PROMOTING ANTITRUST COMPLIANCE
THE ANTITRUST DIVISION'S SUBTLE SHIFT REGARDING CORPORATE COMPLIANCE: A STEP TOWARD INCENTIVIZING MORE ROBUST ANTITRUST COMPLIANCE EFFORTS

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INTRODUCTION:

A surprising feature of many corporate compliance programs is their limited emphasis on antitrust. Compliance efforts are a key feature of modern corporate governance initiatives, and it stands to reason that such initiatives should include safeguards against the severe reputational and financial penalties that may arise from antitrust violations. Nevertheless, corporate antitrust compliance efforts often lag behind initiatives addressed to other high-risk legal areas, such as the Foreign Corrupt Practices Act. Some critics believe that the lack of emphasis on antitrust compliance results from the Antitrust Division's opposition to giving credit for compliance programs under the United States Sentencing Guidelines, which contrasts with efforts to credit effective compliance programs in the FCPA space. In a recent, positive shift, the Antitrust Division has begun crediting compliance in less formulaic ways. This article proposes that the Antitrust Division go further, by establishing a more concrete, transparent structure for crediting antitrust compliance. In addition, this article recommends changes to the Sentencing Guidelines to codify the role that compliance can play in mitigating criminal antitrust sanctions.

Part One of this article details the surprising lack of focus on corporate antitrust compliance despite the increased risks of criminal prosecutions and civil liability. This is in contrast to FCPA compliance which has, by all accounts, increased in response to heightened DOJ enforcement efforts. Part Two describes the Antitrust Division's historical treatment of corporate compliance and the tension between the Sentencing Guidelines' structure and the policies and incentives within the Antitrust Division, how this treatment diverges from the practices of the rest of the Department of Justice, and how the relative faltering of antitrust compliance may be attributable to this divergence. Part Three explains how, very recently, the Antitrust Division has begun departing from its historical practice by crediting compliance in less formulaic ways at sentencing. Part Four proposes that, moving forward, the Antitrust Division should continue to credit compliance at sentencing and adopt a more transparent approach to maximize its incentive effect on corporate antitrust compliance. Part Five proposes that the Sentencing Guidelines incorporate a mechanism for crediting compliance programs in a way that the Antitrust Division can support within the context of the leniency program and existing DOJ policy.

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I. CURRENT COMPLIANCE CULTURE

A. Antitrust Compliance—Big Risks But Little Recognition

Corporate compliance has become a central fixture of many modern corporate governance initiatives. Logic would thus dictate that antitrust compliance programs would be of particular concern to companies looking to minimize the steep risks and penalties inherent in criminal antitrust violations. The goal of all effective antitrust compliance programs is to curb the risk of collusive behavior by educating executives and employees concerning potentially anticompetitive conduct.[2] If effective, the benefits of antitrust compliance programs can be substantial. They may protect a company and its employees from massive and costly lawsuits by preventing antitrust violations altogether, and may also root out cartel behavior in its infancy, increasing the chances that a company will be the first to detect and report anticompetitive conduct and thus secure leniency from the Antitrust Division.[3]

Today, companies that collude with their competitors to fix prices, rig bids, or allocate markets face historically severe penalties from criminal antitrust enforcement in both the United States and abroad. Average total corporate fines for such criminal violations have steadily increased in the U.S. from $535 million between 2005 and 2008, to at least $1 billion in all but two years between 2009 and 2014.[4] The severity of criminal antitrust penalties has also increased for company employees. An average of 13 individuals per year were sentenced to prison in the U.S. for antitrust violations between 1990 and 1999, compared to the 44 individuals sentenced in 2014 alone. The average prison sentence also increased from eight months between 1990 and 1999 to 25 months between 2010 and 2014.[5] In addition to the increasing costs of government prosecution, there is also the virtual certainty of tag-along private litigation, which exposes companies to joint and several liability, treble damages, and counsel fees in connection with class action and opt out suits by direct and indirect purchasers—not to mention exposure to enforcement by the now extensive competition regimes across the world.

The increases in amount and severity of criminal antitrust sanctions can be attributed to a number of factors, including: statutory increases in maximum allowable penalties, the Antitrust Division's focus on international cases, which tend to implicate larger volumes of commerce, newfound attention paid by judges to the seriousness of antitrust violations, and increased utilization of the Antitrust Division's leniency program. The global reach of antitrust enforcement is also not limited to American enforcement. "Dozens of countries have effective and aggressive cartel enforcement programs,"[6] thus a violator may face stiff penalties in multiple jurisdictions.

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2 Brent Snyder, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the International Chamber of Commerce and United States Council of International Business Joint Antitrust Compliance Workshop: Compliance is a Culture, Not Just a Policy 1, 6 (Sept. 9, 2014) (transcript *available at* http://www.justice.gov/atr/public/speeches/308494.pdf) [hereinafter Compliance is a Culture].

3 *Id.* at 3.

4 *Division Update Spring 2015*, Department of Justice Antitrust Division, http://www.justice.gov/atr/division-update/2015/criminal-program-update (last visited June 16, 2015).

5 *Id.*

6 Snyder, Compliance is a Culture, *supra* note 2, at 3.

Given the current antitrust enforcement backdrop, one would expect companies to work diligently to improve their internal antitrust compliance protocols. However, critics and anecdotal evidence suggests this has not been the case. Indeed, instead of tracking the constant uptick in detection and prosecution of anticompetitive conduct over the past decade, corporate focus on antitrust compliance has never seemed to get off the ground in the same way as FCPA compliance. Although there has not been extensive study in this area, a 2012 survey indicates that 92% of companies discussed antitrust compliance in the company code of business conduct, whereas only 60% of those companies reported conducting any kind of antitrust compliance training program.[7] This means that a staggering 40% of companies had no substantial antitrust compliance program. And even for the subset of companies that require some antitrust compliance trainings, the effectiveness of those programs is questionable. For instance, a mere 22% of all respondents required compliance training for employees attending "high risk gatherings of competitors," like trade association meetings.[8] Furthermore, 64% of companies reported that they did not conduct comprehensive internal audits, a key safeguard that detects illegal activity.[9]

Thus, despite the substantial benefits of a successful antitrust compliance program—avoidance of high fines, prison for individuals,[10] legal costs, and treble damages in civil actions—antitrust compliance efforts remain largely deficient.

