) participated in, condoned, or were willfully ignorant of the offense. Since compliance programs are to be

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[5] Rill, see footnote 1, supra, February 20, 1992.

[6] Roberts, see footnote 1, supra.

designed to give an organization's managers significant, affirmative responsibilities in compliance oversight, the Division is likely to pursue potential disqualifications on this ground vigorously. Where an organization's high-level personnel are involved in the commission of a crime, that crime becomes a true corporate act notwithstanding the existence of a compliance program, and no reduction in the organization's fine is warranted.

Second, the Division will certainly hold any organization whose "substantial authority personnel" participated in an offense to the burden, placed upon it by the Guidelines, of overcoming a presumption that its compliance program simply was not "effective" and therefore the organization is not entitled to credit. The Guidelines definition of "substantial authority personnel" clearly encompasses typical antitrust perpetrators -- individuals with authority to negotiate or set price or bid levels.

Third, the Division is highly unlikely to credit "paper" compliance programs. Chief among the Division's principal concerns during the development of the Guidelines chapter on organizational sentencing was that substantial credit not be given for programs that rely primarily on paper -- such as memos enjoining personnel not to commit antitrust violations; that is, programs adopted without a real commitment to deterring offenses and without a real likelihood of heading them off. Communicating corporate policy, standards and procedures regarding antitrust compliance is, of course, an essential part of an effective program, but the Guidelines require far more before an effort can qualify for fine reduction. However, even a great proliferation of memoranda and meetings on compliance may provide little opportunity for an organization and its employees to effectively detect -- and thus deter -- violations of law. Such would be the case where a compliance program is structured to rely largely on the good faith of the very personnel that would be tempted to commit secretive violations, and on

personnel whose principal role is to urge compliance, but who themselves have no stake in the success of a compliance program.

Fourth, the Division is likely to credit highly an organization's affirmative steps to detect price fixing or bid rigging, steps premised on the possibility, or even the assumption, that education and admonition will not deter personnel determined, for whatever reason, to act in bad faith. An example of affirmative steps would be active monitoring of employee conduct -- of, say, particular pricing and bidding decisions and practices -- to improve the chance of detecting and deterring questionable conduct. Also, both regular and unannounced audits of price changes, discount practices and bid sheets, conducted by those familiar with the firm's past and present business practices and trained in recognizing questionable divergence, would be other examples of creditable affirmative action. An organization's ability to detect antitrust violations in its own operations in this way is probably far greater than the Division's, as long as the organization's auditors are competent and reliable.

Fifth, it is critical to have both regular (scheduled) and unannounced audits of front-line pricing and bidding personnel to test their level of understanding of the antitrust laws and their degree of compliance with a program's requirements and standards relating to prevention and detection, backed up by disciplinary mechanisms and potential penalties for failures.

Sixth, the elements of a compliance program, particularly the audit elements, should be "customized" -- that is, designed and targeted to the firm's specific organization, operation, personnel, and business practices.

Seventh, the Division is likely to examine closely the incentive structure of any compliance program that is proffered for credit under the Guidelines. Two types of incentives immediately come to mind: First, strong negative incentives directed toward persons in positions with potential to commit antitrust violations -- perhaps loss of position, and/or

forfeiture of benefits; and, second, strong positive incentives for reporting suspicious conduct directed toward employees who might become aware of violations -- including subordinate employees. Employees should receive explicit assurances that they will not be punished for reporting suspected antitrust violations to company compliance officials.

Eighth, and finally, a compliance program will not be credited if the organization becomes aware of the violation and there are unreasonable delays reporting it to government authorities. The Sentencing Commission has made a clear determination that having the ability effectively to detect violations of law is not sufficient to merit sentence mitigation, the knowledge gained must be shared promptly with law enforcement personnel.

NOTE: As discussed in Section V(D) below, a compliance program's ability to detect an antitrust violation early may have its greatest impact at the beginning of the enforcement process rather than at sentencing. An organization that detects its wrongdoing early and decides to voluntarily disclose the violation to the Division is likely to receive very favorable treatment -- including even complete amnesty.

