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COMMENTS SUBMITTED ON THE DEPARTMENT OF JUSTICE'S REVIEW OF CORPORATE ENFORCEMENT POLICIES

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The Society of Corporate Compliance and Ethics (the "SCCE")[1] including its sister organization, the Health Care Compliance Association, is a non-profit organization comprised of more than 18,000 members (individual professionals and companies), dedicated to improving the quality of corporate governance, compliance and ethics. The SCCE champions ethical practice and compliance standards in all organizations, and seeks to provide the necessary resources for compliance professionals and others who share these principles.

SCCE supports the mission of the Department of Justice to prevent corporate crime. We believe that corporate and other organizations' effective compliance and ethics programs are essential to the success of this mission. We also believe that governments play an indispensable role in promoting the types of programs that can truly prevent and detect illegal practices.

[1] www.corporatecompliance.org

These comments are submitted by SCCE in response to Deputy Attorney General Rod J. Rosenstein's invitation for comments on the Department of Justice's enforcement policies, as set forth in his speech of October 6, 2017.

In these comments we make the following points:

- We agree that "Consistency promotes fairness and enhances respect for the rule of law." All Divisions of the Department should have a consistent and fair approach to recognizing and promoting effective compliance and ethics programs. The Sentencing Guidelines standards provide a common baseline utilized throughout the business community that the Department should adopt to promote consistency and effectiveness.
- The Department should ensure it has the internal expertise to deal effectively with compliance and ethics programs, either by retaining it or having personnel trained in this area.
- The US Attorneys Manual as applied to all enforcement activities provides an important resource. Excellent policies/approaches relating to compliance programs developed in one area, such as the Fraud Section, but that are generally applicable in all substantive areas, should be applied for all enforcement activities and referenced in the Manual.
- The Department following a realistic and consistent approach to compliance and ethics programs is key to promoting truly effective programs.

The need for consistency in the approach to compliance & ethics programs.

In his presentation at New York University Law School, Deputy Attorney General Rod J. Rosenstein gave an important message dealing with the Department's enforcement policy. His remarks provided encouragement for those working in the compliance and ethics field, whose day-to-day job is to prevent and detect illegal and unethical

conduct in organizations.[2] The speech also invited comment and input in dealing with the Department's approach to corporate violations.

The speech made a very important point about the value of consistency:

> "[I]t is important to have clear policies in order to promote consistency across the Department's many offices and tens of thousands of decision-making employees. Consistency promotes fairness and enhances respect for the rule of law. Predictability and consistency also are important because they facilitate good business decisions and promote the confidence of investors and consumers."

Compliance and ethics practitioners who work daily in companies to prevent and detect misconduct know the importance of these words. When we explain to boards, managers and employees the importance of ethical conduct and having effective compliance and ethics programs we need to send a strong, unmistakable message about the importance of serious compliance efforts.

As we have recognized over time, the fact that enforcers will assess compliance programs and give credence to effective ones in dealing with companies has had an enormous impact. We can point to the Standards of the Organizational Sentencing Guidelines and relevant enforcement statements and policies. For environmental crimes, we can point to a long-term policy of the Environmental and Natural Resources Division.[3] For foreign bribery we can cite in detail the tough words of the FCPA guide, showing that both DOJ and the SEC take real compliance programs seriously.[4] We can quote the no-nonsense language of the US Attorneys Manual, making it clear that strong – but only strong –

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[2] These comments apply to all forms of organizations, including corporations.

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

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

compliance programs matter to enforcers.[5] We can point to highly useful statements like the Fraud Section's enforcement questions[6] to guide management in the right direction for creating strong programs.

But, within the Department of Justice the approach is not consistent when it comes to one important enforcement area: antitrust crimes. Here, alone, all the advice we give our clients does not apply. Here we have to explain that the same department that encourages and considers programs in the other areas of corporate crime completely ignores them in this one area. The same diligent steps that matter for all forms of business crime do not apply at all here.