B. Rise In Other Forms of Compliance

In contrast to the antitrust arena, recent proliferation in FCPA enforcement has seen an attendant *increase* in FCPA corporate compliance programs. Like antitrust, criminal and civil enforcement of the FCPA has seen significant growth in recent years. A 1998 Amendment to the FCPA broadened the statute's jurisdictional reach,[11] and the DOJ has since prioritized FCPA enforcement, resulting in a spike of prosecutions.[12] While there were only five FCPA enforcement actions in 2004, that number ballooned to over 70 in 2010.[13]

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7 Society of Corporate Compliance and Ethics, Antitrust: A Dangerous But Underappreciated Compliance Issue 3 (March & April 2012), *available at* http://www.corporatecompliance.org/Resources/View/ArticleId/227/Antitrust-Compliance-How-Does-the-Government-Impact-Your-Program.aspx.

8 *Id.*

9 *Id.* at 6.

10 The Division will not prosecute cooperating officers, directors and employees of the leniency applicant. *See* Scott Hammond, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the National Institute of White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 2 (Feb. 25, 2010) (transcript *available at* http://www.justice.gov/atr/public/speeches/255515.pdf) .

11 Paul Enzinna, *The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Business*, Manhattan Institute (Jan. 17, 2013), http://www.manhattan-institute.org/html/ib_17.htm#.VgHBkU3H_mQ.

12 Lanny Breuer, Ass't Att'y Gen., Criminal Div., U.S. DOJ, Speech Presented at the National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) (transcript *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt).

13 Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 Int'l L. News 1 (2013) (*available at* http://www.americanbar.org/publications/international_law_news/2013/winter/the_increasing_risk_multijurisdictional_bribery_prosecution_why_having_fcpa_compliance_program_no_longer_enough.html). While the number of resolved FCPA enforcement actions in 2010 was higher than the combined total of all FCPA enforcement actions from its inception in 1977 through 2005, FCPA prosecutions then began to slow. In 2011 there were fewer than 50 cases. *Id.* Thus far in 2015 there have been only four. *SEC Enforcement Actions: FCPA Cases*, Securities and Exchange Commission, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited June 16, 2015).

Although the stakes are high for companies accused of FCPA violations, they are not nearly as high as in the antitrust context. For example, the four most recent settlements by FCPA corporate offenders included payments ranging from $3.4 million to $25 million.[14] By contrast, on May 20, 2015, four banks agreed to plead guilty to price fixing in the foreign currency exchange spot markets, and agreed to fines ranging from $395 million to $925 million.[15] And these massive differences in exposure are not limited to public enforcement: in contrast to antitrust, there is little risk of tag-along private civil actions in the context of the FCPA—under which there is no statutory private right of action[16]—and certainly none that can result in treble damages.

However, despite the less severe nature of FCPA penalties, unlike antitrust compliance FCPA compliance efforts have significantly expanded as enforcement efforts have increased. Although empirical studies on this issue are also scarce, the trend is apparent. Companies are investing large sums to minimize their FCPA exposure by implementing robust compliance programs, devoting "often scarce resources into the development, benchmarking, monitoring, and auditing of detailed and exhaustive FCPA compliance programs."[17] These programs have become more sophisticated, with companies overhauling "bulky" programs into "smarter risk-based compliance regimes."[18] Many companies have even adopted robust "enterprise wide 'zero tolerance' policies" regarding FCPA violations.[19] Other anecdotal examples of the split between antitrust and FCPA compliance abound. Two national compliance conferences in 2014 saw only a single panel on antitrust compliance, whereas both conferences held numerous FCPA related panels and programming.[20]

II. IMPACT OF INCENTIVES ON CORPORATE COMPLIANCE

The divergent trajectories of antitrust and FCPA corporate compliance may be attributable, at least in part, to the different treatment that antitrust and FCPA compliance programs have historically received by the Department of Justice throughout the investigation, prosecution, and sentencing of corporate offenders.

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14 *SEC Enforcement Actions: FCPA Cases*, Securities and Exchange Commission, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited June 16, 2015). BHP Billiton agreed to pay $25 million on May 20, 2015. FLIR systems agreed to pay $9.5 million on April 8, 2015. Goodyear Tire & Rubber Company agreed to pay $16 million on February 24, 2015. Walid Hatoum / PBSJ Corporation agreed to pay $3.4 million on January 22, 2015. *Id.*

15 Press Release, Department of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015) (*available at* http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas). Citicorp agreed to a $925 million fine. Barclays agreed to a $650 million fine. JP Morgan agreed to a $550 million fine. RBS agreed to a $395 million fine. *Id.*

16 *E.g., Lamb v Phillip Morris, Inc*, 915 F 2d 1024, 1029-1030 (6th Cir 1990).

17 Hassan, *supra* note 13.

18 Gavin Parrish & Greg Esslinger, *Beyond FCPA: A Look at the emerging compliance landscape*, Inside Counsel (July 15, 2014), http://www.insidecounsel.com/2014/07/15/beyond-fcpa-a-look-at-the-emerging-compliance-land.

