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GET-OUT-OF-JAIL-FREE CARDS: AMNESTY DEVELOPMENTS IN THE UNITED STATES AND CURRENT ISSUES

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I. INTRODUCTION

First and foremost, antitrust amnesty programs are designed to help detect, deter and prosecute cartels by awarding "lenient" treatment to – not indicting – those who voluntarily report illegal activity.[1] As Assistant Attorney General Thomas O. Barnett has explained:

> It is notoriously difficult to discover cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court. To penetrate the elaborate concealment strategies cartels use, prosecutors must have a tool to convert cartel members into cooperative witnesses, so that prosecutors can gain access to background information, testimony, and the documents that otherwise might be destroyed. Amnesty programs are such a tool.[2]

The United States' current amnesty program has been very successful by any measure – the increased number of amnesty applications and cases, including internal investigations and prosecutions, and the higher amount of penalties obtained.[3] The number of applications now averages two per month, compared to one per year under the previous policy. Fines which used to be in the single digits have now been as high as $500 million, and the Division has had fines imposed of over $3 billion, over 90% of which were from international cartels.[4] And since imitation is the sincerest form of flattery, the fact that the rest of the world has followed the United States' lead in adopting amnesty policies underscores the successfulness of the policy.[5]

In addition to their role in identifying and stopping cartels, leniency programs accommodate two fundamental, and sometimes conflicting, policy goals of criminal antitrust law: efficiency and equity. Where government investigations result in the expenditure of significant amounts of time and resources without yielding sustainable convictions or evidence sufficient to support such convictions, the criminal process is inefficient. Leniency policies remedy this inefficiency by encouraging participants in criminal antitrust violations to come forward to prosecutors as quickly as possible with high quality, direct information of the crime, which enables the government to reduce the time and increase the likelihood for obtaining a conviction.

Leniency also must balance the level of this encouragement against criminal law's principles of fairness and retribution. Providing amnesty to a highly culpable ring-leader and coercer of a criminal antitrust conspiracy may provide prosecutors with an early bounty of highly useable evidence, but not without violating the criminal law's sense of fairness by not appropriately punishing

1 "Lenient" treatment is also called amnesty or immunity.
2 *"Criminal Enforcement of Antitrust Laws: The U.S. Model"* by Thomas O. Barnett, President of the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy, New York, New York, (September 14, 2006) (http://www.usdoj.gov/atr/public/speeches/218336.htm.)
3 *See* R. Hewitt Pate, International Anti-Cartel Enforcement, address before ICN Cartels Workshop (Nov. 21, 2004) at 4 (http://www.usdoj.gov/atr/public/speeches/206428.htm).
4 *See* Scott D. Hammond, *A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program* 14 & n.9 (Apr. 24, 2002) (http://www.usdoj.gov/atr/public/speeches/10862.htm).
5 *"An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program,"* by Scott D. Hammond, Deputy Assistant Attorney General, Before the American Bar Association (January 10, 2005) (http://www.usdoj.gov/atr/public/speeches/213247.htm.)

the criminals most responsible for the violation. Alternatively, leniency policies that weigh the balance too heavily in favor of fairness run the risk of reducing the incentives for confessors to come forward. Finding the balance between efficiency and fairness has marked the evolution of the U.S. Department of Justice's leniency policies.

This paper begins by reviewing the history of that evolution in the United States' leniency policy, from its beginning in 1978 to the current corporate and individual leniency policies, as well as the "Amnesty Plus" and "Penalty Plus" programs, and the advantages of cooperation even where a confessor is not the first to approach the agencies. Next, the paper reviews some of the more relevant recent developments affecting the application and scope of leniency in the United States, including: the *Stolt-Nielsen* investigation, the U.S. Justice Department policy referred to as the McNulty Memorandum, the Antitrust Criminal Penalty Enhancement and Reform Act, the latest amendments to the Sentencing Guidelines and the recent debate before the Antitrust Modernization Commission. A companion paper by Tim Fraser assesses the emergence, and convergence, of leniency policies in other jurisdictions around the world. Although this paper is limited to amnesty under the antitrust laws, criminal activity may implicate other types of laws and other types of amnesty programs.[6]

II. HISTORY OF THE ANTITRUST DIVISION'S LENIENCY POLICY

The Antitrust Division unveiled the world's first antitrust leniency policy in 1978. The policy underwent three substantial revisions in 1993 and was supplemented with a leniency policy for individuals in 1994. Recently, the Division enhanced the leniency policy's leverage with the deployment of the amnesty plus and penalty plus programs. Despite the revisions and enhancements, the basic 1978 design for the program remains intact today.