It is difficult, if not impossible, to explain to clients the reason why the Department does not speak about compliance with one voice. Contrary to the other Divisions of the Department, and the approach of the Federal Sentencing Guidelines, the Antitrust Division says it will not consider compliance programs, no matter how exemplary a company's compliance efforts were. This Division applies one inflexible policy that fits all sizes and all circumstances. No compliance program is considered, no matter what the facts of a specific case may be, or how diligent the program may have been.

Thus in the US Attorneys Manual, the Antitrust Division has this language:

> "[A]ntitrust violations, by definition, go to the heart of the corporation's business. 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."

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[5] United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm

[6] U.S. Department of Justice, Criminal Division Fraud Section, "Evaluation of Corporate Compliance Programs," https://www.justice.gov/criminal-fraud/page/file/937501/download .

It is certainly true that antitrust lawyers know well the Division's policy on voluntary disclosure. But to suggest that any segment of the "business community" knows that this one part of the Department of Justice completely ignores compliance programs, or what the reason for this might be, has no basis in fact. It is likely that even lawyers who deal with the normal range of federal criminal practice may not know this, let alone business people.

As for anyone seeking an understandable rationale for this statement, the metaphor of going "to the heart of the corporation's business" is beyond mysterious. It is important to remember that the focus of antitrust criminal law is not the complex aspects of antitrust like monopolization and mergers. We are talking about the economic equivalent of street crime here: rigging bids, fixing prices and allocating markets. These can certainly be corporate level crimes, as is also true for the many other areas where compliance programs do count, such as securities fraud, bribery, healthcare fraud, and government contract fraud. But antitrust crimes can just as easily be one-off, remote activities by employees throughout the business. For example, any of these scenarios could be an antitrust crime:

1. An HR manager in a small subsidiary calls a meeting of local HR managers at a group of local companies to agree on what beginning salaries should be.
2. Two sales people for branch offices of competing companies in Iowa divide up the market for wheat harvesting machines in the western part of the state.
3. Three sales reps selling appliances in one county in Illinois agree they will hold firm on not discounting.
4. The branch offices of two companies engaged in construction agree they will rotate bids on school districts in a three county rural area.

All of these qualify as antitrust crimes, but not one of them comes near the heart of any business; if any metaphor is useful, then they are much closer to the toes than the heart.

But even within the Antitrust Division the approach is also not

consistent. Companies that do not bother with a program and wait until they are caught after committing a crime get special attention. If only then they make an effort to have an effective program they will get a reduction in sentence. But nothing done to *prevent* crime matters; only closing the barn door after the cows escape receives rewards in antitrust crimes.

This is certainly a distinction that reflects no enforcement consistency. Thus, in a case pursued by the Fraud Section, where a senior official arranges bribes to government officials, the compliance program is considered. But if in the same company a new, junior sales person agrees with a competitor's salesperson to rig a bid, the program does not count. If a bid is rigged in a government contract fraud case the program does count if it is prosecuted by the Fraud Section under the False Claims Act, but does not count if it is prosecuted by the Antitrust Division under the Sherman Act. There have even been cases where there were offenses both inside and outside of antitrust in the same case, such as where bribery and bid rigging operate in tandem. Where is the consistency? Where is a policy that any business person could understand and follow?

We also believe there has been a cost to this odd inconsistency. In the antitrust field where government has taken an approach bordering on hostility to compliance programs, it may well be that companies have devoted less attention and resources to compliance programs. As observed by Professor Danny Sokol, "Current compliance programs in antitrust may now include nothing more than a day of lectures with some PowerPoint slides. However, this does not solve compliance problems, and may, in fact, breed cynicism on the part of employees."[7] The results of a survey of compliance practitioners conducted by the Society of Corporate Compliance and Ethics reflects this same trend finding that the overwhelming majority of companies lack antitrust auditing that would meet even minimum Sentencing Guidelines standards.[8]

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[7] D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 223–24 (2012)

[8] See Joseph E. Murphy, *Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be*, CORP. COMPLIANCE INSIGHTS (June 20, 2012),

Recently this observation was confirmed by the Antitrust Division's own Acting Deputy Assistant Attorney General for Criminal Enforcement, Marvin Price. In comments for an ABA Antitrust Section publication, he noted:

> "While criminal antitrust fines and prison terms are significant, and the Division has a well-established record for prosecuting both companies and individuals, *antitrust crimes often do not appear to garner the same compliance dollars as other types of white-collar crimes.*
>
> In our investigations we often see evidence of compliance training programs that contain just a brief mention of antitrust issues after a lengthy discussion of corruption and bribery."[9]

The Fraud Section (and the SEC) recognizes and takes into account diligent compliance programs; the Antitrust Section does not.