In sum, the Antitrust Division's traditional reluctance to excuse antitrust violations entirely on the basis of proffered corporate good faith and compliance programs, while likely to continue, will not lead the Division to downplay well thought-out and implemented programs; the Division will recommend giving credit where credit is due. But if a compliance program boils down essentially to "we told them not to do it," the Division is likely to be less than impressed.

V. COMPLIANCE PROGRAMS, SELF REPORTING, AND COOPERATION: DO THE DISADVANTAGES OUTWEIGH THE BENEFITS?

A. Disadvantages

Inside and outside counsel for organizations point out that compliance programs and self-reporting have significant costs and disadvantages. Some of the most frequently cited disadvantages include:

- It is a major administrative burden and an expensive, difficult endeavor for an organization to put in place a compliance program and monitoring system that will satisfy the Sentencing Guidelines' and the government's requirements;
- Vigorous monitoring and auditing procedures are not only demanding, but they also may create a watchdog environment in the workplace and have a negative impact on internal relationships;
- Self-reporting exposes the corporation and its officers to potential criminal and civil liability that they otherwise might have escaped, particularly treble damage actions in the antitrust context;
- Exposing violations can lead to possible debarment or suspension by federal, state, and local authorities;
- Enforcing compliance programs can lead to suits for defamation and wrongful termination by disciplined or discharged employees;
- Shareholder derivative actions may be brought against the officers and directors of the corporation;

- Reporting violations uncovered through a compliance program may result in the possible loss of self-evaluative and attorney-client privilege and work product protection for internal audits and investigative reports; and
- In addition, there are some non-legal consequences, such as damage to the corporation's good name, loss of business, and possible adverse effects on employee productivity and employee morale.

For purposes of my talk today, I will only set out these frequently asserted disadvantages; I am not going to attempt to evaluate them. And while I do not intend in any way to belittle the difficulties that organizations face when implementing a truly effective compliance program or self-reporting violations uncovered by such programs, I believe that the wide range of benefits that organizations can derive from having such programs ultimately outweighs any disadvantages.

B. Principal Benefit: Prevention

Obviously, the principal benefit of an antitrust compliance program arises when the program actually works. A successful program prevents violations from ever occurring in the first place, and the organization and its officers are never faced with felony prosecution and conviction. The firm with a successful program does not have to worry about the burden, disruption, and costs of an antitrust investigation or litigation. The firm also does not have to worry about discussing plea agreements or negotiating other disposition alternatives with government prosecutors. Nor does the firm have to worry about the prison sentences likely to be imposed on its culpable officers or about calculating its criminal fine range under the Sentencing Guidelines and paying a minimum fine of 15 percent of the dollar volume of commerce done by it that was affected by the violation. Finally, the firm doesn't have to worry about treble-damage

awards to private plaintiffs, treble antitrust or false claims damage awards to the government, or the risks of suspension and debarment from doing business with federal, state and local government agencies.

Even if a compliance program is unsuccessful and a violation does occur, the program still may provide significant benefits at the time of sentencing and potentially greater benefits at other points in the enforcement process.

C. Benefit Upon Conviction: Sentence Mitigation

The benefit provided by an effective compliance program that is most likely to be considered by organizations in this post-Sentencing Guidelines era is the mitigation of an organization's criminal fine provided by USSG §8C2.5(f). The fine range for an organization under Chapter Eight of the Sentencing Guidelines is determined by an organization's culpability score and its corresponding minimum and maximum multipliers, which are applied to the organization's base fine. Culpability scores start at 5 points, and go up to a maximum of 10 points or down to a minimum of 0 points.

Reduction For Compliance Programs

An organization gets a 3-point reduction in culpability score if, notwithstanding the violation, it had designed, implemented, and enforced an "effective" compliance program, as defined in the Sentencing Guidelines. This 3-point reduction, depending on the amount of commerce affected by an antitrust violation, can be worth a fine savings of many millions of dollars. For example, let's assume a hypothetical organization that has more than 200 but less

than 1,000 employees in a medium-sized, multi-year antitrust conspiracy where the volume of commerce done by the organization that was affected by the violation totaled $40 million. Such an organization would have a culpability score of 8, and a fine range between $12.8 million and $25.6 million. The 3-point reduction for an effective compliance program would reduce the organization's fine range to between $8 million and $16 million, which means that its minimum fine would be reduced by $4.8 million and its maximum fine would be reduced by $9.6 million.