Division's 1978 Amnesty Policy

On October 4, 1978, the Assistant Attorney General for the Antitrust Division of the Department of Justice, John Shenefield, announced the Division's prosecutorial amnesty policy.[7] Under the policy, corporations or officers who voluntarily reported their criminal violations of the antitrust laws to the Division ***prior*** to its detecting the conduct were ***eligible*** for discretionary leniency from prosecution. The policy afforded leniency only to the first "whistleblowing conspirator" to come forward, whereas any subsequent confessors were prosecuted but given more lenient sentencing recommendations. For a confession to meet the policy's standards, it had to be a truly corporate act, not simply a confession by an individual executive or officer.

Upon receiving a pre-investigation confession, the Division applied five additional factors in deciding whether to grant the confessor leniency: (1) whether the Division could have reasonably expected that it would have become aware of the conspiracy in the near future, absent the corporation's confession; (2) whether the corporation, on discovering the illegal activity took quick, effective action to end its participation in the conspiracy; (3) whether the corporation's confession was made with candor and completeness and whether it continued to cooperate with the Division throughout the investigation; (4) the nature of the violation and the confessing party's role in it, *e.g.*, whether the corporation coerced co-conspirators into participating in the conspiracy, whether its conduct had an actual exclusionary effect on others in the marketplace, whether it originated the scheme, and whether the scheme harmed competition; and (5) whether the corporation had made or stated its intent to make restitution to injured parties.

The 1978 policy did not elaborate on how the Division would weigh the factors, the first three of which enhance the efficiency of the leniency program by increasing the incentives for confessors to act quickly and effectively, and the last two of which are geared towards maintaining equitable principles in granting leniency by not letting the most culpable or least contrite off the

6 For example, there are many parallels between the United States' Corporate Leniency Policy and the Security and Exchange Commission's Seaboard Report, which outlines the Commission's enforcement policy with respect to voluntary disclosures and cooperation. *See* Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship and Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44, 969, Accounting and Auditing Enforcement Release No. 1,470 (Oct. 23, 2001); *see also* Statement of the Securities and Exchange Commission Concerning Financial Penalties (2006).

7 *See* 4 Trade Reg. Rep. (CCH) Paragraph 13,112 (2001).

hook. This lack of transparency and certainty resulted in the policy's failure to be as successful as anticipated, producing only one confessor per year and failing to uncover a single international cartel.[8]

1993 – Corporate Leniency Policy

On August 10, 1993, the Division announced three substantial revisions to its Corporate Leniency Policy designed to provide transparency and certainty and to increase incentives to cooperate. First, where leniency under the old policy had been discretionarily given to corporations confessing their culpability prior to the Division detecting the violation, it is now ***assured*** under the new policy. Second, a corporate confessor reporting a violation during an ongoing investigation may be eligible for leniency under the current policy, where it would not have been under the 1978 policy. Finally, officers, directors and employees coming forward with a corporation qualifying for automatic amnesty are also assured amnesty, provided they cooperate with the investigation. There had been no such guarantee under the previous leniency policy.

To qualify for "Part A," or automatic leniency, a corporate confessor reporting illegal activity must do so before an investigation has been opened and must also meet six additional conditions. First, the Antitrust Division must not have received information about the violation before the corporate confessor comes in. Second, the confessor must have promptly and effectively terminated its participation in the illegal activity upon discovering it. Third, the report of the violation must be full, complete and candid, and the corporation must continue to cooperate with the Division's investigation. Fourth, the confession must be a true corporate act, not simply confessions of individuals. Fifth, the corporation must make restitution to the injured parties where possible. Finally, the confessor must not have been the coercer, ring-leader or originator of the illegal activity. The Division has since clarified this final condition to disqualify confessors only if they are the lone ringleaders or organizer of the conspiracy.[9] While these conditions are essentially similar to those evaluated in the 1978 policy, the current policy clarifies that all of them must be met to qualify.

