BNA, INC.

WHITE COLLAR CRIME REPORT

BNA Employee-Owned Since 1947

VOL. 4, NO. 18 611-616 AUGUST 28, 2009

VOLUNTARY DISCLOSURE

This is part 1 of a series. In this part, we will examine the primary characteristics and potential risks and benefits of those policies of the Department of Justice and the Securities and Exchange Commission that are designed to encourage corporate self-reporting of wrongful conduct. In part 2, we will look at similar policies established by the Environmental Protection Agency, the Department of Health and Human Services, and the Internal Revenue Service, as well as the Bank Secrecy Act's regulations that require financial institutions to self-report fraud or misconduct to the Treasury Department.

When Should a Company Voluntarily Disclose Wrongful Conduct to the Government? Factors to Consider

BY DAVID M. ROSENFIELD

In today's rapidly changing prosecutorial and regulatory landscape—with a new emphasis on holding companies accountable for the misdeeds of their employees, particularly in light of the recent economic meltdown—companies must be ever more vigilant in detecting corporate misconduct. Nevertheless, it should also be recognized that the discovery of corporate misconduct by a company often creates a difficult dilemma for that company: whether to self-report to the government. Voluntary self-disclosure has many advantages and is often the best approach. Yet the decision as to whether to voluntarily disclose involves many competing considerations. While voluntary disclosure may significantly mitigate, or even eliminate, the penalties for misconduct, it may also render potential defenses moot, result in a waiver of substantive rights and protections, and ensure increased government scrutiny and reporting requirements going forward. Moreover, voluntary disclosure can result in harsh penalties for activity that might never have been uncovered by the government if the corporation had simply put an end to the misconduct but not reported it.

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Many U.S. government agencies have implemented leniency policies to encourage corporate self-reporting, as well as to promote an atmosphere of corporate com-

 ISSN 1559-3185

pliance and to mitigate investigation costs. Perhaps the best-known policy is the Corporate Leniency Policy of the Justice Department's Antitrust Division (the ''Antitrust Leniency Policy''). The Antitrust Leniency Policy provides that the first corporation to disclose wrongdoing, but *only* the first corporation, will not be criminally prosecuted or fined.[1] Conversely, while government agencies such as DOJ (outside of the Antitrust Division), the Securities and Exchange Commission, the Environmental Protection Agency, and the Internal Revenue Service, among others, also have leniency policies for self-reporting corporations, these policies neither provide for guaranteed immunity from criminal or regulatory prosecution nor detail the specific benefits to be gained from self-reporting. Thus, the risk to a corporation that self-reports criminal conduct or regulatory violations can be much greater under these programs, and a company should understand that the information it discloses may ultimately be used against it by prosecutors or regulators.

It is also important to recognize that the likelihood that the government will eventually learn about any improper conduct at a company is increased by the possibility that a ''whistleblower'' will report the conduct under the False Claims Act, 31 U.S.C. § § 3729, et seq., which incentivizes such reporting by providing for monetary relief for successful claims filed by whistleblowers.

The decision whether to self-report is a critical one for a company and the audit committee of its board of directors (which usually oversees corporate internal investigations). Therefore, this decision should almost always be made in consultation with experienced outside counsel and in anticipation of a potential settlement with the government. Consideration should also be given to whether a privilege waiver will be necessary, recognizing that such a waiver will likely open the doors to discovery of the information in civil lawsuits.

This article will examine the leniency policies of various government agencies as they apply to self-reporting corporations, with the primary exception of the Antitrust Division's Corporate Leniency policy, which, as noted in footnote 1, has been extensively discussed elsewhere.[2] It will also discuss the potential risks and benefits facing a company that is considering whether to self-report criminal conduct or regulatory violations to these agencies.