Reduction For Self-Reporting And Cooperation

The largest single reduction in culpability score available to an organization is the 5-point reduction for self-reporting and cooperation.[7] An organization can get a 2-point reduction for cooperation and acceptance of responsibility, and a 1-point reduction for just acceptance of responsibility. These reductions are separate and apart from the 3-point reduction for having an effective compliance program. In the case of our hypothetical organization, getting the 5-point reduction in culpability score for self-reporting rather than the 3-point reduction for having an

[7] USSG §8C2.5(g) of the organizational guidelines states:

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

effective compliance program lowers the fine range to between $6 million and $9.6 million, resulting in a savings from the original fine range of between $6.8 million and $16 million. It is important to note, however, that in order to be able to self-report a violation in sufficient time to take advantage of the 5-point reduction, an organization has to be aware that an offense has been committed. Having an effective compliance program in place is likely to provide an organization with the necessary knowledge concerning a violation at an early enough point in time to take advantage of the self-reporting reduction.

Reduction For Lower Volume Of Commerce Affected

Also, separate and apart from any reduction in culpability score for compliance programs, self-reporting, and/or cooperation, the compliance program that detects and stops a violation quickly in turn limits the volume of commerce affected by the violation and, hence, reduces the organization's criminal fine through reduction of the size of the base fine amount, not to mention the organization's future treble-damage exposure.

D. Valuable Benefits Between Prevention And Sentence Mitigation

Does the Floor On Fines in Antitrust Cases Mean That Sentence Mitigation is Not Sufficient to Justify the Effort of Compliance Programs and the Risks of Self-Reporting and Cooperation?

Although the combination of self-reporting and having an effective compliance program can result in an 8-point reduction to an organization's culpability score, the benefit provided by that reduction in terms of sentence mitigation is not as significant in the case of antitrust violations as it is for most other types of violations. There are two antitrust-only provisions found in §2R1.1(d) of the Sentencing Guidelines that, in combination, establish a special minimum fine in antitrust cases. The first provision is an instruction to use 20 percent of the volume of affected commerce, in lieu of pecuniary loss, in establishing a base fine. The second provision is that, whatever an organization's culpability score, neither the minimum nor maximum multiplier for an antitrust offense may be less than 0.75, whereas with other offenses, as culpability scores decrease, the minimum multiplier can go as low as 0.05. The net result of these two provisions is that there is a "floor" on the minimum fine in antitrust cases of 15 percent of the volume of commerce done by the organization that was affected by the violation.

The Guidelines' minimum multiplier of 0.75 for antitrust offenses dictates that an organization is subject to a minimum fine of 15 percent of affected commerce, no matter how exemplary its compliance program, how immediate its self-reporting, and how complete its cooperation. Indeed, a firm with no increase in its starting culpability score of 5 can get to nearly the minimum multiplier (0.80 instead of 0.75) with only acceptance of responsibility -- and without a compliance program, without self-reporting, and without cooperating in the

investigation. Thus, it is not surprising that some commentators ask: Do the Guidelines provide sufficient incentive for such actions -- particularly self-reporting, with its many collateral consequences?

Wrong Question! Focus Should Be On Beginning Of Enforcement Process, Not Sentencing.

The problem with such a question is that it is the wrong question to ask. The question focuses on the impact of compliance programs, self-reporting, and cooperation at sentencing, rather than on the impact of these actions at the beginning of the enforcement process. From the perspective of Antitrust Division prosecutors, self-reporting, cooperation and acceptance of responsibility have other, potentially far more important impacts than sentence mitigation. In assessing the benefits of compliance programs, self-reporting, and cooperation, counsel for the organization should not concentrate on the end of the enforcement process where the Sentencing Guidelines come into play, but instead should concentrate on the beginning of the enforcement process. That is where such actions by the organization have their real value.

Early Detection Of A Violation Creates The Opportunity To Obtain Favorable Treatment.