If a corporation qualifies for automatic or "Part A" leniency, so do its officers, directors and employees, provided that they admit their involvement in the illegal activities with candor and completeness and continue to cooperate with the Division in its investigation. If a corporation does not qualify for automatic immunity, it may still be eligible for discretionary, or "Part B" immunity.

Under "Part B" immunity, a corporation's confession that comes after the Division has received information about the violation from another source, whether or not an investigation has begun, or under circumstances where the corporation was a central figure in the conspiracy may qualify if it meets all the other conditions for automatic leniency, and if the following additional conditions are satisfied: 1) it is the first confessor to come forward and qualify for leniency; 2) at the time of the confession, the Division has not collected evidence sufficient to produce a sustainable conviction;[10] and 3) in the exercise of its discretion, the Division determines that it would not be unfair to grant the corporate defendant leniency given its role in the illegal activity, the nature of the violation, and when the confessor came forward.

In exercising its discretion to grant leniency, the Division considers how long it took the corporation to come forward and the centrality of the corporation's role in the conspiracy. The Division is much more likely to find it fair to grant a corporate defendant leniency if the corporation comes in before an investigation has begun. The stronger the case the Division has developed independent of the confession, the less likely it is that the Division will find it fair to grant the confessor leniency.

If a corporation qualifies for discretionary leniency, its employees, officers and directors who assist the Division with its investigation are also eligible for leniency. The Division will consider

8 *See* J. Anthony Chavez, *The Carrot and Stick Approach to Antitrust Enforcement*, 1542 Prac. L. Inst. / Corp. L. & Prac. Course Handbook Series 519, 551 (PLI Order No. 8736) (2006); Scott D. Hammond, Department of Justice, *Cornerstones of An Effective Leniency Program* (presented before the ICN Workshop on Leniency Programs, Sydney, Australia) (Nov. 22-23, 2004) (http://www.usdoj.gov/atr/public/speeches/206611.htm.)

9 *Id*. fn. 4.

10 Congress' recent authorization of wiretapping in criminal antitrust investigations, *see* 18 U.S.C. Section 2516(1)(r), may make it more likely in future cases that the Division will have evidence sufficient to sustain a conviction without the corporate confessor.

granting these people leniency on the same basis as if they had approached the Division as individuals seeking leniency.

1994 – Leniency Policy for Individuals

Exactly one year after announcing its Corporate Leniency Policy, the Antitrust Division announced its Leniency Policy for Individuals on August 10, 1994. Under the policy, individuals may obtain leniency from the Division without first waiting for their corporation to seek it. The Division will grant automatic leniency to individuals who report a criminal antitrust violation before the Division has begun an investigation and before it has received information about the violation. Additionally, to qualify for automatic leniency, the individual must confess with candor and completeness and cooperate with the Division's investigation. A final condition to obtaining automatic leniency is that the individual confessor was not the coercer, leader or originator of the criminal activity. Individuals who do not qualify for automatic leniency under the Leniency Policy for Individuals may still be considered by the Division in its discretion for either statutory or informal immunity.

Amnesty "Plus"/Penalty "Plus"

In addition to its formal corporate and individual leniency policies, the Antitrust Division has developed two important and supplemental strategies for getting confessors to disclose information regarding antitrust conspiracies. The first strategy has been dubbed "Amnesty Plus." Under this policy, an applicant who may not qualify for amnesty from prosecution for one criminal offense may still be eligible for amnesty from prosecution by reporting a second criminal offense "plus" a reduction in the criminal penalty for the first offense. As with the revisions to the Corporate Leniency Policy, the Amnesty Plus program appears to have been successful. As of November 2005, the Division had "roughly 56 sitting grand juries investigating suspected international cartel activity. Nearly half of th[o]se investigations were initiated by evidence obtained as a result of an investigation of a completely separate industry."[11]

Where Amnesty Plus provides incentives to inform the Division of a criminal violation, the "Penalty Plus" policy provides disincentives for not coming forward. A corporation that fails to provide information under the Amnesty Plus program of the second violation runs the risk of facing substantially higher fines should the second offense be discovered by the Division. In this circumstance, it is the Division's policy to seek an upward departure from the Sentencing Guidelines, which could mean a potential fine as high as 80 percent or more of the volume of affected commerce.