19 David Kennedy & Dan Danielson, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Sept. 2011), at 11 (*available at* http://www.opensocietyfoundations.org/reports/busting-bribery-sustaining-global-momentum-foreign-corrupt-practices-act).

20 Robert Connolly, *In the competition for compliance $$, don't forget Antitrust. Here's Why . . .* , CartelCapers (October 8, 2014), http://cartelcapers.com/blog/competition-compliance-dont-forget-antitrust-heres/.

A. The Antitrust Division's Historical Position Against USSG Credit For Compliance

In policy speeches,[21] the Antitrust Division has expressed the view that compliance programs advance two significant objectives in antitrust enforcement: the prevention and detection of anticompetitive behavior. As to prevention, the Antitrust Division views an effective compliance program as one that successfully prevents unlawful conduct that could expose a company to significant criminal liability. In this sense "the true benefit of compliance programs" is to prevent antitrust crimes, "not to enable organizations that commit such violations to escape punishment for them."[22] As to detection, the Antitrust Division believes that a successful compliance program may lead to early detection of reportable conduct, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. As AAG Bill Baer has noted, "[e]ffective compliance programs . . . maximize the chance for a company guilty of price fixing to find out about the conspiracy early enough to qualify for corporate leniency or otherwise cooperate with our investigation."[23] But, equally important, "it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line."[24]

However, the Antitrust Division has historically rejected the proposition that compliance programs that were initially unsuccessful at detecting anticompetitive conduct can mitigate criminal penalties, and has thus refused to credit such compliance programs through the Sentencing Guidelines.[25] The Antitrust Division has offered three rationales for this often-criticized policy: (1) antitrust cases go to the heart of the corporation's business, (2) almost all antitrust violations involve high-level company personnel and rarely (if ever) involve "rogue" employees, and (3) the leniency program already rewards effective compliance programs. Further, certain provisions in the Sentencing Guidelines have reinforced the Antitrust Division's historical policy.

Antitrust Violations Go To The Heart Of The Corporation's Business. The Antitrust Division has stated that antitrust crimes are unique compared to other corporate crimes because they almost always implicate a corporation's entire culture, and thus it has refused to credit compliance programs that fail to detect antitrust violations in the first place.[26] The U.S. Attorneys' Manual specifically endorses this view, noting that although usually prosecutors should consider voluntary disclosure, cooperation, remediation or restitution

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21 Speechmaking is a means for the Division to publicly explain the "legal analytical frameworks" it employs. "The Division periodically publishes speeches, guidelines, policy statements, and closing statements that provide guidance on the legal and economic analytical frameworks the Division employs when reviewing proposed transactions and conducting investigations." Division Update Spring 2014, *supra* note 4.

22 William Kolasky, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the Corporate Compliance 2002 Conference: Antitrust Compliance Programs—The Government Perspective (July 12, 2002) (transcript *available at* http://www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective).

23 Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 7 (Sept. 10, 2014) (transcript *available at* http://www.justice.gov/atr/speech/prosecuting-antitrust-crimes).

24 Kolasky, *supra* note 22.

25 Snyder, Compliance is a Culture, *supra* note 2, at 7-8.

26 *Id.* at 5-7.

in determining whether to seek an indictment, these considerations "would not necessarily be appropriate in an antitrust investigation" because "Antitrust violations, by definition, go to the heart of the corporation's business."[27] "With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government."[28]

Antitrust Violations Usually Involve Senior Company Personnel. The Antitrust Division has been resistant to recognizing or crediting compliance programs in antitrust prosecution because, in the Antitrust Division's experience, antitrust violations have almost always involved high level personnel.[29] Indeed, the Antitrust Division has publicly acknowledged that it is almost never the case that a "rogue" employee, acting solely in his/her own self-interest, commits an antitrust violation.[30] Because the Antitrust Division's perspective is that top level executives are typically involved in anticompetitive schemes, any compliance program that exists in a corporation that commits an antitrust violation must not have had the true support of corporate leadership and, therefore, should not receive credit.

Leniency Already Rewards Effective Compliance. The Antitrust Division has historically taken the view that the steep penalties for antitrust violations and the opportunity to take advantage of the Antitrust Division's corporate leniency program provide sufficient motivation to companies to invest in antitrust compliance programs. As Brent Snyder, Deputy Assistant Attorney General for Criminal Enforcement for the Antitrust Division, recently explained:

> A company with at least a partially effective compliance program should be able to discover the cartel early, increasing its chances of seeking leniency before its co-conspirators do, and then promptly stop its participation, disclose its antitrust crimes completely, and fully cooperate with the Division's investigation.[31]

In other words, the Antitrust Division has viewed leniency as the benefit for those companies whose compliance efforts fall short of preventing a violation, but are able to detect the violation as a result of an effective compliance program.[32] The Antitrust Division has thus refused to credit or otherwise take account of corporate compliance

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27 U.S. Attorney's Manual, 9-28.400, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

28 *Id.*

29 Kolasky, *supra* note 22 ("I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of respondeat superior. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program.").

30 Like Garth Peterson, the FCPA defendant discussed in Part IIB, *infra*, a rogue employee acts unlawfully on her own accord, bypassing compliance safeguards without the knowledge or consent of her company.

31 Snyder, Compliance is a Culture, *supra* note 2, at 3.

32 *Id.* at 2-3.

programs because, in the Antitrust Division's view, a "truly" effective compliance program "would have prevented the crime in the first place or resulted in its early detection," thus there is no rational for permitting non-leniency applicants to escape criminal antitrust liability based on the preexistence of a compliance program that failed to fulfill these basic functions.[33]

Impact on Credit at Sentencing. One significant result of these historical Antitrust Division policies is that the Antitrust Division has categorically declined to account for the existence of or improvements to compliance programs when calculating corporate fines at sentencing. This approach has been further reinforced by the Sentencing Guidelines.