As I mentioned earlier, the principal benefit of a successful antitrust compliance program is, obviously, the prevention of a violation. If you can avoid violating the law in the first instance, you avoid having to deal with fines, imprisonment, damages and debarment entirely. The next most important benefit is that it enables the organization to detect the violation early.

Early detection, in turn, affords an organization the opportunity to consider the options of voluntary disclosure (self-reporting) and cooperation with the government at a time in the enforcement process, far in advance of conviction and sentencing, when such actions have the potential for very favorable treatment for the organization -- including even complete amnesty. If amnesty is not available, there remains a whole range of disposition alternatives with substantial benefits to the organization -- alternatives unavailable to the organization that does not detect the violation, and cooperate, early. It is these various advantages that I am now going to talk about.

Amnesty -- A Complete Pass From Prosecution.

If a compliance program fails to prevent a violation, but enables the organization to detect the violation early, come forward, and disclose the illegal conduct to the Antitrust Division, the organization may still be able to escape government prosecution. To look at the possibility of escaping criminal antitrust liability entirely, we have to look at the Division's Corporate Amnesty Policy (also known as the "Corporate Leniency" or "Corporate Immunity" Policy). Assistant Attorney General for Antitrust Anne Bingaman first announced a new Corporate Amnesty Policy at the annual ABA Meeting in August 1993.

Under the previous policy, which had been in effect for 14½ years,[8] the grant of amnesty was not automatic. It was dependent upon prosecutorial discretion based on a series of seven

[8] The Antitrust Division's original Corporate Leniency Policy was first announced in October 1978. See "The Disclosure of Antitrust Violations and Prosecutorial Discretion," remarks by John H. Shenefield, then Assistant Attorney General, Antitrust Division, before the 17th Annual Corporate Council Institute (October 4, 1978); "Trends in Criminal Antitrust Enforcement," remarks by Richard J. Favretto, then Deputy Director of Operations, Antitrust Division, before the 12th Annual Antitrust Institute of the Ohio State Bar Association (October 27, 1978).

factors, and it was available only to those who came forward before the Division had initiated an investigation. Assistant Attorney General Bingaman thought that the longstanding policy of denying amnesty to any corporation once an investigation was underway was too rigid and might be depriving the Division of additional cooperation that would, on balance, serve the public interest. Therefore, the policy was changed in several respects. There are three major changes:

- The first major change is: Amnesty is automatic if there is no pre-existing investigation. If a corporation comes forward prior to an investigation, it receives amnesty if it satisfies six criteria--actually five, in addition to coming forward before we have an investigation. The grant of amnesty is certain, no prosecutorial discretion involved. These six criteria are:

  1) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.

  2) The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity.

  3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation.

  4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

  5) Where possible, the corporation makes restitution to injured parties.

6) The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

- The second major change is: Amnesty is still available after an investigation has begun. If a corporation comes forward after an investigation has begun, it still may qualify for amnesty if it is in a position to offer the Division important and valuable cooperation. It must satisfy seven criteria in this situation, four of which are the same as under the automatic amnesty, the first two of which are the most significant: (1) It must be the first corporation to come forward and (2) the Division at that point does not yet have evidence that is likely to result in a sustainable conviction against the firm.
- The third major change is: If a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation, admit their involvement in the activity, and agree to cooperate, also receive automatic amnesty.

In addition, if individual executives of an organization seeking amnesty after an investigation has begun fully cooperate in the same manner, they will be given serious consideration for lenient treatment as well -- in the form of individual amnesty or individual immunity.

The impact of the amnesty program has been very significant. Prior to August 10, 1993, the effective date of the new corporate amnesty policy, 17 corporations applied for amnesty, 10 corporations received amnesty, and three

corporations inquired about the program but never formally sought admission into the program. That was over a period of 14½ years.

In the two years since the announcement of the new Corporate Amnesty Policy, 15 corporations have applied to the program, five have already received amnesty, one was rejected and seven remain pending, awaiting satisfaction of the conditions (it is a conditional grant; the amnesty is not complete until all of the conditions are satisfied).

That means that, in 14½ years under the old policy, 17 corporations applied and, in the first two years of the new policy, 15 corporations have already applied. So there has been a dramatic difference in activity under the new Amnesty Policy.