The Department of Justice

Policy Description. In August 2008, under the guidance of Deputy Attorney General Mark Filip, Title 9, Chapter 9-28.000 of the U.S. Attorney's Manual (''USAM''), titled ''Principles of Federal Prosecution of Business Organizations,'' was issued.[3] This section of the USAM details the following nine factors that are to be considered by DOJ when determining whether to criminally charge a corporation:

- the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
- the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- *the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents*;
- the existence and adequacy of the corporation's pre-existing compliance program;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable and the impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions. [4]

In a May 8, 2009, speech in Washington, D.C., at the American Bar Association's National Institute on Internal Corporate Investigations and In-House Counsel, Attorney General Eric Holder emphasized that what DOJ expects from corporations is, among other things, ''vol-

[1] As the Antitrust Division's Corporate Leniency Policy has been extensively reviewed in numerous articles, it will not be addressed herein. One recent article concerning this policy is the following: David M. Rosenfield, *The DOJ's Corporate Leniency Policy*, Competition Law 360 (Jan. 23 & 30, 2009), available at http://competition.law360.com/articles/83865 for part I of the article, Jan. 23, 2009, and http://competition.law360.com/articles/83866 for part II of the article, Jan. 30, 2009. On Nov. 19, 2008, the Antitrust Division clarified the leniency policy. *See* Scott D. Hammond, ''Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters,'' DOJ public documents (Nov. 19, 2008), available at http://www.usdoj.gov/atr/public/criminal/239583.htm. For an informative discussion regarding these clarifications, *see* ''Justice Department Refines Leniency Program for Criminal Antitrust Violations,'' Bingham McCutchen LLP Alert (Dec. 15, 2008), available at http://www.bingham.com/Media.aspx?MediaID=7959.

[2] This article is by no means all inclusive, as it does not cover the leniency policies of many government agencies. Rather, the article focuses on the leniency policies of some key government agencies. If a company is dealing with an agency not discussed herein, it should, of course, become familiar with the leniency policy, if any, of that particular agency.

[3] The USAM includes many of the same provisions found within the Dec. 12, 2006, memorandum issued by then-Deputy U.S. Attorney General Paul J. McNulty and also titled ''Principles of Federal Prosecution of Business Organizations,'' available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. This memo is also known as the McNulty Memorandum, and certain of its provisions, particularly those concerning waiver of the attorney-client privilege, were modified in the USAM provisions.

[4] USAM § 9-28.300 (emphasis added); *see also* ''Principles of Federal Prosecution of Business Organizations,'' memorandum from Mark R. Filip, deputy attorney general, to heads of department components and U.S. attorneys (Aug. 28, 2008) at 3-4, available at http://www.usdoj.gov/opa/documents/corpcharging-guidelines.pdf.

  WCR ISSN 1559-3185

untary disclosure,'' ''timely disclosed relevant facts,'' and ''remedial measures.''[5]

Section 9-28.700 of the USAM, titled ''The Value of Cooperation,'' states that DOJ will take into account whether a company self-disclosed in deciding whether to criminally charge the company. It specifically provides:

> In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Additionally, Section 9-28.750 of the USAM, titled ''Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary Disclosures,'' provides:

> Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division has a policy of offering amnesty only to the first corporation to agree to cooperate. Moreover, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

What DOJ is requiring of corporations today is not a waiver of the attorney-client privilege, but rather, the timely disclosure of all key facts. In this regard USAM § 9-28.720, titled ''Cooperation: Disclosing the Relevant Facts,'' provides, in pertinent part, as follows:

> Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.

Section 9-28.400 of the USAM, titled ''Special Policy Concerns,'' notes that, in considering whether to prosecute a corporation, DOJ must consider the practices and policies of each appropriate division within the Justice Department:

> The Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

Finally, the U.S. Sentencing Guidelines, although no longer mandatory and to be used for guidance only, provide for a significant reduction (five levels) in a corporation's offense level to reward timely and complete self-disclosure, cooperation, and acceptance of responsibility.[6]

Risk, Benefit Analysis. The fourth factor on the USAM's nine-factor list, which deals with voluntary disclosure, can lead to a major dilemma for corporations that discover wrongdoing. With the exception of factor six (remedial actions), deciding whether to voluntarily disclose is the only factor that the corporation itself controls. The remaining factors are subject to the prosecutorial discretion of DOJ. Therefore, while a company will likely receive the benefit of lesser sanctions as a result of voluntary disclosure, such a disclosure can also lead to punishment for a crime that otherwise would never have been discovered. Thus, the risks and benefits of voluntary disclosure must be carefully analyzed and weighed before a decision is made.

