American Bar Association, Section of Litigation
Commercial & Business Litigation Committee

ARTICLES

When and Why to Consider Self-Disclosure of Criminal Conduct

By Ariel A. Neuman and Jen C. Won – March 21, 2019

Criminal investigations and prosecutions can be a devastating collateral consequence of commercial litigation. Opponents in civil litigation are uniquely positioned to make trouble for a company whose agents engaged in criminal conduct. Referrals to the Federal Bureau of Investigation (FBI) and U.S. Attorney's Office can wreak havoc on an opposing party. Documents obtained in discovery and testimony obtained through depositions almost always can be turned over to law enforcement authorities, and that evidence can provide the government with a virtual road map for a criminal investigation. This is true even where the putative crime has nothing to do with the subject of the litigation.

Corporations can be held criminally liable for the criminal acts of their officers, employees, and agents, even if those actions were in violation of the company policies and procedures and contrary to guidance the company provided to individuals. As long as the employee was acting within the scope of his or her authority (i.e., the employee was authorized to sign the contract, issue the invoice, or sign the check) and with some intent to benefit the company, the company is legally on the hook. *See, e.g.*, *United States v. Agosto-Vega*, 617 F.3d 541, 552–53 (1st Cir. 2010); *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008).

A conviction for a corporation can carry with it huge financial penalties, intrusive and disruptive third-party monitors, and court-ordered changes to business practices. For instance, after its emissions cheating came to light, Volkswagen was convicted of multiple felonies, was forced to pay more than $30 billion in fines and penalties, and had several top executives charged with federal crimes. The company is still operating under a government consent decree.

The conviction may also preclude the corporation from participating in federal or state-funded programs (debarment) and may result in revocation of its business licenses and permits. All of that assumes that the company survives the repercussions from (a) financial institutions that now view the corporation and its owners as untenably risky clients, (b) business partners unwilling to accept the public taint and private impact of doing business with a "dirty" counterpart, and (c) the loss of customers' confidence and respect.

Of course, not every crime by every employee results in a prosecution of the company. Prosecutors have substantial latitude in determining whether to prosecute a corporation for violations of federal criminal law committed by its agents. The U.S. Department of Justice's (DOJ's) *Justice Manual* (JM)—the manual that is supposed to guide the DOJ's prosecutorial decisions—provides that prosecutors should consider multiple factors, such as the nature and seriousness of the crime, the pervasiveness of wrongdoing within the corporation, and the corporation's history of similar misconduct, in determining whether to bring charges. *See* JM §§ 9-27.220 et seq.

All of this leaves companies large and small facing the difficult quandary of what to do when they discover criminal conduct by officers, employees, or agents. Fire them? Report the misconduct to the authorities? Quietly move the offenders to a different division? Does it solve the problem to just stop the problematic activity? What if you refund any ill-gotten gains? This article gives civil litigators a high-level survey of the key factors to consider as to when and why a corporation might decide to get ahead of the curve and self-disclose its agents' criminal conduct to law enforcement authorities. It also highlights the need to engage competent criminal counsel at the first hint that one's client may have engaged in criminal conduct.

The DOJ's Enforcement Policy on Voluntary Disclosure—Lessons for Litigators

The DOJ's *Justice Manual* emphasizes a corporation's voluntary disclosure and full cooperation as important factors in prosecutors' decisions regarding whether to pursue charges against the corporation. Full cooperation goes beyond the mere disclosure of facts relevant to misconduct and may entail providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. *See* JM § 9-28.720.

Indeed, the DOJ is working hard to convince companies that there can be only one answer to the question of what to do when arguably criminal conduct is uncovered: self-report the crimes to law enforcement at the earliest possible opportunity and fully cooperate with the authorities' investigation. No competent litigator should proceed without at least considering the possibility of self-disclosure at any sign of criminal conduct.

Even better from the DOJ's perspective is if the company does the criminal investigation itself—hopefully through an independent internal investigation conducted by competent criminal counsel—and serves up all the wrongdoers on a silver platter to the FBI and assistant U.S. attorney. Indeed, in light of the benefits that come with self-disclosure, armies of lawyers are hired on a daily basis by companies seeking to ferret out and potentially self-report their criminal conduct.