I should point out that, in addition to our Corporate Amnesty Policy, on August 10, 1994 Assistant Attorney General Bingaman announced that the Antitrust Division was establishing, for the first time, an Individual Leniency Policy that permits individuals to apply for leniency on their own behalf, not as part of a corporate proffer or confession. There are four conditions that must be met for an individual to qualify for leniency under this new policy:

1) The report of illegal antitrust activity must be made before the Division has begun an investigation.

2) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.

3) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation.

4) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

Any individual who does not qualify for leniency is considered for statutory or informal immunity on a case-by-case basis. Since the initiation of the individual leniency policy a year ago, two individuals have been granted leniency.

Getting back to corporate amnesty, note that whether or not an investigation has begun--that is, whether you are trying to qualify for automatic or alternative amnesty--only the first corporation to come forward gets amnesty. While some distinctions can be drawn between the criteria in the Sentencing Guidelines that will allow a firm to get credit for self-reporting, as compared to the criteria for automatic amnesty, the important thing is the high degree of similarity between those criteria. In most cases, if an organization qualifies for Guidelines' credit, it will also qualify for automatic amnesty.

Further note that sometimes amnesty might actually be more easily obtainable than a self-reporting adjustment under the Guidelines. Ironically, amnesty will be easier in two circumstances: (1) if we already have an investigation underway, you cannot qualify for self-reporting credit, but we have a new amnesty policy which specifically addresses that situation and allows for amnesty and (2) if a corporation does not report the activity promptly upon discovery, it is disqualified from receiving the self-reporting credit, but the automatic amnesty provision requires only that the corporation promptly terminate its part in the conspiracy, not promptly report, so once again it may be easier to qualify for amnesty. So, if we return to our earlier hypothetical, obviously if the corporation in our example receives amnesty, there will be no criminal fine at all, which is an additional $6 million savings from even the most favorable self-reporting reduction under the Sentencing Guidelines.

The Sentencing Commission, at least implicitly, also recognized the greater benefit to an organization for self-reporting at the beginning of the enforcement process. It took the Division's amnesty program into account in establishing the calculation construct for fines in antitrust cases. The Background Commentary to §2R1.1 (Antitrust Offenses) states:

> For an organization . . . the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge. (Emphasis added.)

Let me make one additional observation concerning the benefit of receiving organizational amnesty from the Division. Many federal and state regulations concerning suspension and debarment are brought into play when a company is charged or convicted of an offense involving fraud against the government, such as bid rigging a contract being let or financed by the United States or a state or local government. A company that receives amnesty from the Division and is never criminally charged is unlikely to face suspension or debarment, unlike its co-conspirators who may receive sentence mitigation but lose substantial future revenue from missed opportunities to bid on government contracts. Businesses that do significant business with the government should carefully consider the potential for suspension or debarment when considering whether to seek amnesty from the Division.

Downward Departure From Guidelines' Fines For Organizations That Provide Substantial Assistance To The Government.

Even if an organization comes in and does not meet the amnesty requirements, it may receive a fine below -- perhaps substantially below -- the Guidelines' minimum as a consequence of fully cooperating with the government in its investigation. There are very few options available to a judge to make a downward departure from the Guidelines' ranges, and one of those options expressly requires prior government approval before it can be considered by the court. Under §8C4.1, the court may depart downward if the defendant provides substantial assistance in the investigation or prosecution of another organization that, or an individual not directly affiliated with the defendant who, has committed an offense[9] -- but only if the government makes a motion requesting the departure. Once the motion is made, the government can advise the court of the value of the cooperation and recommend a specific reduced sentence, but, of course, the decision of whether and how much to depart is left to the discretion of the court.

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[9] USSG §8C4.1 of the organizational guidelines states:

Substantial Assistance to Authorities - Organizations (Policy Statement)

(a) Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant who has committed an offense, the court may depart from the guidelines.

(b) The appropriate reduction shall be determined by the court for reasons stated on the record that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the organization's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the nature and extent of the organization's assistance; and

(3) the timeliness of the organization's assistance.

A compliance program that results in the early detection of a violation affords an organization an opportunity to cooperate with the government at a time when its cooperation will qualify as "substantial assistance" and warrant a downward departure.