An example in which DOJ favorably treated a company that voluntarily disclosed wrongdoing was the Micrus Corp. case in 2005.[7] Micrus voluntarily disclosed to DOJ that it had paid officials and agents in France, Turkey, Spain, and Germany more than $355,000, consisting of stock options, honoraria, and commissions, as incentives to purchase Micrus medical devices.[8] In Micrus's settlement agreement with DOJ, the company agreed to pay a $450,000 fine, adopt a Foreign Corrupt Practices Act [9] compliance program, and hire an independent compliance expert for three years to ensure that it became compliant with the FCPA.[10] Micrus's voluntary disclosure was one of the primary factors that led DOJ to agree to this favorable settlement, in which Micrus was able to avoid criminal prosecution for violating the FCPA.[11]

While voluntary disclosure resulted in favorable treatment for Micrus by DOJ, voluntary disclosure does not guarantee such treatment. Factor four on the USAM's list, voluntary disclosure, in and of itself does not guarantee that a corporation will not be criminally prosecuted. As noted in the comments to Section 9-28.300 of the USAM:

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[5] The author, Mr. Rosenfield, attended Attorney General Holder's speech.

[6] *See* U.S.S.G. § 8C2.5(g)(1), which provides: ''If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points.''

On the other hand, simply cooperating in an investigation and affirmatively accepting responsibility for criminal conduct without voluntary disclosure merits only a 2-level reduction for a corporation. *See* § 8C2.5(g)(2).

[7] ''Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability,'' DOJ press release (March 2, 2005), available at http://www.usdoj.gov/opa/pr/2005/March/05_crm_090.htm. *See also* DOJ agreement with Micrus Corp., available at http://www.law.virginia.edu/pdf/faculty/garrett/micrus.pdf; *Self-Disclosure Reduces FCPA Sanctions for Calif. Firm*, Washington Tariff & Trade Letter, Vol. 25, No. 10, at 1 (March 7, 2005), available at http://www.wttlonline.com/ht/a/GetDocumentAction/id/21624.

[8] *Self-Disclosure Reduces FCPA Sanctions for Calif. Firm,* supra.

[9] The FCPA is found at 15 U.S.C. §§ 78, et seq.

[10] *Self-Disclosure Reduces FCPA Sanctions for Calif. Firm*, supra.

[11] *Id.*

In some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

Chiquita Voluntary Disclosure. A matter that illustrates the pros of voluntary disclosure to DOJ is the case involving Chiquita Brands International, Inc. From 1997 to 2004, Chiquita paid ''protection'' money to a group called the Autodefensas Unidas de Colombia (''AUC''), a well-known Colombian criminal organization.[12] The payments were made through Banadex, a wholly-owned Colombian subsidiary of Chiquita.[13] Chiquita started making the payments through Banadex in 1997, after a Banadex executive had met with the then-leader of the AUC, Carlos Castaño.[14] Castaño informed Banadex that a failure to make payments to the AUC could result in physical harm to the employees and property of Banadex.[15]

By September 2000 certain senior executives at Chiquita became aware that Banadex was making payments to the AUC, and that the AUC was an extremely violent criminal group.[16] Nevertheless, Chiquita continued to make the payments through various intermediaries, and recorded them in its books as ''security'' payments.[17]

On Sept. 10, 2001, the U.S. government designated the AUC as a foreign terrorist organization (''FTO''), and on Oct. 31, 2001, the AUC was designated as a specially designated global terrorist organization.[18] Once the AUC was designated as an FTO, it became a federal crime for any U.S. corporation to provide or transfer money to it.[19] Moreover, the AUC's terrorist designation was widely publicized in the American media.[20] Nevertheless, Chiquita still made as many as 50 additional payments to the AUC from Sept. 10, 2001, to Feb. 4, 2004.[21]

On Feb. 20, 2003, an employee of Chiquita informed a senior executive that the AUC was a terrorist organization,[22] at which point senior executives at Chiquita decided to seek the advice of outside counsel as to whether they could continue making the AUC payments.[23] Counsel emphatically advised Chiquita to cease making the payments, informing the company that it was against U.S. law to do so.[24]