Under the Organizational Sentencing Guidelines, which apply to any corporate defendant, not just antitrust offenders, corporate fines are calculated by deriving a "culpability score" by adding up various aggravating factors and subtracting mitigating factors listed in the Guidelines. Higher culpability scores translate into larger fines.[34] Under §8C2.5(f), effective compliance and ethics programs are considered a mitigating factor, and reduce a culpability score by up to three points.

Receiving such a credit for antitrust crimes could account for savings in hundreds of millions of dollars in fine payments for corporate defendants. Take hypothetical Company Z that is pleading guilty to one count of price fixing. Under the guidelines, Company Z's base fine is $100 million. Company Z has greater than 5,000 employees and the company cooperated with the DOJ. Without crediting compliance, this could result in a fine range between $160 and $320 million. By contrast, given the same facts, if Company Z received a three point reduction in its culpability score for an effective compliance program, it would result in a fine range between $100 and $200 million (before any 5k departure under § 2R1.1).[35]

In reality, Company Z would never receive the additional three point reduction. Under previous versions of the Sentencing Guidelines §8C2.5(f)(3), a compliance program could not be considered effective, and thus not credited at sentencing, if an employee with substantial authority participated in, condoned or was willfully ignorant of the offense.[36] According to Antitrust Division policy, this describes the vast majority of cartel cases. Since "most antitrust crimes are committed by just such high-ranking officials," companies were automatically disqualified "from receiving any sentence mitigation, no matter how good its corporate compliance program."[37]

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33 *Id.*at 7.

34 *See generally,* Fed. Sentencing Guidelines, Chapter Eight—Sentencing of Organizations, *available at* http://www.ussc.gov/guidelines-manual/2010/2010-chapter8.

35 This assumes a $500 million volume of commerce.

36 Ethics Res. Ctr., The Federal Sentencing Guidelines at Twenty Years 27 (2012), *available at* http://www.ethics.org/files/u5/fsgo-report2012.pdf.

37 Kolasky, *supra* note 22.

In 2010, the United States Sentencing Commission softened this hard-line rule, transforming it into a rebuttable presumption.[38] It is now possible for a company to obtain up to a three point reduction in its culpability score as credit for an effective compliance and ethics program, even if a high-level person were involved.[39] Under §8C2.5(f)(3)(C), there are four conditions for receiving this benefit:

> (i) the individual or individuals with operational responsibility for the compliance and ethics program . . . have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);
>
> (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
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> (iii) the organization promptly reported the offense to appropriate governmental authorities; and
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> (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.[40]

Through this revision, the Commission removed the previous "credit blocker" language regarding high level personnel.[41] However, the Antitrust Division has not viewed this change as meaningful because unless a company was first into the Leniency Program it could not meet the requirement that "the compliance and ethics program detected the offense before discovery outside of the organization or before such discovery was reasonably likely."

Thus, although §8C2.5(f)(3)(C) affords up to a three point reduction in the culpability score for a company compliance program, as a practical matter, that change has not materially impacted the Antitrust Division's view about the unworkability of this provision in light of its Corporate Leniency Program.

B. Treatment of Compliance in Other Components of the DOJ

Since the Corporate Leniency Program is unique to the Antitrust Division, other components of the Department of Justice—which do not have that avenue for crediting compliance available to them—readily take advantage of the incentives offered under the Sentencing Guidelines for incentivizing compliance. For example, in 2012, the DOJ and SEC jointly published the "A Resource Guide to the US Foreign Corrupt Practices Act." The 120 page Resource Guide includes ten pages devoted exclusively to the role of compliance in FCPA investigations and prosecutions. The DOJ and SEC make clear that "a well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including

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38 Fed. Sentencing Guidelines §8C2.5(f)(3)(B)(i)-(ii), *available at* http://www.ussc.gov/guidelines-manual/2010/2010-chapter8.

39 Ethics Res. Ctr., *supra* note 36, at 27.

40 Fed. Sentencing Guidelines §8C2.5(f)(3)(C), *available at* http://www.ussc.gov/guidelines-manual/2010/2010-chapter8

41 Ethics Res. Ctr., *supra* note 36, at 27.

FCPA violations,"[42] unequivocally explaining the value of compliance. The Resource Guide explains the ways in which the agencies will consider compliance programs throughout an investigation as a means to encourage compliance:

> [The agencies] 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.[43]

In FCPA enforcement, compliance programs are factored into charging decisions, including in deciding whether to enter into a Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreement (NPA), and in imposing fines or other sanctions.[44]

The Criminal Division, the unit responsibility for FCPA enforcement, has routinely utilized DPAs and NPAs as a tool in FCPA enforcement.[45] Between 1993 and 2009, the Government Accountability Office reported that the Criminal Division entered into a total of 49 DPAs and NPAs.[46] Such agreements "encourage compliance" rather than merely "punish prior bad acts."[47] Their use "reflects a balanced judgment by the DOJ that compliance and self-monitoring are ultimately the surest route to effective enforcement."[48] Yet, DPAs and NPAs have their own complications. Because they are products of prosecutorial discretion, they are not the ideal vehicles for sending the types of clear, predictable signals to the business community to incentivize investment in robust compliance. Further, once DPAs or NPAs are signed, companies become subservient to the Division, with prosecutors playing the role of probation officers in monitoring corporate compliance efforts for a designated period of time. For example, Barclays entered into a non-prosecution agreement with the Criminal Division of the DOJ related to the bank's conduct in the LIBOR conspiracy. The NPA had a two year term, during which Barclays agreed to "further strengthen" its compliance and internal controls, and was prohibited

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42 Crim Div. of the U.S. DOJ & Enforcement Div. of the U.S. SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act 56 (Nov. 14, 2012), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter Resource Guide].

