

TO VOLUNTARILY DISCLOSE OR NOT: THAT IS STILL THE QUESTION FOR REGULATED BUSINESSES

by

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Our Leniency Program is inherently transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application...However, recall that we had roughly 15 years of experience with a Leniency Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applications come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confessions, our experience suggests that it is far less likely to report wrongdoing, especially where there is not ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.

This comment by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division of the Department of Justice, lies at the heart of an effective self-disclosure program. Without this “transparency” and “predictability,” as is the case with many voluntary disclosure programs, companies will not have the incentive to come forward and disclose potential criminal violations.

Companies face an ever-growing array of complex regulations with which they must comply. As a result, companies establish comprehensive compliance systems to guard against and to ferret out suspected illegal conduct. But what happens when a company, through an audit or other internal control process, discovers a potential criminal violation? Does it self-report the violation in hopes of receiving leniency, or does it keep quiet and hope that the government will never be the wiser? The answer always requires a detailed investigation of the facts and an analysis of the consequences of self-disclosing. That investigation and analysis must be conducted before any disclosure is made.

The federal government has numerous programs that offer varying incentives for voluntarily disclosing potential criminal violations to the government. A company may seek entry into any one of these programs after discovering a violation, but usually before the government starts its own investigation into the alleged illegal activity. While acceptance into one of these programs may conclude with a non-prosecution agreement, that is not always the case.

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The Varying Self-Disclosure Programs

Self-disclosure programs come in all shapes and sizes. At one end of the spectrum is the Department of Justice (“DOJ”) Antitrust Division’s Leniency Policy, which grants full immunity from criminal prosecution to qualifying individuals and corporations. This assurance against prosecution has made the Policy highly successful. Confidence in the Policy was temporarily shaken, however, when DOJ revoked an immunity agreement and subsequently indicted a company based on the same violations that it had disclosed. (See F. Joseph Warin and Peter E. Jaffe, *Stolt-Nielsen Ruling Offers Lessons On Negotiating Corporate Amnesty Agreements*, WLF LEGAL BACKGROUNDER, Vol. 23 No. 10, available at <http://www.wlf.org/upload/03-07-08warin.pdf>, for a detailed discussion of the *Stolt Nielsen S.A.* case).

On the other end of the spectrum is the Environmental Protection Agency’s (“EPA’s”) Audit Policy, which only provides for a “recommendation” of non-prosecution. As many practitioners know, EPA’s “recommendation” provides little comfort when prosecutorial discretion lies not with EPA, but with DOJ or other prosecuting authorities.

The Antitrust Leniency Program: The Leader of the Pack

On August 10, 1993, DOJ’s Antitrust Division revised its Policy to make it more attractive for companies to self-report.¹ The Policy offers a company full amnesty from prosecution if the company: 1) was first to report the illegal activity; 2) took prompt and effective action to stop the activity; 3) was not the ring-leader of the activity; 4) self-disclosed candidly and completely, and promised to continually cooperate with DOJ during the investigation; and 5) made restitution where appropriate. Additionally, individuals can also seek amnesty under a separate Leniency Policy – one of the only policies to offer such protection to individuals.²

The principal value and appeal of the Policy is its guarantee of immunity: the Policy removes from DOJ its discretion to prosecute a qualifying company. That said, DOJ reserves some discretion to determine whether the company actually met and complied with the Policy’s specific conditions. In *United States v. Stolt Nielsen, S.A.*, 524 F. Supp. 2d 609 (E.D. Pa. 2007), DOJ indicted the self-disclosing company when, in DOJ’s judgment, the company had failed to take “prompt and effective action to terminate its part in the anticompetitive activity.” Ultimately, the district court disagreed with DOJ, dismissed the indictment on fairness grounds, and held DOJ to the terms of the original agreement. The decision restores to companies and their counsel the confidence and predictability needed when deciding whether or not to disclose criminal antitrust activity.

The Rest of the Pack

Below we discuss the key federal voluntary disclosure programs, their specific conditions for acceptance, and their incentives for self-disclosing criminal violations. All of these programs, however, share one fundamental weakness: the payoff for self-reporting is uncertain.

EPA, ENRD, and the Coast Guard. Under EPA’s Audit Policy, the Agency will generally not recommend criminal prosecution if the environmental violations were voluntarily discovered, promptly reported, and corrected through the company’s systematic compliance effort.³ In terms of eligibility criteria, EPA’s Audit Policy considers many of the same factors that a prosecutor must consider when determining whether to bring a corporate prosecution. Both the Audit Policy and DOJ’s McNulty Memorandum⁴ consider such factors as the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, and the

¹See Corporate Leniency Policy, <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

²See Leniency Policy for Individuals, <http://www.usdoj.gov/atr/public/guidelines/0092.htm>.

³See EPA’s “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>.

⁴See Undated Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys, http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

corporation's history of similar conduct. For example, pervasive and systemic environmental violations that are ignored by management will render a company ineligible for the Policy.

On July 1, 1991, DOJ's Environment and Natural Resources Division ("ENRD") unveiled its own approach to determining whether to bring criminal charges for violations of environmental law.⁵ ENRD's Policy directs a prosecutor to weigh such factors as the quality of a company's disclosure, the quality and extent of a company's cooperation, and the seriousness and pervasiveness of a company's noncompliance. The document operates on a sliding scale. If a company satisfies many of the factors, it may receive a declination. The fewer factors that a company satisfies, the less likely the prosecutor will be lenient.

On November 14, 2007, the United States Coast Guard issued its Environmental Crimes Voluntary Disclosure Policy ("Coast Guard Policy"), to be located in Appendix V to the United States Coast Guard Maritime Law Enforcement Manual.⁶ The Coast Guard Policy largely mirrors EPA's Audit Policy. Most importantly, under the Coast Guard Policy, qualifying regulated entities that self-disclose environmental violations are assured only that the Coast Guard "will not recommend" to DOJ or another prosecuting authority that criminal charges be brought.