Second-In

Second-in confessors, which are the second companies to confess their involvement in an illegal antitrust conspiracy after a first qualifying company comes forward under the Division's leniency program, are the primary beneficiaries of the Amnesty Plus policy. A second-in confessor who is ineligible for Amnesty Plus, because the Division has already opened an investigation in the second market, may be offered amnesty on the condition that it covertly assists the Division in its investigation of the second market.

In addition to increasing the probability of qualifying for Amnesty Plus or affirmative amnesty, there are four other significant benefits to being a second-in company. First, second-in companies may have their criminal penalty reduced by limiting the scope of the affected commerce used to calculate the penalty. The reason is that it is the Division's practice not to include self-incriminating information provided by second-in companies in calculating the applicable Sentencing Guidelines range for the company's volume of affected commerce. Second, second-in companies may obtain substantial cooperation discounts applied to the bottom of the Guidelines range on the order of 30% to 35%. Confessors following second-in companies may still be eligible for cooperation

11 Scott D. Hammond, U.S. Dep't of Justice, *An Update of the Division's Criminal Enforcement Program* (Nov. 16, 2005) (http:/www.usdoj.gov/atr/public/speeches/213247.htm.)

discounts, albeit in smaller amounts. A third, and related, benefit is that second-in companies can assure a low-starting point in which to apply the cooperation discount. A second-in company is generally eligible for a starting point at the minimum Guidelines range, whereas subsequent confessors generally start well above this point. The fourth benefit of being a second-in company is securing more favorable treatment for its executives and employees, both by minimizing the number of them subject to prosecution and by maximizing the favorability of individual plea agreements.

III. RECENT DEVELOPMENTS AFFECTING THE DIVISION'S LENIENCY POLICY

There have been a number of recent judicial and regulatory developments that affect the interpretation and strength of the Division's leniency policies. Recent judicial developments have both strengthened and weakened the Government's flexibility in handling leniency agreements.

Stolt-Nielsen, which has been much talked about but may not have a significant effect on the actual application of the leniency programs because it may be limited to the unusual facts of the case, highlights the risks confessors face when the Government has the power to withdraw its conditional leniency. Judicial retrenchment of the Justice Department's Thompson Memorandum, on the other hand, may substantially limit the type of "cooperation" the Government may demand from corporate confessors seeking leniency.

Recent regulatory and legislative developments, such as the Antitrust Criminal Penalty Enhancement and Reform Act and amendments to the Sentencing Guidelines, have increased the incentives to prospective criminal defendants of seeking leniency. And the work of the Antitrust Modernization Commission may result in future legislative changes.

Applying the Division's Corporate Leniency Policy – *Stolt-Nielsen*

In March 2004, Stolt-Nielsen became the first company to have its conditional leniency revoked by the Division since the introduction of the 1993 Corporate Leniency Policy.[12] Although *Stolt-Nielsen S.A.* turns on a unique fact-pattern, it is also an example of how stringently the Division will apply the requirement that corporations promptly and effectively cease their participation in the illegal activity being reported.