43 *Id*.

44 *Kennedy*, *supra* note 19, at 29.

45 The Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(2) gives the government the power to enter into DPAs and NPAs. NPAs consist of a letter from the government signed by both parties, and no criminal charge, guilty plea, or conviction is required. In comparison, DPAs require that the government file criminal charges, and declines to prosecute, contingent upon the offending company fulfilling its obligations set forth in the agreement. A company with a DPA usually has more "comprehensive and onerous" obligations than a company with a NPA. In both instances, the agreement is usually contingent on significant compliance efforts, often overseen by an independent monitor. *See, e.g.*, Kellie Lerner and Elizabeth Friedman, *When You Lose the Race to Corporate Leniency*, Law360, Mar. 15, 2013, http://www.law360.com/articles/424203/when-you-lose-the-race-to-corporate-leniency

46 Government Accountability Office, DOJ Has Taken Steps To Better Tracks Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness 14 (Dec. 2009), *available at* http://www.gao.gov/new.items/d10110.pdf.

47 Kennedy, *supra* note 19, at 13.

48 *Id*.

from committing any U.S. crime during that time.[49] Three years later, Barclays pled guilty to participating in the alleged foreign exchange conspiracy, and some of the alleged illicit conduct had occurred during the term of the NPA. The government exercised its discretion and declined to prosecute the bank for the breach of the agreement. Instead a penalty of $60 million was negotiated.[50]

Furthermore, the DOJ has also considered a company's track record of compliance in deciding whether to move forward in prosecuting a company. In 2012, the Department of Justice declined to prosecute Morgan Stanley for an FCPA violation. Garth Peterson, a Morgan Stanley employee, circumvented Morgan Stanley's internal controls to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese official of a state-owned enterprise with whom he had a personal friendship. The DOJ charged Peterson with FCPA violations, but declined to prosecute his employer Morgan Stanley, specifically crediting Morgan Stanley's strong compliance program.[51] The Department of Justice noted that Morgan Stanley constructed and maintained a system of internal controls (i.e., a compliance program) which provided reasonable assurances that its employees were not bribing government officials.[52]

The FCPA Resource Guide acknowledges that "no compliance program can ever prevent all criminal activity by a corporation's employees," and companies will not be held "to a standard of perfection."[53] The DOJ considers and integrates compliance into the entire FCPA enforcement process and, as discussed above, this has resulted in many noting an increase in company resources being put towards FCPA compliance efforts.

C. The Tension Between the Antitrust Division's Corporate Leniency Policy and Creating Incentives At the Penalty Phase

In the past two decades of antitrust enforcement, the emphasis on leniency, "combined with dramatic increases in the largest fines, has led to the demise of many cartels that had negatively affected global markets." Despite the incredible progress in fighting cartels, "there are limitations to the effectiveness of these policies as currently designed" because "cartels continue to form."[54] Part of the problem, as discussed in Part IA, *supra*, is that the emphasis on and investment in corporate antitrust compliance programs is not keeping pace with the upward trend in enforcement and sanctions.

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49 Non-prosecution Agreement at 3, *United States v. Barclays PLC*, *available at* http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf.

50 Plea Agreement, at 9 *United States v. Barclays PLC* (*available at* http://www.justice.gov/file/440481/download) [hereinafter Barclays Plea Agreement].

51 Philip Urofsky et. al., *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken-the Fallacies of Reform*, 73 Ohio St. L.J. 1145, 1155 (2012); *See also*, Press Release, Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by the FCPA (Apr. 25, 2012), *available at* http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required [hereinafter Morgan Stanley FCPA Press Release].

52 Morgan Stanley FCPA Press Release, *supra* note 51.

53 Resource Guide, *supra* note 42, at 56.

54 Margaret C. Levenstein & Valarie Y. Suslow, Cartels and Collusion: Empirical Evidence, in Oxford Handbook of International Antitrust Economics

Critics believe that the Antitrust Division's historical failure to take account of compliance programs of non-leniency applicants at any point in criminal antitrust prosecutions may be a contributor to the current state of antitrust compliance.[55] The few studies in this area indicate that an "overwhelming majority" of company respondents pointed to government lack of recognition of compliance programs as a motivating factor in their compliance decisions.[56] Not every compliance program will prevent or immediately detect all collusive behavior, yet the Antitrust Division will not credit compliance otherwise. Yet, while it is true that the ultimate compliance incentive is the Antitrust Division's Corporate Leniency Program, the disparity between corporate efforts to implement FCPA and antitrust compliance programs suggests that there is still room for even greater incentives in the antirust space.

III. THE ANTITRUST DIVISION'S CHANGING POSITION ON CREDITING COMPLIANCE

A. Signals that the Division May Begin Crediting Significant Improvements to Compliance Programs when Recommending Fines at Sentencing

While the Antitrust Division long maintained a policy of refusing to credit compliance directly in any phase of the antitrust enforcement process, the Antitrust Division's recent remarks and actions make clear that this approach is evolving. In September 2014, top Antitrust Division officials gave public remarks indicating that it was reconsidering its resistance to crediting compliance in antitrust enforcement. DAAG Snyder noted that while no new policies had been formalized, the Antitrust Division was "actively considering ways in which [it] can credit companies that proactively adopt or strengthen compliance programs after coming under investigation."[57] He cautioned that any acknowledgement of compliance in the enforcement process would require a company to demonstrate that "its program or improvements are more than just a façade . . . [T]rue compliance starts at the top, is not optional, and is part of the company's culture."[58]

Less than one year later, for the first time in modern history, the Antitrust Division openly credited a non-Leniency company for implementing an effective compliance program after the start of an investigation. As noted above, on May 20, 2015, Barclays PLC and four other banks entered into plea agreements with the DOJ in the FX investigation. The Barclays PLC plea agreement contained a single sentence that immediately gained notoriety in the antitrust community because it acknowledged and credited post-investigation improvements to Barclays' compliance program:

> The parties further agree that the Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense.[59]

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55 Society of Corporate Compliance and Ethics, *supra* note 7, at 6.