On the advice of outside counsel, on April 24, 2003, Chiquita self-reported the AUC payments to DOJ, indicating that the payments had been made under a threat of violence.[25] In response, DOJ advised Chiquita that the payments were illegal and to cease making them immediately.[26] Nevertheless, Chiquita made as many as 20 additional payments to the AUC between April 24, 2003, and Feb. 4, 2004.[27] Banadex was sold by Chiquita in June 2004.[28]

Criminal Investigation Begins. After Chiquita's voluntary disclosure to DOJ in April 2003, the Justice Department began a criminal investigation of Chiquita.[29] Chiquita fully cooperated with DOJ in its investigation by producing corporate records and facilitating witness interviews.[30] Moreover, in response to the criminal investigation, Chiquita made a settlement proposal to DOJ pursuant to which Chiquita would (a) plead guilty to a single felony count of financial dealings with terrorists; (b) acknowledge making $1.7 million in payments to the AUC; (c) pay a $25 million fine; (d) be placed on probation for five years; and (e) establish a compliance committee.[31]

Chiquita's proposal left two issues open for negotiation. First, the government could have demanded a much higher fine than the $25 million offered by Chiquita. In this regard, pursuant to the International Emergency Economic Powers Act (the ''IEEPA''), 50 U.S.C. § 1705(b)(2), Chiquita could have faced a maximum fine of twice its financial gain, and during the time of the AUC payments Chiquita had made an estimated $49.4 million in profits from its Banadex Colombian banana operations.[32] Thus, the $25 million offered was only a quarter of what Chiquita could have been fined under the IEEPA. Second, DOJ could have exercised its discretion to prosecute individuals employed by Chiquita who were involved in the criminal conduct.[33] In the end, the two issues were resolved in Chiquita's favor: The proposed $25 million fine was accepted by DOJ, and no prosecutions were brought against individual Chiquita employees.[34]

While many factors contributed to DOJ's decision to accept Chiquita's proposal, Chiquita's voluntarily disclosure of its wrongdoing was a significant factor in that determination.[35] The Justice Department directly addressed this issue in its September 2007 sentencing memorandum to the court, noting, ''Chiquita's volun-

[12] *See Chiquita Brands International, Inc., Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay a $25 Million Fine*, DOJ press release (March 19, 2007), available at http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html.
[13] *Id.* at 2.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1.
[19] *Id.*
[20] *Id.* at 2.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 3.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Sue Reisinger, *Blood Money Paid by Chiquita Shows Company's Hard Choices*, Law.com (Dec. 26, 2007), available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1195639472310.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *United States v. Chiquita Brands International Inc.*, No. 1:07-cr-00055-RCL, government's sentencing memorandum at 20-21 (D.D.C. Sept. 17, 2007), available at http://law.du.edu/images/uploads/corporate-governance/international-us-chiquita-gov-sentencing.pdf.

  WCR ISSN 1559-3185

tary disclosure—standing alone—merits comment. As a matter of good policy and common sense, the Department of Justice encourages self-reporting.''[36] The Justice Department also noted that Chiquita pled guilty to a very serious charge and that ''Chiquita accepted responsibility for its criminal conduct and deserves the benefit of acceptance of responsibility.''[37]

In its sentencing memorandum, DOJ also emphasized, however, that there are limits to the benefits of self-reporting, stating that ''self-reporting alone does not automatically protect a company from prosecution, any more than a confession would protect an individual from prosecution.''[38]

Self-Reporting Best Choice. Another reason Chiquita's decision to voluntarily self-report was arguably the best choice is that, based upon the other factors in the then-applicable McNulty Memorandum,[39] the government could have been much tougher on Chiquita. Chiquita's crime was serious, executives knew that the activity was ongoing, and Chiquita continued to make the illegal payments even after it was told by the Justice Department to stop them.[40] Essentially, the only factor that DOJ could view positively was Chiquita's voluntary disclosure.

The primary factor that weighed against Chiquita's decision to voluntarily disclose was the possibility that, absent the disclosure, the government would never have discovered Chiquita's conduct. But that was a risk that Chiquita was simply unwilling to take.

Thus, while voluntary disclosure will certainly not preclude a prosecution, the circumstances of the Chiquita case indicate that the Justice Department is likely to strongly consider significant beneficial treatment to corporations that voluntarily disclose criminal conduct.