In November 2002, an antitrust lawyer, John Nannes, met with Stolt-Nielsen's Chairman, Samuel Cooperman regarding a February 2002 memorandum written by Stolt's former in-house counsel, Paul O'Brien, which outlined potential evidence of a criminal antitrust violation.[13] Nannes was then retained by Stolt and authorized to begin the process of obtaining leniency for the company from the Antitrust Division. He began the process by asking his former Division colleague, James Griffin, then Deputy Assistant Attorney General for the Antitrust Division, whether the Division had opened up an investigation into the parcel tanker industry. Although not using any names explicitly, Griffin intimated that he had heard that O'Brien had been fired by Stolt for authoring the memorandum regarding potential antitrust violations, suggesting both that Stolt would be ineligible for amnesty under the program because the Division had already learned of the violations and that if he were fired for disclosing violations the company may not have promptly addressed the violations. (Apparently, the *Wall Street Journal's* publishing of an article on November 22, 2002, that described O'Brien's wrongful termination suit against Stolt, caused the Division to open its investigation of the parcel tanker industry.)[14]

In December 2002, Nannes met with the Division and informed it that even though O'Brien had been fired, Stolt followed O'Brien's recommendations for implementing an antitrust compliance program. Griffin advised Nannes that if Stolt had not in fact withdrawn from the conspiracy, it would not be eligible for amnesty under the program. Nannes stated that Stolt had taken steps to withdraw its participation, but he did not go so far as to say that Stolt's participation

12 U.S. Dep't of Justice, Press Release, *Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing, and Bid Rigging Charges for Its Role in An International Parcel Tanker Shipping Cartel* (Sept. 6, 2006).
13 *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553, 556 (E.D. Pa. 2005).
14 *See Stolt-Nielsen S.A.*, 352 F. Supp. 2d at 565.

ended in March 2002, which is the month after O'Brien's memorandum. (In fact, it appears that Stolt continued to participate in the conspiracy until November 2002, nine months after O'Brien's memorandum.) Shortly after the meeting, Nannes received a marker from the Division, which reserved Stolt's place as first in line for leniency eligibility, and began his internal investigation of Stolt and the allegations in O'Brien's memorandum.

In January 2003, Nannes made a proffer to DOJ, which included the fact that Stolt had participated in a market allocation scheme with its competitors. The date on which Stolt had withdrawn from the conspiracy was not apparently discussed. Soon after the proffer, Griffin sent Nannes a corporate leniency letter, which was later modified to cover all of Stolt's subsidiaries and affiliates. The letter represented that Stolt "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of that activity," but did not mention the month in which it believed Stolt's participation ended. Stolt then provided documents and other information to the government, enabling it to obtain convictions for the other industry participants. Three months after the leniency letter was issued, however, the Division temporarily suspended Stolt's amnesty because it believed Stolt continued to participate in the market allocation scheme in the second half of 2002. In February of the following year, Stolt filed suit seeking an injunction to force the Division to honor the January 2003 letter agreement not to prosecute Stolt. The month after the suit, the Division formally withdrew Stolt's amnesty and notified Stolt that it would seek an indictment, which the Division later agreed to stay until Stolt's injunction suit was resolved. The Division's belief was that O'Brien's February 2002 memorandum constituted Stolt's discovery of the activity and that waiting until November to cease participation did not constitute prompt and effective termination. The Division believed that even though its letter did not state a date certain, the principle underlying the concept of timeliness was clear from its published policy.

The District Court ruled in favor of Stolt on the grounds that the Division's understanding of when Stolt withdrew from the conspiracy was not part of the amnesty agreement as it was not in the four corners of the contract, which had an integration clause expressly excluding outside terms from the agreement.[15]

The District Court's opinion was overruled by the Third Circuit in March 2006[16] holding that the lower court was without jurisdiction to enjoin the Government from seeking an indictment against Stolt.[17] The lower court lacked authority to enforce the agreement because immunity agreements protect defendants against conviction, not indictment, and thus did not implicate Stolt's constitutional rights, the only circumstance where the judiciary might enjoin prosecutions.[18]

A petition for a writ of certiorari was filed on July 20, 2006, along with an application to Justice Souter to recall and stay the mandate of the Court of Appeals pending the Court's disposition of the certiorari petition. Justice Souter denied the application. Stolt re-filed the application with Justice Stevens who referred it to the full Court. On August 21, 2006, the Court denied petitioners' application. Stolt, along with two subsidiaries and two executives, was then indicted by a federal grand jury.[19] Stolt filed a motion to dismiss the indictment on the basis of the leniency agreement on November 22, and evidentiary hearings have been held since May 30, 2007. The district court has not yet ruled on the motion to dismiss.