Even in the non-criminal government enforcement context, self-disclosure is often the name of the game. When the Securities and Exchange Commission (SEC) considers possible enforcement actions, self-reporting is one of the four broad categories the SEC uses to determine appropriate charges and remedies. The remaining three categories—self-policing, remediation, and cooperation—are arguably tied to self-reporting as well. *See* Remarks of Andrew Ceresney, The SEC's Cooperation Program: Reflections on Five Years of Experience (May 15, 2015).

> **A rare immunity guarantee.** The DOJ historically has incentivized companies to self-disclose crimes in arenas where criminal conduct is particularly difficult to detect. Most of its programs do not come with any guarantees, however.
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> An important exception is the DOJ's Antitrust Division and its well-established Corporate Leniency Policy. The policy virtually guarantees that corporations and

individuals who self-report anticompetitive activity and cooperate in the investigation of the so-called cartel will *avoid* criminal conviction, fines, and prison sentences, so long as they are "first in the door" and agree to cooperate fully with the government's investigation. In the antitrust setting, even if the government is aware of the misconduct but does not yet have evidence sufficient to secure a conviction, the "first in the door" corporate cooperator can still guarantee itself immunity (though its officers and employees may not be so lucky). This program is an outlier.

The current trend. The more common scenario faced by corporations that self-disclose is a mix of hoping for the best and relying on the DOJ's good faith and desire to incentivize others to come forward.
The DOJ is moving toward a model for all crimes based largely on its policies related to the Foreign Corrupt Practices Act (FCPA). FCPA violations are notoriously hard to detect given that, by definition, they largely occur outside the United States. By using the stick of crippling penalties should criminal conduct be uncovered by the government, and the carrot of potential insulation from prosecution should a company self-report, the DOJ has created an entire legal practice devoted to helping companies detect, investigate, and self-report FCPA violations.

Under the DOJ FCPA Pilot Program introduced in 2016 "to encourage companies to disclose the FCPA misconduct," companies are eligible for mitigation credit if they (1) voluntarily disclose all relevant facts; (2) fully cooperate with the DOJ investigations; (3) preserve and disclose documents; (4) make employees available for interviews; and (5) adopt appropriate remedial measures, including disciplining culpable employees. *See* Memorandum from Andrew Weissmann, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016).

The program was so successful (the number of self-reported FCPA violations doubled within 18 months) that the DOJ instituted a revised FCPA Corporate Enforcement Policy, which further encourages voluntary disclosures of FCPA-related misconduct by conferring a presumption that the DOJ will decline to prosecute companies that meet the revised policy's requirements. *See* *U.S. Attorneys' Manual* § 9-47.120, FCPA Corporate Enforcement Policy.

The trend is spreading, and as DOJ resources are stretched to their limits, the DOJ is increasingly turning to private companies and their private lawyers (often former DOJ attorneys) to do the government's work for it. The DOJ recently confirmed that the FCPA Enforcement Policy applies to virtually every other type of case investigated by the DOJ's Criminal Division. This means that the same incentives to disclose and cooperate, but with the same uncertain outcome as described in the FCPA Enforcement Policy, now apply to crimes involving accounting and securities fraud, health care fraud, money laundering, and virtually every other type of offense. *See* Remarks of Deputy Attorney

> General Rod Rosenstein at the 32nd Annual ABA National Institute on White Collar Crime (Mar. 2, 2018).
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> Self-reporting in the environmental crimes context also often will yield significant benefits. Some federal agencies, such as the Environmental Protection Agency and the DOJ's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting may qualify the corporation for amnesty or reduced sanctions. *See*, *e.g.*, EPA Announces Renewed Emphasis on Self-Disclosed Violation Policies (May 15, 2018).

Individual Accountability

It is impossible to consider corporate self-reporting without reflecting on the effects it may have on those individuals implicated in the misconduct, as well as those around them. Where the company might avoid prosecution, individuals who are served up to law enforcement by their employers could face ruined reputations, mountains of legal bills, and, in the worst-case scenario, years in prison. The ramifications of potential criminal liability are something few civil lawyers are used to worrying about.

