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June 1, 2012

Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Commission Priorities for the Upcoming Year

Dear Judge Saris and fellow Commissioners:

The Washington Legal Foundation (WLF) welcomes the opportunity to offer its views on the U.S. Sentencing Commission's priorities for the upcoming year. WLF appreciates the work of the Commission as it considers its priorities for the amendment cycle ending May 1, 2013. Since the Commission's formation over twenty-five years ago, WLF has maintained a longstanding interest in the work of the Commission and its determination of appropriate sentences for various categories of offenses. To that end, WLF has regularly submitted written comments and testified before the Commission on a variety of substantive legal and policy issues. Moreover, WLF frequently litigates cases involving corporate criminal liability and regularly publishes studies, reports, and other analyses on corporate criminal liability and related issues.

WLF writes to add its voice to others urging the Commission to reconsider the important role that antitrust compliance programs should play in sentencing determinations. WLF believes that by not providing companies with an opportunity to receive credit for antitrust compliance programs, the current Guidelines actually create a disincentive for companies to implement such programs altogether. While robust compliance programs, where implemented, help to prevent many antitrust violations from occurring, the current sentencing regime may result in more antitrust violations than if companies were given the opportunity to receive reduced sentences as a result of their efforts in maintaining effective compliance strategies.

A business organization that proactively seeks to prevent and detect violations of law through a robust compliance program furthers the public interest and deserves credit when it comes to enforcement and sentencing. This view represents the collective wisdom of the expert advisory group that assisted in the creation of the Guidelines, as well as many expert

commentators.<sup>1</sup> While the current Guidelines reflect this understanding in rewarding other effective compliance programs, they do not currently do so in the antitrust context. That is because the Department of Justice's Antitrust Division has taken the position that, because antitrust violations go to "the heart" of a company's activities, any compliance program that does not prevent every violation is a "failed" compliance program.<sup>2</sup> The Division focuses instead on amnesty as a means of enforcement, whereby the first member of a cartel to admit wrongdoing receives amnesty from prosecution, regardless of guilt. The Commission should reject the Division's idiosyncratic approach.

Among other things, such an approach is wholly inconsistent with DOJ's own U.S. Attorneys' Manual, which expressly "recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees."<sup>3</sup> The mere fact that misconduct by a company employee was not detected in any given case does not render a company's compliance program deficient. Many instances arise where misconduct is isolated or impossible to discover despite the existence of a robust and aggressive compliance policy. In such instances, a company should not be unfairly penalized or denied the benefit of credit at sentencing. Punishing an organization that has taken all reasonable and appropriate steps to comply with the law and detect wrongdoing does nothing to further the stated goals of deterrence in criminal sentencing.

Further, the Antitrust Division's emphasis on amnesty requires nothing of the company that is the first to report a violation. Yet in other contexts, violations reported to the Criminal Division of the Department of Justice require violators to implement compliance programs or to improve existing ones. As one commentator observed, it would seem possible under the current regime for a company to conclude that it is in its best interest "not to worry about compliance, but instead to devote its attention to making sure that it was always the first one to confess to the government if a cartel was about to be discovered. It could then keep most of its excess cartel profits, since it would not be responsible for large fines, and its plea would limit its civil exposure to single damages."<sup>4</sup>

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<sup>1</sup> Banks, Theodore, *The Trouble With Antitrust Compliance and 10 Ways to Fix It*, LAW TECHNOLOGY NEWS, May 1, 2012, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1335713542002&slreturn=1> (last visited on May 31, 2012).

<sup>2</sup> *Ibid.*

<sup>3</sup> Murphy, Joe, *Antitrust Compliance – A World Apart?*, CORPORATE COMPLIANCE INSIGHTS, Jan. 19, 2012, available at <http://www.corporatecomplianceinsights.com/antitrust-compliance-a-world-apart/> (last visited on May 31, 2012).

<sup>4</sup> See *supra* note 1.

The Antitrust Division's refusal to allow credit for effective compliance programs stands athwart the emphasis the rest of DOJ places on organizational compliance. This lack of consistency presents corporate counsel and other legal advisors with a quandary when explaining compliance options to their corporate clients. Those who advise their clients to implement an effective compliance program for antitrust issues must also explain that such a program will not be rewarded if a violation should ever occur. Such an incongruous approach can function as a disincentive to companies who would otherwise invest precious resources in developing a strong compliance program.

WLF urges the Commission not to allow the Antitrust Division's apathy towards preventative compliance programs to define the Commission's agenda. The Guidelines should be consistent and cohesive in encouraging and rewarding effective compliance programs. This view can best be implemented by expressly providing in Chapter Eight of the Guidelines that credit for an effective compliance program may apply to an organization sentenced for an antitrust violation so long as the organization otherwise satisfies the criteria for such credit. This change would give real teeth to both DOJ's and the Commission's commitments to encouraging effective compliance programs in order to prevent wrongdoing.

WLF appreciates the opportunity to provide the Commission with feedback and urges the Commission to carefully consider the important role that corporate compliance programs can play in the antitrust context.

Respectfully submitted,

/s/ Cory L. Andrews  
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