While it may appear that after this opinion there is nothing, other than trust, to guarantee confessors that the government will adhere to the letter of agreements reached under the Leniency Policy, there may be further developments as the trial court considers the effect of the letter on the possibility of conviction. Additionally, it is important to recognize that the Division has a strong incentive to honor its leniency agreements because the effectiveness of its programs depends on a high level of certainty. Thus, it is unlikely that *Stolt-Nielsen* will have a significant impact on the operation of the leniency programs. But the case highlights the risks associated with conditional leniency and it may cause some nervousness on the part of those in or seeking to enter the amnesty process.

15 *Id*. at 562.
16 *See Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 187 (3d Cir. 2006), cert. denied, 127 S.Ct. 494 (2006).
17 *Id*. at 187.
18 *Id*. at 184-86.
19 *See* U.S. Dep't of Justice, *supra* note 12.

The Thompson Memo

On January 20, 2003, Larry Thompson, Deputy Attorney General of the United States, authored a memorandum binding on all federal prosecutors called *Principles of Federal Prosecution of Business Organizations* (hereinafter, the "Thompson Memo"), which was essentially identical to a memorandum authored by Eric Holder, Deputy Attorney General in 1999. The Thompson Memo required that federal prosecutors consider the advancing of legal fees by corporations to their employees under investigation by the Department of Justice as a factor weighing in favor of indicting the corporate defendant. Historically, most corporations under investigation for criminal wrongdoing extend attorneys' fees to their principals and employees who are also being investigated in their individual capacities. After the Thompson Memo, corporations seeking lenient treatment from Justice Department prosecutors run the risk that, if they advance legal fees to their employees who are also under investigation, they may not qualify for leniency. Commentators and bar associations have roundly criticized this aspect of the Thompson Memo as an infringement on individual defendants' Sixth Amendment right to counsel – by depriving individual defendants of the means to pay for their own defense – and due process rights under the Fifth Amendment – by essentially voiding defendants' contractual rights to attorney fees. The criticism gained judicial support when the Thompson Memo was found to infringe on individual defendants' right to a fair trial and to effective assistance of counsel by Judge Lewis Kaplan in *United States v. Stein*, 435 F.Supp.2d 330, 367 (S.D.N.Y. 2006) (*Stein I*). In a second ruling regarding the same KPMG tax fraud prosecution (*Stein II*), Judge Kaplan suppressed certain KPMG employee defendants' proffered statements to the DOJ, finding that "the Thompson Memorandum and the actions of the USAO, quite deliberately coerced . . . KPMG to pressure its employees to surrender their Fifth Amendment rights" by inducing KPMG to threaten to terminate payment of attorneys' fees for non-cooperative employees.[20]

The McNulty Memo

On December 12, 2006, then U.S. Deputy Attorney General Paul J. McNulty announced a new DOJ corporate prosecutorial policy (hereinafter, the "McNulty Memo") that would replace the Thompson Memo. The change was spurred by criticism from the business community and the defense bar of both the frequency and ease with which DOJ prosecutors demanded privileged material under the Thompson policy, the constitutional issues identified in *Stein I* and *Stein II* with respect to attorneys' fees, and by proposed legislation by Senate Judiciary Committee Chairman Arlen Specter (R-Pa), The Attorney Client Privilege Protection Act.[21] The McNulty Memo changed the Thompson Memo in two significant ways.

First, the new policy places more stringent limitations on the procurement of privileged material. Prosecutors must demonstrate a legitimate need for privileged information, and any request stemming from the need is subject to an extensive approval process. The approval process depends on the type of waiver requested. Specifically, a request for waiver of claims of attorney-client privilege or attorney work product involving *purely factual* information ("Category I") must be authorized in writing by the United States Attorney, or (for an antitrust violation) by the Assistant Attorney General for the Antitrust Division.[22] Only if Category I material gives an incomplete basis to conduct a thorough investigation should DOJ request a waiver of attorney-client communications or *non-factual* attorney work product ("Category II"). Waiver for Category II material should only be requested in rare circumstances and requires written approval from the United States Attorney or (for an antitrust violation) the Assistant Attorney General for the Antitrust Division, and the Deputy Attorney General.[23] Furthermore, and more important for corporate defendants, if the corporation decides not to waive its privilege to Category II information upon request from the government, the revised policy instructs prosecutors to exclude the denial from their charging decision-making process.[24] The