56 *Id.*

57 Snyder, Compliance is a Culture, *supra* note 2, at 9.

58 *Id.*

59 Barclays Plea Agreement, *supra* note 50 at 16.

This brief sentence indicates that the substantial improvements Barclays made to its corporate compliance program, coupled with its cooperation efforts, caused the Antitrust Division to reduce its recommended fine down to $650 million.[60]

Since the Barclays plea was announced, the Antitrust Division has provided several public statements about its decision to credit Barclays' compliance efforts. At the Sixth Annual Forum on International Antitrust Issues in Chicago on June 8, 2015, DAAG Snyder noted that while "it can be challenging to separate the rhetoric from true commitment" when evaluating improvements in compliance programs, there were "demonstrable differences" which separated Barclays' compliance efforts from the other banks prosecuted as part of the FX conspiracy.[61]

In a speech on June 11, 2015, at the ABA Americas Cartel Panel in Brazil, DAAG Snyder further elaborated on the steps Barclays took that resulted in the compliance credit, indicating that new management had embraced compliance and created accountability at the highest levels of the company.[62] He also enumerated several specific attributes of well-run compliance programs. He remarked that compliance trainings should be innovative, interesting, and proactive; that the company should monitor and give feedback to employees who are working in areas of the company particularly vulnerable to anticompetitive conduct; and suggested that compliance departments could set up an internal anonymous hotline for employees to report possible violations.[63]

And most recently, at the Annual Global Antitrust Enforcement Symposium at Georgetown on September 29, 2015, DAAG Snyder announced that the Antitrust Division had given KYB Corp. a discount on its $62 million fine for price-fixing shock absorbers because it adopted an effective compliance program. See http://www.mlex.com/US/Content.aspx?ID=723322 (Sept. 29, 2015). Although Snyder declined to provide details about KYB's compliance program, he stated that "where we can see that the company has fundamentally taken steps to change its business culture and you can see actual results from the company's efforts in that regard, we have indicated a willingness to credit that in connection with sentencing and have done so a couple of times over the last few months—and anticipate that we will be doing so again in the not-so-distant future." *See Id.*

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60 Barclays further agreed that its FX trading and sales practices and collusive conduct violated a principal term of its June 2012 non-prosecution agreement resolving the department's investigation of the manipulation of LIBOR and other benchmark interests rates. Barclays thus also agreed to pay an additional $60 million criminal penalty based on its violation of the non-prosecution agreement. *Id.* at 9-10.

61 Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at Sixth Annual Chicago Forum on International Antitrust 7 (June 8, 2015) (transcript *available at* http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago) [hereinafter Sixth Annual Chicago Forum].

62 Brent Snyder, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Division, address at ABA Americas Cartel Panel, JW Marriott Hotel, Rio De Janeiro, Brazil (June 11, 2015) [hereinafter ABA Americas Cartel Panel] (notes on file with author).

63 *Id.*

B. Other Signals that the Antitrust Division's Stance on Compliance is Shifting

The language in the Barclay's plea and related remarks by Antitrust Division officials are the strongest indicators of internal Antitrust Division policy shifts concerning recognition of antitrust compliance programs. However, these are not the only signals of a shift in the Antitrust Division's historical stance on antitrust compliance.

For instance, the Antitrust Division may also be taking greater count of compliance at the charging stage. At the Antitrust Spring Meeting, the Antitrust Division noted the door is "open a crack" to a case where a low-level rogue employee is the sole actor charged in a price-fixing case.[64] As discussed in Part IIA, *supra*, by charging an individual price-fixer and declining to pursue a case against that individual's company, the Antitrust Division would presumably be acknowledging that the company had sufficient compliance procedures in effect that were circumvented by a rogue employee. However, this small acknowledgement by Snyder is not likely to result in meaningful changes in the Antitrust Division's practices: Snyder has also recently compared rogue employees in antitrust cases to Bigfoot, "often rumored but seldom seen."[65]

At bottom, the sentencing credit awarded to Barclays and other recent actions indicates that the Antitrust Division's historical view of corporate compliance has shifted, and that it may be prepared to reward companies that improve their compliance programs post-violation. This position has a very different focus than an analysis under the Sentencing Guidelines, which rewards pre-existing corporate compliance programs. It allows the Antitrust Division to give credit under other sentencing provisions, such as 18 U.S.C. §§ 3553(a), without conceding that it is possible for a non-leniency applicant to have an effective compliance program when it failed to discover the conduct in the first instance.

While crediting compliance without having to do so under the specified Guidelines' provision helps the Antitrust Division balance its policy concerns with its apparent desire to credit corporate defendants beyond the leniency applicant, it gives little insight into what it takes to satisfy the Antitrust Division in that context. And nothing about the recent credit given by the Antitrust Division suggests that any articulation of the requirements necessary for securing compliance credit are forthcoming. Thus, while these shifts in the Antitrust Division's position regarding compliance are apparent to attentive antitrust counsel, they have, for the most part, been slow to recognize by the business community at large. Accordingly, many companies and their corporate counsel remain uncertain about the circumstances in which the Antitrust Division may be willing to credit antitrust compliance programs going forward. While the Antitrust Division may have an "I'll know it when I see it" mentality about crediting compliance, companies need transparency and structure to appreciate the necessary steps that will lead to compliance credit. And the Antitrust Division is no stranger to witnessing what success can come from having transparent and concrete guidelines. Indeed, the Corporate Leniency Program is a shining example of just that.