The record shows that the Antitrust Division, consistent with Guidelines policy, regularly seeks downward departures for defendants providing substantial assistance early in investigations, and that the departures have resulted in substantial reduction from the Guidelines' fine ranges.

In our previous hypothetical, which resulted in a minimum fine of $6 million, the Division, depending upon the value of the cooperation, might recommend a fine of $1 million for a corporation in those circumstances--$5 million less than the best possible result under the self-reporting clause of the Sentencing Guidelines.

Other Favorable Treatment By The Government For Organizations That Cooperate.

If an organization desires to cooperate, but doesn't come in early enough to qualify for a downward departure (i.e., the investigation has progressed to a point that the organization's cooperation can no longer qualify as "substantial assistance"), the government can still tailor a criminal settlement that is advantageous to the organization, and favorable relative to organizations that come in later. For example, under §1B1.8 of the Guidelines, the Government can agree that self-incriminating information provided by a cooperating defendant that was previously unknown to the Government will not be used in determining the defendant's applicable guideline range.[10]

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[10] §1B1.8 Use of Certain Information

(a) Where a defendant agrees to cooperate with the Government by providing information concerning unlawful activities of others, and as part of the cooperation agreement the government agrees that

In our hypothetical conspiracy, even though the Division may ultimately be able to prove $40 million in commerce, if the amount readily provable is $15 million at the time that the corporation comes forward and the additional volume of commerce is excluded from consideration under a §1B1.8 agreement, the lower volume of commerce becomes the basis for the Sentencing Guidelines calculation. In our hypothetical, that would result in a fine of $2.25 million instead of $6 million.

To sum up, in our hypothetical situation, a corporation whose compliance program failed faced fines of zero, $1 million, $2.25 million, $6 million, or $13 million -- depending on when in the enforcement process it exercised its option to self-report and cooperate with the Government. This is a graphic example of the principle that companies that come in early get better deals than companies that come in later, and the company that reports a violation before we have notice of it, and then cooperates, gets the best deal of all -- amnesty and zero corporate penalties.

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self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(b) The provisions of subsection (a) shall not be applied to restrict the use of information:

(1) known to the government prior to entering into the cooperation agreement;

(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);

(3) in prosecution for perjury or giving false statement;

(4) in the event there is a breach of the cooperation agreement by the defendant; or

(5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

But I have not yet exhausted the list of benefits that cooperating with the Division can bring for those companies that fail to qualify for organizational amnesty. What other favorable treatment is available?

Favorable treatment by the Division might include a government sentencing recommendation ("B type" plea agreement), or an agreed-upon sentence ("C type" plea agreement), at the low end of the guidelines range, or a recommendation or agreement that the fines be paid on an installment schedule, or an agreement not to recommend any particular fine. The Division might agree to inform other government agencies of a defendant's cooperation and ask that that defendant not be debarred from bidding on future government contracts. It might also include limiting the charges in the information/indictment. Thus, although Department prosecutors must ordinarily charge the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction, as required by the Principles of Federal Prosecution,[11] and inform the probation office of both charged and "relevant" (i.e., §1B1.3) conduct so that the applicable Guidelines range for sentencing would be unaffected, as required by Department policy,[12] we may also consider such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. Such considerations may result in a plea agreement limiting the scope of charges brought against the organization in the information/indictment. For example, the Division may limit the number of counts of the primary offense, the number of

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[11] U.S. Department of Justice, United States Attorneys' Manual, Title 9-27.310, 15 (1993) (Supplement to Principles of Federal Prosecution).

[12] Id., at Title 9-27.410.

related crimes charged, the time period or geographic scope covered, or the number of rigged bids or the volume of sales at fixed prices. In light of the prima facie or possible collateral estoppel consequences of a conviction on federal antitrust charges, organizations may benefit from the limitation of charges when it comes to defending possible private actions for treble-damages. Favorable treatment by the Division might also include assistance in reaching a "global" settlement.

