

RESPONSE OF THE SECTION OF ANTITRUST LAW
OF THE AMERICAN BAR ASSOCIATION TO THE REQUEST
FOR ADDITIONAL PUBLIC COMMENT REGARDING
THE U.S. SENTENCING GUIDELINES FOR ORGANIZATIONS

On June 27, 2002, the American Bar Association's Section of Antitrust Law submitted comments in response to the Request for Public Comment by the Advisory Group on Organizational Guidelines to the United States Sentencing Commission dated March 19, 2002. The Section included a proposal that the calculation of the culpability score be amended to allow a reduction for the maintenance of an effective compliance program despite the participation of high level personnel in the offense. Also, the Section proposed that the Guidelines affirmatively state that waiver of the attorney/client privilege and work product protection should not be a factor in determining whether an organization's sentence should be reduced for its cooperation with the government.

Both of these issues are reflected in the Advisory Group's recent Request for Additional Public Comment. Accordingly, the Section submits this supplement to its previous comments and responds to specific issues raised by the Advisory Group. Just as before, the views expressed herein are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the Association.

I. ISSUES RAISED BY PARAGRAPH 4 OF THE REQUEST FOR ADDITIONAL PUBLIC COMMENT

In Paragraph 4(d), the Advisory Group focuses specifically on the sentencing effect of the participation of high-level personnel in the offense. It asks whether such participation should continue to support a rebuttable presumption that the organization's compliance program was not effective, and, therefore, that the culpability score should not be reduced. Basically, the Advisory Group asks whether § 8C2.5(f) should be amended to change the approach on this issue.

In its initial comments, the Section described how the rebuttable presumption of § 8C2.5(f) effectively becomes conclusive in almost all antitrust prosecutions, and precludes a company from receiving this sentencing consideration. Antitrust offenses are almost always committed by individuals who have management or pricing authority for the organization. The nature of the offense eliminates the possibility that the organization's culpability score will be reduced because of the implementation of a program to prevent and detect criminal conduct. In essence, an isolated act by a single employee that directly contravenes corporate policy can be sufficient to eliminate the benefit that should be realized from a compliance program that is pursued diligently and is otherwise very effective.

This situation is not confined to large companies, nor is it dependent on the size of the organization. Nearly every company will find itself addressing this problem when confronted by an antitrust offense committed by one of its employees. The unfortunate effect of § 8C2.5(f) is to reduce the incentive to implement the compliance programs contemplated by § 8A1.2 which are at the core of the Organizational Guidelines.

The Section proposes that the Guidelines focus on the facts relating to the design, implementation and enforcement of the organization's compliance program. The participation of management personnel in the offense should not be a determinative or overriding issue, particularly in the antitrust context. Thus, the reference to the participation of high level personnel and the rebuttable presumption should be deleted. Instead, this section of the Guidelines should state:

If there is a dispute concerning whether the organization's program was effective to prevent and detect violations of law, the government must establish the organization's lack of due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.

The Section submits that such an approach would implement a fact-based assessment of the organization's good faith and due diligence, and would not place undue emphasis on what could be nothing more than isolated conduct that was inconsistent with corporate policy and culture. The Section wishes to make clear that the Antitrust Division of the U.S. Department of Justice does not agree with this proposal.

II. ISSUES RAISED BY PARAGRAPH 5 OF THE REQUEST FOR ADDITIONAL PUBLIC COMMENT

In paragraph 5, the Advisory Group focuses specifically on whether an organization should be expected or required to waive its legal privileges in order to qualify for a sentencing reduction because of its cooperation with the government. The Advisory Group asks whether the Guidelines should be amended to reiterate and reinforce the importance and continued need for the protection afforded by the attorney/client privilege and work product doctrine.

In its initial comments, the Section noted that many federal prosecutors require an organization to waive the attorney/client privilege and work product protection to secure the sentencing benefits for cooperation under § 8C2.5(g). Although the Antitrust Division of the United States Department of Justice does not seek or require such a waiver, the issue affects organizations in many other investigations and prosecutions.

The possibility that such a waiver and disclosure will be required in the course of the government's investigation can inhibit the ability of attorneys for the organization to provide legal advice based on a full and candid factual disclosure. Companies may be dissuaded from conducting a thorough internal investigation of alleged wrongdoing, and employees may be reluctant to provide information if they must be concerned that the company eventually will be required to disclose all privileged information it collects to the government. Without such

information from its employees, it is often impossible for a company to obtain all of the facts and engage in a full assessment of their legal significance.

The possibility that disclosure of attorney-client information will be required undermines fundamental objectives of the Guidelines. Organizations may be deterred from conducting thorough investigations because of a fear that information will have to be disclosed to the government which will support not only a criminal proceeding but generate and fuel extensive private civil damage litigation. Virtually all antitrust criminal actions are followed by private damage actions which are potentially more costly to the corporation than the criminal penalties imposed. Also, organizations would refrain from self reporting, including the Antitrust Division's leniency program, which has been an enormously successful vehicle for uncovering major antitrust conspiracies without the requirement of waiver of the attorney-client privilege.

The Section proposes that Comment 12 to § 8C2.5 be amended to state affirmatively that waiver of these legal privileges and protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government. The Section recommends that Comment 12 be amended to include:

Provided, however, that an organization's decision concerning whether or not to disclose information or material subject to the attorney/client privilege or work product doctrine should not be considered in determining whether cooperation has been thorough or otherwise affect the determination of the sentence to be imposed on the organization.

The Section submits that such an amendment would provide unequivocal support for long standing and well established legal protections, and advance the fundamental objectives of the Guidelines.

III. CONCLUSION

The Section believes a periodic review of the operation of the Guidelines is important, and it appreciates the opportunity to provide these comments. The Section stands ready to provide additional comments or information if requested by the Advisory Group.