20 *United States v. Stein*, 440 F.Supp.2d 315, 337 (S.D.N.Y. 2006). Rather than dismiss the government's indictment, Judge Kaplan opened a parallel civil proceeding to resolve the KPMG employees' contract claims against KPMG. *Stein I,* 435 F. Supp.2d at 377-378. The Second Circuit then rejected the novel remedial procedure, vacating the order asserting ancillary jurisdiction as beyond the jurisdiction of the district court. *Stein v. KPMG, LLP*, 2007 WL 1487822 (2d Cir., May 23, 2007). The Second Circuit did not consider the constitutional issues decided by the district court.

21 Carrie Johnson, *Higher Hurdles Set in Corporate Crime Cases*, The Washington Post, Dec. 13, 2006 at D1.

22 Memorandum from Paul J. McNulty, *Principles of Federal Prosecution of Business Organizations*, to the U.S. Dep't of Justice (Dec. 12, 2006) at 9, 11.

23 *Id.* at 10.

24 *Id.*

DOJ can, however, favorably consider a corporation's acquiescence to a waiver request in determining whether it has cooperated with a government investigation.

Second, the new policy instructs prosecutors not to consider a corporation's payment of its employees' attorneys' fees in deciding whether to pursue a conviction, unless the totality of the circumstances shows that payment of the fees was meant to hinder government investigation. If this unusual finding is made, corporate payment of attorney's fees may be considered in the charging decision only if authorized by the Deputy Attorney General.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004

Increasing the incentives for participating in the Division's leniency programs, the Antitrust Criminal Penalty and Reform Act of 2004 imposes significantly higher criminal antitrust penalties for both businesses and individuals. The Act raised the maximum statutory criminal fine for corporations from $10 million to $100 million and for individuals from $350,000 to $1 million. (The alternative fine provision, 18 U.S.C. Section 3571(d), under which the Division can seek twice the gain or twice the loss remains unchanged; it is through use of this provision that many of the record settlements have been obtained.) Prison sentences under the Act were also increased, from a maximum prison sentence of 3 years to 10 years.

In addition to raising the stakes for convictions, the Act limits a cooperating defendant's exposure from private litigation to single, not the standard treble, damages, an extremely significant incentive to seek leniency. (The detrebling feature will sunset in 2009.) The Act defines cooperating with the government as: (1) providing a full account of all facts relevant to the civil action; (2) furnishing all documents relevant to the civil action; and (3) making oneself available for interviews, depositions and testimonies in connection with the civil action.

Compliance Programs and Sentencing

Effective November 1, 2004, the United States Sentencing Commission amended the Sentencing Guidelines to provide that corporations employing an "effective" compliance program are eligible for a downward departure in sentencing.[25] The amendments were promulgated in response to Section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which required the Commission to ensure that the Guidelines "are sufficient to deter and punish organizational criminal misconduct." These amendments have led to more pervasive and robust corporate compliance programs across the country.

Under Section 8B2.1 of the Guidelines, for an organization to have an effective compliance program, it shall: "(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." The program does not necessarily need to either detect or prevent criminal activity to be "effective," but the Guidelines identify seven minimum requirements for a compliance program to be deemed effective.

First, an effective program must have established "standards and procedures to prevent and detect criminal conduct."[26] This requirement shares parallels with the Department of Justice's leniency policies. Second, the control group or governing authority of the corporation must know about how the compliance program works and must also oversee the implementation and effectiveness of the program.[27] The oversight and responsibility for the compliance program shall be assigned to a "high-level" individual within the corporation,[28] whereas the individual with operational responsibility for the program must report periodically to the "high-level" personnel and the governing authority of the corporation regarding the program's effectiveness.