As it stands now, practitioners cannot give clients a rational explanation for why different Divisions take such inconsistent approaches. Given the possible application of different laws to similar misconduct, practitioners cannot even confidentially advise clients which of the inconsistent policies would apply.

The solution is easy and fully meets the call for consistency. There never was a need for a special antitrust exception, and there certainly is no need for one now. The Department could simply clean up the US Attorneys' Manual by excising the extra language covering the Antitrust Division. Companies that ignore legal risk and have no compliance program or only a paper one should receive no benefit, no matter what the violation. Companies that have made a serious, diligent effort to prevent violations should have this considered in a manner that is consistent and understandable for the business community.

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http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/ .

[9] Rosman & Price, *Antitrust Division Views on Compliance: Past, Present, Future*, Cartel & Criminal Practice Committee Newsletter 3, 4 (Fall 2017)(emphasis added).

What should be done with separate guidance documents on compliance programs?

We share the view that practitioners should be able to find relevant guidance in one central location. However, this does not mean that the existing guidance should simply disappear. The simplest approach is to require that all current guidance be referenced in the US Attorneys Manual, with a link to that guidance. This keeps the Manual from becoming an encyclopedia, yet enables practitioners to gain from specific guidance designed to address a variety of circumstances.

From a compliance and ethics perspective there are three that are particularly valuable. For those in the environmental field, the July 1, 1991 letter from the Environmental and Natural Resources Division provides a useful direction in developing an environmental compliance program.[10] For those dealing with the risk of foreign bribery, the FCPA Guide gives them solid direction.[11]

There is a third, more recent document that deserves special attention: The Evaluation Questions written by the Fraud Section.[12] These encapsulated the tough questions we have been asking corporate clients for years; the fact that the Fraud Section started asking these same questions was like a burst of morning sunlight for many companies.

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

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

[12] U.S. Department of Justice, Criminal Division Fraud Section, "Evaluation of Corporate Compliance Programs," https://www.justice.gov/criminal-fraud/page/file/937501/download .

Our concern, however, is that only those dealing with the Fraud Section may get this message. It would be better to have these questions referenced directly in the Manual as a tool that will be used by all Divisions in the Department.

How can the Department ensure it sends a strong message about compliance programs?

Designing and implementing an effective compliance and ethics program is a challenging task. This is not simply the practice of law; it is the way that law and ethics get translated and applied in organizations with hundreds or hundreds of thousands of employees and others acting for the organizations. It is a complex, multidisciplinary field that requires study and mastery of a variety of subjects. Understanding the law is helpful, but just one of many steps that are required.

In the past couple years, we have begun to see enforcement agencies understand this point and take a practical approach. First, in Canada, the Competition Bureau determined that it needed in-house expertise in this area. It designated experienced officials in the Bureau who were to specialize in this area. The officials attended full academies presented by the Society of Corporate Compliance & Ethics, sat for exams, and qualified as Certified Compliance & Ethics Professionals.

Subsequently, the US Department of Justice Criminal Division's Fraud Section went into the market and retained under contract a practitioner who could serve as the Section's expert.

In each instance, this sent a strong message to the marketplace that compliance programs mattered, but that there was no place for mere box-ticking or paper exercises. Practitioners knew they would now be dealing with officials who actually knew the field.

The point is a simple one. If an agency is dealing with any new subject area it makes sure it has the necessary expertise in that field. In dealing with compliance and ethics programs, agencies need experts in compliance and ethics.

The Society of Corporate Compliance and Ethics is willing to assist in this effort.

Respectfully submitted

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