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64 Robert Connolly, *Some Highlights from the ABA Antitrust Spring Meeting*, CartelCapers (April 20, 2015), http://cartelcapers.com/blog/some-highlights-from-the-aba-antitrust-spring-meeting/.

65 *Id.*

IV. SHORT TERM SOLUTION: TURN AD HOC AND LESS FORMULAIC PRACTICES INTO EXPLICIT POLICIES

To better incentivize compliance in the short term, the Antitrust Division should turn its ad hoc practices into transparent policies. The Antitrust Division has already demonstrated that it has an available mechanism for crediting certain compliance programs at sentencing under 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572. Accordingly, the Antitrust Division could take a number of short-term steps to increase transparency and improve compliance incentives.

First, the Antitrust Division should take additional steps to publicly explain its new perspective on compliance. Instead of subtle references buried in plea agreements or ad-hoc exercises of prosecutorial discretion, the Antitrust Division should take advantage of the momentum created by this recent, positive shift and promulgate guidelines that will more concretely incentivize corporations to implement and maintain robust compliance programs. While the DOJ cannot comment specifically on the Barclays plea until the company has been sentenced, the Antitrust Division could make an official policy statement explaining generally its approach to compliance and sentencing. There have certainly been hints in recent public pronouncements and comments to the press about what the Antitrust Division may be looking for, but the time is ripe for more transparency. These factors should be clearly described and publicly disseminated by the Antitrust Division.

Second, the Antitrust Division should draw upon its vast experience to assemble and disseminate the attributes of corporate compliance programs that it determined were successful or substantially improved. It need not create a "one size fits all" compliance policy; but could simply set out the types of programs and qualities that have worked, and share that with the antitrust community.

Third, as in the Barclays plea, the Antitrust Division can operationalize these policy changes in the short term by continuing to recommend credit for exceptional existing compliance programs or marked improvements to compliance programs under 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572(a).[66] Crediting of compliance should be both "backwards facing" (i.e. applied to existing compliance programs that were well-conceived and implemented, but failed to detect the instant offense) and "forwards facing" (i.e. applied to improvements to compliance made in response to the discovery of the crime). To only

66 In sentencing an organization, a judge calculates a fine range based on the defendant's culpability score, calculated under the Sentencing Guidelines. Then, the judge considers if any of the § 3553(a) and § 3572 (a) factors are applicable, which gives the judge discretion to consider the individual nature of the defendant. By invoking these two provisions, the judge can set the fine above or below that guidelines range. *See* USSC, Guidelines Manual, Chapter 8: Organizational Defendants, *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8 (§8C2.8: "Determining the Fine Within the Range (Policy Statement) (a) In determining the amount of the fine within the applicable guideline range, the court should consider: (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization."; Commentary to §8C2.8(a): "Subsection (a) includes factors that the court is required to consider under 18 U.S.C. §§ 3553(a) and 3572(a) as well as additional factors that the Commission has determined may be relevant in a particular case.").

consider "forward facing" compliance, as currently supported by the Antitrust Division,[67] would misalign incentives by causing companies to delay investing in antitrust compliance programs until the Antitrust Division detected a crime—which is the only way a non-leniency applicant could receive compliance credit at sentencing. To encourage up-front investments, pre-existing compliance programs, i.e., those in existence prior to action by the Antitrust Division, should be credited, when deserving.

More specifically, the existence or improvements to compliance programs fit neatly within two sub-sections of § 3553(a). Section 3553(a)(1) provides that judges should consider "the nature and circumstances of the offense and the history and characteristics of the defendant." The language in this section is very broad, allowing for the implementation of a compliance program to be part of the characteristics of an offending company.

Section 3553(a)(2)(B-C) requires that judges consider if the sentence imposed will "afford adequate deterrence to criminal conduct," and "protect the public from further crimes of the defendant."[68] In the antitrust context, crediting meaningful compliance by reducing fines would further deterrence and prevention. If companies receive credit for improvements to their compliance program, it sends a powerful signal to other corporations that the Antitrust Division and the courts will reward robust compliance programs. The stronger a compliance program, the greater likelihood that a company will not engage in pernicious anticompetitive behavior.

Furthermore, 18 U.S.C. § 3572(a) enumerates factors that can impact the amount, time for payment and method of payment of a fine. Section 3572(a)(8) requires that, for organizational defendants, judges consider "any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense." Improvements to compliance fit squarely within § 3572(a)(8), because it is an effort by a company to prevent future anticompetitive conduct.

In the Barclays FX plea agreement, the Antitrust Division provided a pathway grounded in the current law for compliance to be recognized at sentencing. Formalizing and explaining the policy will send a clear message to companies that their compliance efforts may help them mitigate their antitrust penalties, thus incentivizing corporate compliance.

V. LONG TERM SOLUTION: PROPOSED AMENDMENT TO SENTENCING GUIDELINES

While in the short term, with clear policy announcements, invoking § 3553(a) and § 3572(a) provides an opportunity for the Antitrust Division to acknowledge the importance of compliance at sentencing, ultimately, the Sentencing Commission should

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67 Snyder, Sixth Annual Chicago Forum, *supra* note 61 ("It is important here to distinguish between "backward looking" and "forward looking" compliance efforts. I do not mean that we are now willing to credit "backward looking" compliance efforts—preexisting compliance programs that failed to deter or detect the illegal cartel conduct. The U.S. Sentencing Guidelines sets out how earlier compliance efforts should be credited. A compliance program that fails to deter or detect cartel behavior cannot qualify for that credit.")