25 United States Sentencing Commission, Guidelines Manual Section 8B2.1 (Nov. 1, 2004).
26 *Id*. at Section 8B2.1(b)(1).
27 *Id*. at Section 8B2.1(b)(2)(A).
28 *Id*. at Section 8B2.1(b)(2)(B).

Third, the corporation shall not knowingly include in its control group any criminals or individuals whose conduct is inconsistent with ethics or an effective compliance program. Fourth, the corporation must train its governing authority, its high-level personnel, its substantial authority personnel, its employees and its agents with respect to its compliance standards and procedures. Fifth, the corporation must take reasonable steps to: (1) ensure that its program is being followed, "including monitoring and auditing to detect criminal conduct;" (2) evaluate its program's effectiveness; and (3) publicize a system by which employees may report violations and seek guidance regarding the program.

Sixth, the corporation's program must be promoted throughout the program by both providing incentives to comply as well as discipline for criminal conduct or failing to take reasonable steps to avoid criminal conduct. Finally, if the corporation detects criminal conduct, it must respond quickly and take measures to correct its compliance program and procedures.

In implementing the seven requirements outlined by the Guidelines, a corporation must periodically assess the risk that criminal conduct will occur, including assessing both the magnitude of the potential criminal conduct and its likelihood of occurring given the company's particular business. "For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing."[29]

In deciding how exactly to meet these requirements, corporations are to consider: "(i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct." Should the corporation fail to adhere to applicable industry standards of practice or relevant governmental regulation, that weighs against finding that the corporation had in place an effective compliance program.

The larger corporation will more likely have to make significant investments in a more formal compliance program for its program to be deemed "effective." The smaller corporation, on the other hand, may satisfy the Guideline's requirements by having its governing authority managing the company's compliance efforts, by using informal staff meetings to train employees regarding compliance, by using its existent staff rather than employing specialized compliance staff, and by modeling its compliance efforts on best-practices developed by other organizations. The Guidelines presume that a company does not have an effective compliance program if criminal conduct recurs.

Other Potential Developments on Sentencing

On April 2, 2007, The Antitrust Modernization Commission ("AMC") issued its Report and Recommendations ("Report") regarding statutes potentially in need of Congressional revision, including criminal penalty statutes. The first recommendation concerns whether 18 U.S.C. Section 3571(d), the alternative fine provision, should remain applicable to Sherman Act prosecutions. That subsection provides that: "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." Under this provision, corporate antitrust fines may exceed the statutory maximum of $100 million, another reason why corporations have an incentive to seek amnesty. The AMC Report opposed amending Section 3751(d) to make it inapplicable to Sherman Act prosecutions, finding "nothing unique about antitrust offenses that justifies their being carved out or otherwise exempted" from the provision.[30]

The AMC also debated whether the ambiguity in language under Section 3751(d) about whether a fine should be calculated based on the individual defendant's sales or whether it should be based on the sales of the cartel as a whole should be clarified. The commissioners ultimately voted not

29 *Id.* at Section 8B2.1 cmt. 6(A)(ii).
30 Antitrust Modernization Commission, Report and Recommendations 298 (2007).

to change the basis for calculating fines for Sherman Act violations, recommending that such "interpretive questions regarding the statute be left to courts to resolve in the context of actual cases."[31]

The final issue debated by the AMC was the Sentencing Guidelines' use of an estimate of the harm caused by an antitrust violation set at 20% of the amount of commerce affected by the violation. The specific question posed by the AMC was "whether the existing proxy is empirically sound and accurately reflects the best estimate of typical harm in antitrust cases."[32] The commissioners recommended that Congress "encourage the Sentencing Commission to reevaluate and explain" the presumptive 20% harm proxy in light of modern economic understanding and analysis.[33] The commission also recommended that the Sentencing Commission amend the Guidelines to make explicit that the 20% harm proxy (or any revised proxy) may be rebutted by proof of a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.[34]

While it is far too early to predict the effect of the AMC's report, to the extent fine levels increase through judicial interpretations of the alternative fine provision of Section 3751(d), the incentive for a corporation to seek amnesty should increase.

31 *Id*. at 299.
32 *Id*. at 301.
33 *Id*. at 300.
34 *Id*. at 295.