In November 2018, Deputy Attorney General Rod Rosenstein announced that the DOJ will relax the all-or-nothing approach it took in the so-called Yates Memo. Remarks of Rod Rosenstein at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018). At its core, the Yates Memo required that corporations identify *all* individuals involved in *any* aspect of alleged misconduct, in order for the corporation to receive *any* credit for its cooperation with the government.

Under the revised policy, to qualify for "any cooperation credit" in criminal cases, companies now have to work "in good faith to identify individuals who were substantially involved in or responsible for wrongdoing" and disclose that information to the DOJ. Moreover, the revised policy focuses "on the individuals who play significant roles in setting a company on a course of criminal conduct." *Id.*

It is important to note that the DOJ will not award any credit to a corporation that "conceals involvement in the misconduct by members of senior management or the board of directors" or that "otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct." *Id.*

Boards and executives considering self-disclosure must realize that there is a very real chance that employees and others who engaged in the misconduct will be facing a federal prosecution based largely on evidence voluntarily turned over by the company.

Key Considerations for Civil Litigators

This brief overview obviously cannot cover the complexities surrounding a decision to self-report. Experienced criminal counsel must be engaged in order to evaluate whether self-

disclosure and self-reporting is the right choice and to understand the potential ramifications thereof. Such representation should be engaged at the very first sign of potential problems, especially when discovered in the course of civil litigation. Do not let the opposing party be the one to call the U.S. Attorney's Office.

The first step is to conduct a privileged, independent internal investigation to determine what actually occurred. In-house counsel rarely are equipped to conduct the investigation with an eye toward the possibility that the company may choose to disclose all the findings. Keeping the investigation privileged will avoid disclosure of facts learned during the investigation in related civil litigation, at least in the first instance, while decisions regarding self-disclosure are being made. That said, underlying documents that are not in and of themselves privileged will make their way to the other side through discovery, and so the internal investigation usually has to work quickly and efficiently.

At the same time, civil counsel must examine the financial exposure that self-disclosure creates. For instance, in the antitrust arena, although the DOJ may grant a "first-in-the-door" cooperator full immunity, civil plaintiffs are likely to take advantage of available treble damages when the misconduct comes to light. Settlements with the DOJ are rarely, if ever, confidential. A full and complete analysis is necessary as part of any decision to open the company files to law enforcement.

All of that said, should a company choose to follow the path of self-reporting, there are some rules that should be assumed in advance.

1. **Disclosure must be truly voluntary.** In other words, a company must disclose the wrongdoing before an imminent threat of a governmental investigation, and the disclosure must be independent of any other legal obligation. *See* JM § 9-28.300.
2. **Full cooperation means disclosing all facts, including facts related to individuals.** Do not expect to hide anything. Responsible individuals should be identified at the outset and the full extent of their misconduct disclosed. A company will not receive cooperation credit by simply reporting the wrongdoing in a narrative. All relevant facts should be tailored to particular individuals. *See id.* § 9-28.210. The role and conduct of management are particularly important. An internal investigation may uncover a corporate culture in which the management tacitly encouraged criminal conduct.

   Full cooperation with the DOJ also requires turning over all documents in a timely manner and assisting with the government's prosecution of individuals.
3. **Restitution and reform should be contemplated.** Consider immediate restitution and institutional reform, even before the investigation is complete. The DOJ also will consider whether a company has taken appropriate remedial measures—including discipline for wrongdoers—in determining whether to prosecute a corporation. *See id.* § 9-28.1000. To demonstrate its commitment to compliance, the company should take steps to create the expectation among employees that criminal conduct will not be

tolerated.

To receive any cooperation credit from the DOJ, the company must forfeit all ill-gotten profits. A corporation's effort to pay restitution or disgorgement even in advance of any court order may decrease the likelihood that the DOJ will bring formal charges. Similarly, the government may also credit the corporation's efforts to implement or improve its compliance program.

Conclusion

Self-disclosure of criminal conduct is virtually becoming a requirement given current DOJ policy. Failure to disclose upon detection will lead to prosecutions and the imposition of significant penalties that may otherwise be avoided. Whether the misconduct comes to light in the context of a referral from an opponent in civil litigation, a whistleblower, or a victim report, the consequences for a company will be far worse if the feds knock on the company's door, as opposed to vice versa. Civil litigators who represent corporations will want to keep these considerations in mind and strive to stay informed about the latest developments in DOJ policy.

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