VI. RECENT SENTENCING DEVELOPMENTS IN ANTITRUST CASES

A. Calculation Of The Volume Of Commerce "Affected" By The Violation

The antitrust sentencing guideline, Section 2R1.1, increases a defendant's base offense level based on the "volume of commerce attributable to the defendant" that was affected by the violation. 2R1.1(d). The Sixth Circuit recently issued a pivotal interpretation of the meaning of the phrase "volume of commerce attributable to the defendant" in a unanimous decision issued earlier this year in United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995).

Hayter Oil involved a conspiracy of gasoline "jobbers" in eastern Tennessee. These middlemen bought gasoline at pipeline terminals and transported it to regions where the big oil companies and independents did not operate stations. Consequently, a handful of men and women controlled the distribution of gasoline throughout much of eastern Tennessee. From 1984 until early 1989, the jobbers met periodically and negotiated fixed market-wide increases in retail gasoline prices. As in nearly all price-fixing conspiracies, the conspirators cheated on the agreement and prices occasionally were cut to attract sales volume. Uniform pricing was also disrupted by the introduction of mid-grade unleaded gasoline and the phasing out of leaded

gasoline toward the end of the conspiracy. Consequently, the evidence indicated that there were days or weeks at a time in which prices across the market were not uniform and arguably not agreed-upon.

The Hayter Oil indictment charged a single, continuing conspiracy. At sentencing, however, the defendant persuaded the district court that consumers were "affected" by the conspiracy only when sales were made at the fixed, higher prices. The district court then accepted defendant's assertion that the conspirators were successful in charging the agreed-upon prices only 40 weeks out of the five-year period charged in the indictment, or merely 17 percent of the time. Consequently, the court ruled that the volume of commerce attributable to the defendant was not its $4.2 million in sales during the five-year conspiracy period, as contended by the government, but only 17 percent of that number..

On appeal, the Division argued that the district court's interpretation of the guidelines was contrary to its plain language, inconsistent with the guidelines commentary, and contradicted by the per se rule, which relieves the government of the burden of attempting to reconstruct the day-to-day operations of a conspiracy to determine on which days the conspirators charged fixed prices. The Sixth Circuit agreed and reversed, ruling that the volume of commerce attributable to the defendant was all of its gasoline sales during the entire five-year period.

Section 2R1.1 defines "volume of commerce attributable to the defendant" to be a defendant's sales of goods or services "that were affected by the violation." The Sixth Circuit held that "the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific type of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price." 51 F.3d at 1273.

Noting that under the per se rule, the success of a conspiracy is irrelevant for establishing a Section 1 violation, the appellate court ruled that "it would be an anomaly to declare price-fixing illegal per se, without regard to its success, merely because of its anticompetitive effect, but to provide for a fine only if the price-fixing were successful." *Id*. at 1274. Under the district court's interpretation, a defendant who participated in an unsuccessful conspiracy would escape a fine completely.

Finally, the court pointed out that a price-fixing conspiracy "affects" a market from its inception and throughout its existence. The court explained that when competitors agree to stop competing, or when they charge prices below agreed-upon levels to punish cheaters, it can no longer be assumed that the purported competitors are charging free-market prices. Rather, the market is distorted by and prices are affected throughout the existence of the conspiracy.

B. Corporate Defendants Are Facing Stiffer Fines

The impact of the Hayter Oil decision on antitrust sentences is intensified by the organizational sentencing guidelines in Chapter 8, which did not go into effect until after the conspiracy in that case ended. This is because Section 8C2.4(a) sets the base fine at *the greatest of* the offense level fine table in Section 8C2.4(d), the pecuniary gain to the defendant, *or the pecuniary loss from the offense* caused by the defendant . Section 2R1.1(d)(1) instructs that for an antitrust offense, in lieu of pecuniary loss, use 20 percent of the volume of commerce affected by the offense in establishing a base fine. As discussed previously, the base fine may be reduced by as much as 25 percent when the minimum antitrust multiplier of .75 is used or raised by as much as a factor of 4 depending on a defendant's culpability score.