68 *See* 18 U.S.C. § 3553(a)(1); 18 U.S.C. § 3553(a)(2)(B-C)

amend the guidelines to explicitly allow up to a 2 point penalty reduction for an effective compliance program. Such a revision is necessary to standardize the role that compliance plays in the sentencing process, ensuring consistency across like-situated companies. Providing this type of certainty and fairness in the sentencing process is in fact the mission of the Sentencing Commission and the goal of the Guidelines.[69]

As discussed in Part IIA, *supra*, while the normal credit for an effective compliance program is three points under the Guidelines, the Guidelines foreclose any such point reduction for an antitrust compliance program because of the Antitrust Division's policies and the structure of the leniency program. A second or third-in-the-door company cannot meet the requirement in the Guidelines that its compliance program "detected the offense before discovery outside the organization or before such discovery was reasonably likely." The very existence of a leniency applicant means that no other company can qualify for compliance credit. However, as discussed above, critics have posited that the Antitrust Division's historical refusal to provide any compliance credit to non-leniency applicants may have contributed to a relative stagnation of antitrust compliance efforts. Accordingly, the Guidelines should be amended to permit companies to obtain up to a two point reduction for their compliance and ethics programs in certain circumstances.

The current all-or-nothing approach to compliance credit does not acknowledge that while compliance may be imperfect, it may still be effective and worthy of credit. The current scheme sends the message that any compliance effort short of perfection is not worth a company's resources. Partial credit could be given in situations, like the following:

- A company discovers cartel activity through its compliance program, investigates and reports the violation, without ever knowing that the Antitrust Division had already accepted a co-conspirator into its leniency program.
- The violation is discovered without self-reporting, but between the time of discovery and sentencing the company has implemented a robust compliance program and taken legitimate steps to curb future violations.
- A company has a pre-existing (though imperfect) antitrust compliance program, is a first time offender, and shows that it intends to improve its compliance policy to better detect future violations.

Permitting up to a two point reduction, instead of a three point reduction, would achieve the goal of incentivizing companies to adopt robust compliance programs while acknowledging that any compliance program that failed to prevent or first detect collusive behavior does not deserve full credit at sentencing.

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69 United States Sentencing Commission, An Overview of the United States Sentencing Commission 1, *available at* http://isb.ussc.gov/files/USSC_Overview.pdf ("The sentencing guidelines established by the Commission are designed to . . . provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors.").

Proposed Amendment to the Guidelines:

Any revision to the sentencing guidelines should make clear that a company can qualify for a partial compliance credit, notwithstanding that they did not attain leniency. We propose that the following new language be added to § 2R1.1: "(d)(4): When applying § 8C2.5(f)(3)(C), items (ii) and (iii) of that section may still be satisfied despite another party's qualification for leniency for overlapping conduct under the Antitrust Division's Corporate Leniency Policy."

We further support adding the following limiting language to the comments in § 2R1.1: "under no circumstances may an organization receive greater than a 2 point penalty reduction in the circumstances described in (d)(4)."

Finally, the following point structure could be added to the comments to evaluate a company's qualification for up to a 2 point reduction under the Guidelines:

- Effectiveness of Compliance Program
  - The company discovered the violation through its compliance program, and investigated and reported the violation independently without knowing that the Antitrust Division had already accepted a co-conspirator into its leniency program. (subtract 2 points)
- Quality of Compliance Program
  - The company had a robust compliance program prior to the violation, which included all of the following: (1) commitment of senior management to Antitrust compliance; (2) participation of all employees in compliance efforts; (3) proactive compliance through monitoring and auditing high risk activities; (4) discipline procedures for those who violate Antitrust laws; (5) acceptance of responsibility for violations and demonstrated commitment to improve the program. (subtract 2 points)
  - The company had a poor compliance program prior to the violation but shows marked improvement and commitment on all of the following between the violation and sentencing: (1) commitment of senior management to Antitrust compliance; (2) participation of all employees in compliance efforts; (3) proactive compliance through monitoring and auditing high risk activities; (4) discipline procedures for those who violate Antitrust laws; (5) acceptance of responsibility for violations and demonstrated commitment to improve the program. (subtract 1 point)
  - The company had no compliance program prior to the violation but between discovery and sentencing implemented a compliance program with each of the above factors and shows commitment and has taken substantial steps to enforce that program. (subtract 1 point)
- Recidivism
  - The company is a first time offender and had a compliance program prior to the violation (subtract 1 point)

- The additional proposed examples for use in comments to § 2R1.1 amendments:
  - Example 1: Company A comes to the Antitrust Division and begins negotiations to secure leniency. Before leniency is granted, or before Company A has had a chance to provide all documents or witnesses for interviews, Company B, a first time offender, proffers its involvement and immediately begins cooperating as well. If Company B had a compliance program prior to violation that independently detected violation and had all characteristics of a model compliance program, a 2 point reduction for Company B would be appropriate.
  - Example 2: Company C is the third in the door and did not detect the violation through its own compliance program. They are an international conglomerate that has many different divisions. Even though this division has never violated antitrust laws, another division had been prosecuted in the past. Company C had ineffective pre-existing compliance program, but shows marked improvement and commitment to creating a compliance program with each of the five factors above. If the company demonstrates these significant improvements to their compliance program, across all divisions, a 1 point reduction for Company C would be appropriate.

* * *

Corporate antitrust compliance has lagged behind compliance initiatives addressed to other high-risk legal areas, such as the FCPA. The Antitrust Division's historical opposition to giving credit for compliance programs under the Sentencing Guidelines has likely contributed to this disparity. The Antitrust Division has begun crediting compliance in less formulaic ways, but it can and should go further by establishing a concrete, transparent structure for crediting antitrust compliance in the short term, and ultimately amending the Sentencing Guidelines to codify the role that compliance can play in mitigating criminal antitrust sanctions. Such changes will provide companies with the transparency necessary to appreciate the steps that will lead to compliance credit, which will in turn better incentivize them to implement and maintain robust compliance programs.