In the end, a company must carefully weigh its decision of whether to disclose a criminal violation to EPA or to the Coast Guard because DOJ will likely draw its own independent conclusion as to whether prosecution is warranted. Moreover, voluntary disclosure is only one factor among many that DOJ weighs in making its decision whether charges are appropriate.

DoD. To qualify for the Department of Defense ("DoD") Voluntary Disclosure Program, a contractor submits to DoD a comprehensive description of the possible criminal activity, and often conducts a full internal investigation, disclosing to DoD the investigation's findings.⁷ DoD then launches its own "verification" investigation. It will also consult with DOJ and the appropriate suspension/debaring official.

Although there can be considerable benefits to participating in the Program – not least of which is increasing the company's chances of avoiding suspension and debarment – the Program is no panacea against prosecution. DOJ reviews all DoD voluntary disclosures and maintains its traditional discretion as to whether to prosecute. The "Hendricks Memorandum," similar to the McNulty Memorandum, guides that discretion. The DOJ considers such factors as the candor, completeness, and promptness of the company's disclosure; the quality of the company's cooperation; the pervasiveness of the wrongdoing; and the nature and extent of any remedial action.

HHS. The Department of Health and Human Services ("HHS") modeled its voluntary disclosure program, the "Provider Self-Disclosure Protocol," after DoD's program.⁸ To participate in the Protocol, providers must submit to HHS a comprehensive, factually-rich description of the possible criminal activity. The provider must then follow up with a complete internal investigation, and must disclose the findings to the Department's Office of Inspector General ("OIG"). As with the other programs, the reward for disclosing wrongdoing is the possibility of a recommendation for leniency. But leniency is not equivalent to amnesty. HHS "corporate integrity agreements" (an agreement to reform certain business practices) and DOJ deferred prosecution agreements are on the rise. In particular, deferred prosecution agreements ("DPAs") for healthcare fraud were up sharply in 2007. Of the thirty-four DPAs entered into in 2007, ten involved violations of the anti-kickback statute, the health care fraud statute, or the Food, Drug, and Cosmetic Act. This trend is especially noteworthy when one considers that, prior to 2007, DPAs had been used for corporate healthcare fraud cases only

⁵See DOJ's "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," http://www.usdoj.gov/enrd/Electronic_Reading_Room/factors.htm.

⁶See U.S. Coast Guard Maritime Law Enforcement Manual, App. V, "Environmental Crimes: Voluntary Disclosure Policy", available at <http://www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf>.

⁷See DoD's Voluntary Disclosure Program, <http://www.dodig.mil/Inspections/IPO/vdpam.pdf>.

⁸See Provider Self-Disclosure Protocol, <http://oig.hhs.gov/authorities/docs/selfdisclosure.pdf>.

twice before.

Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (“FCPA”) prohibits paying bribes to foreign officials for the purpose of obtaining or keeping business. This anti-bribery statute is overseen by DOJ’s Criminal Fraud Section. The DOJ evaluates a company’s FCPA voluntary disclosure under the aegis of the McNulty Memorandum. A strong showing on the McNulty factors may earn the company a declination. A less-than strong showing may result in prosecution or, ever-more increasingly, some form of corporate pretrial diversion. DPAs for example are way up for corporate FCPA violations. Nearly thirty percent of 2007’s DPAs involved FCPA violations. While it is unclear how many of these agreements sprang from voluntary disclosures, it is clear that companies have very little margin for error under the McNulty factors and when making a voluntary disclosure. More and more, prosecutors may translate their doubts about a company into deferred prosecution, as opposed to a declination. While most DPAs contain onerous requirements such as sizable criminal penalties, enhanced compliance efforts, and corporate monitoring, companies often view pretrial diversion as an attractive alternative to indictment.

Conclusion

While there is no “one size” fits all category for the various self-disclosure programs, some have achieved greater success than others based on the transparency and predictability of success within the program. It is easy to understand why the Antitrust Policy is so well received and has had an increased number of applicants – particularly when a company, with confidence, can adequately assess its chances of being accepted into the Policy and granted amnesty. In the antitrust arena, a company is typically coming forward to disclose its participation in an illegal cartel. The very nature of this activity involves the participation of co-conspirators. Thus, the “first in the door” concept makes sense in terms of acceptance into the Policy and qualifying for immunity from prosecution. In most of the other voluntary disclosure programs, however, you do not necessarily have the existence of co-conspirators. For example, in the environmental field, a company may be contemplating reporting emission exceedences that were not previously reported. Such disclosure typically does not involve a complex and far-reaching conspiracy (at least with respect to other corporate entities), and thus, granting full amnesty for being first in the door makes little sense. That said, it is hard to understand why EPA’s Policy, as well as any of the other programs, do not provide a greater level of protection from prosecution for self-disclosing criminal violations. By not providing automatic amnesty, most companies believe that they will be prosecuted based on the evidence that it disclosed. Unfortunately, this is the case with many of the voluntary disclosure programs as they exist today.

Because there is a lack of transparency in many of the self-disclosure programs, a company can be denied access to the Program entirely based upon any number of technicalities, regardless of its lack of criminal intent. Prosecutors have great discretion in determining whether a company has met the conditions of the specific program. Thus, where a prosecutor believes that charges should be brought and a case can easily be made, he or she is unlikely to follow any “recommendation” against prosecution – especially when no rationale has to be provided when overriding the agency decision. The cornerstone of an effective voluntary disclosure program is the predictability and certainty that if a company meets the conditions of the program, prosecution will not ensue. Anything less provides no incentive to disclose.