In November 1990, the maximum Sherman Act fine for a corporation convicted of a criminal antitrust violation was raised from $1 million to $10 million, while the alternative maximum fine of twice the gross pecuniary gain derived from the crime or twice the gross pecuniary loss caused to the victims of the crime found in 18 U.S.C. § 3571 continued to apply. The effects of this dramatic change in the statutory maximum penalty for a Sherman Act violation are now becoming apparent. In the past 14 months, five corporate defendants have paid fines of at least $4 million for single-count Sherman Act violations, and within the last two weeks an antitrust defendant agreed to pay a statutory maximum $10 million fine after pleading guilty to conspiring to fix prices and rig bids on the sales of explosives used in coal mining and quarry operations. The $10 million fine is the largest fine from a single defendant in a criminal antitrust case. It is instructive to examine how the $10 million fine was reached in the explosives case because the volume of commerce involved was not extraordinary, and we expect to see similar or greater fines in the near future.

In the explosives case, the parties reached a plea agreement which stipulated that the affected volume of commerce was approximately $50 million. Following the guidelines instruction to use 20 percent of the volume of affected commerce in lieu of pecuniary loss, the defendant's base fine was $10 million. The parties also stipulated that the defendant warranted a culpability score of 7, in part due to its timely and full cooperation with the investigation, resulting in a minimum/maximum multiplier of 1.4 to 2.8. Thus, the defendant's guideline fine range was from $14 million to $28 million. In this case, the Division agreed that the calculations of double the gain or double the loss would unduly complicate or prolong the sentencing process and that the $10million statutory maximum fine was appropriate.

As the calculation in the explosives case demonstrates, a $10 million fine for a corporate defendant can be reached in future cases with far less than $50 million in affected commerce. For example, a defendant who is convicted at trial and whose culpability score does not reflect credit for acceptance of responsibility or cooperation would be subject to a significantly higher culpability score and multiplier range. If the explosives defendant above had not provided timely and full cooperation, its culpability score would have been 9 resulting in a minimum/maximum multiplier of 1.8 to 3.6. Using the minimum multiplier of 1.8, a statutory maximum $10 million fine would have been required even if the volume of affected commerce was less than $28 million. Taking the maximum multiplier of 3.6 from this scenario, a $10 million fine would be within the guideline range even if the affected commerce dropped to less than $15 million.

As I stressed earlier, the Sentencing Guidelines were designed to reward companies if they have compliance programs that detect violations and than report wrongdoing and cooperate. Companies that do not report misconduct and are then caught will face severe fines under the Sentencing Guidelines -- even companies that do not have large sales.

VII. CONCLUSION

While a corporate compliance program benefits an organization most when it successfully prevents employees from violating the antitrust laws, even a failed compliance program may create significant opportunities and benefits for the organization. Those opportunities and benefits flow from a compliance program's early detection of a violation. More and more counsel for organizations realize that there is no future in waiting until the end of the line to come forward. They come forward while they still have some negotiating power; that is, when their cooperation will still be of value to the government. Organizations that come in early get better deals than those that come in later, and organizations that report violations before the government is aware of them, and then cooperate in the investigation, get the best deal of all: amnesty from

federal prosecution. In this setting, counsel for an organization, in assessing the benefits of a compliance program, self-reporting, and cooperation, should not focus on the benefits such actions can have at the end of the criminal enforcement process (sentencing); counsel instead should look to where those benefits are greatest: at the earliest stages of the enforcement process.

When an organization whose compliance program has failed is considering its options of self-reporting and cooperation, it should, rather than adding up the number of points its culpability score might be reduced, instead seize the opportunities for favorable treatment afforded by the early exercise of those options. The most favorable treatment is the potential for an organization to escape criminal liability altogether through the corporate amnesty program. Where amnesty is not available, self-reporting and cooperation in the early stages can still result in a government recommendation for a downward departure, or other favorable treatment, such as limited charges, reduced sentencing recommendations, or assistance in reaching global settlements. These benefits can be much more advantageous than those resulting from reductions in culpability score under the Guidelines.

The Antitrust Division has made strong, affirmative efforts not only to encourage organizations to implement effective compliance programs, but also to provide meaningful incentives for organizations to be responsible and forthright when those programs detect violations. The Division will give credit where credit is due. But organizations should be aware that, where they simply wait and seek only the Guidelines' corporate compliance benefits, the Division will strictly scrutinize their compliance program to ensure that it meets both the strict Guidelines' criteria and the Division's own requirements.