The Securities and Exchange Commission

Policy Description. In 2001, the SEC issued its ''Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions'' (referred to as the ''Seaboard Report''), announcing a policy of rewarding companies for self-policing, self-reporting, remediation, and cooperation with SEC staff.[41] The benefits range from ''the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [used] to announce and resolve enforcement actions.''[42]

The Seaboard Report was issued in connection with the SEC's investigation of the Chestnut Hill Farms division of the Seaboard Corporation. No action was taken by the SEC against Seaboard, but the former controller was sanctioned for overstating deferred costs and assets and understating related expenses.[43] The SEC attributed its decision not to take enforcement action against Seaboard to the company's swift and thorough response to the fraud and its full cooperation.[44] In the Seaboard Report, the SEC noted that:

> Within a week of learning about the apparent misconduct, the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee . . . . The full Board was advised and authorized the company to hire an outside law firm to conduct a thorough inquiry. Four days later, Meredith [the controller] was dismissed, as were two other employees who, in the company's view, had inadequately supervised Meredith; a day later, the company disclosed publicly and to us that its financial statements would be restated. . . . The company pledged and gave complete cooperation to our staff. . . . Among other things, the company produced the details of its internal investigation, including notes and transcripts of interviews of Meredith and others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.[45]

The SEC also credited Seaboard for its remediation efforts, including strengthening its financial reporting process and hiring individuals who were certified public accountants for its accounting department.[46]

The Seaboard Report lists 13 specific criteria that the SEC ''considers in deciding whether and how much to reward companies when they self-report, correct wrongdoing and cooperate with SEC staff in its investigation.''[47] Factor eight specifically deals with voluntary disclosure and cooperation:

> What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions? *Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?* Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred? Did the company take steps to identify the extent of damage to investors and other corporate constituencies? Did the

[36] *Id.* at 21.

[37] *Id.* at 20.

[38] *Id.* It is also important to recognize that Chiquita was paying off a terrorist organization in the post 9/11 era, and it continued to do so even after being explicitly warned by DOJ to stop. Nevertheless, the government was still willing to offer leniency to a company that self-disclosed.

[39] The McNulty Memorandum updated a prior memo on the same subject from then-Deputy Attorney General Larry D. Thompson. As did the Thompson Memorandum, the McNulty Memorandum set forth factors that U.S. attorneys were to consider in deciding whether to investigate, charge, or negotiate a plea with a corporation.

[40] *See Chiquita Brands International, Inc., Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay a $25 Million Fine,* supra.

[41] ''Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions'' (the ''Seaboard Report''), Exchange Act Release No. 44969 (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

[42] *Id.* at 2.

[43] *See* David Gourevitch and Seth T. Taube, *The Securities and Exchange Commission Raises the Cost of Non-Cooperation,* Securities Regulation & Law Report, Vol. 36, No. 45 (Nov. 15, 2004), at 2024-2029, available at http://www.gourevitchlaw.com/pdf/sec_cooperation.pdf; *see also In re Gisela de Leon-Meredith*, Exchange Act Release No. 44970, Administrative Proceeding File No. 3-10626 (Oct. 23, 2001), available at http://ftp.sec.gov/litigation/admin/34-44970.htm.

[44] Seaboard Report at 1.

[45] *Id.*

[46] *Id.*

[47] David B. Fine, *SEC Reveals Key Considerations in Self Disclosure Actions*, White Collar Crime Reporter, Vol. 16, No. 1 at 1 (Jan. 16, 2002), available at http://www.wiggin.com/pubs/articles_template.asp?ID=161161152002.

company appropriately recompense those adversely affected by the conduct?[48]

Agency's Focus. The SEC emphasized in the Seaboard Report that it was ''not adopting any rule or making any commitment or promise about any specific case; nor are [we] in any way limiting [our] broad discretion to evaluate every case individually, on its own particular facts and circumstances.''[49] The SEC, however, focuses on four broad measures when deciding whether to forgo any enforcement action, or agree to reduced charges, lighter sanctions, or the inclusion of mitigating language in charging documents.[50] The four measures are: ''(1) self-policing prior to discovery of misconduct, (2) self-reporting of the misconduct once it has been discovered, (3) remediation, and (4) cooperation with regulatory authorities and law enforcement.''[51]

On Oct. 6, 2008, the SEC published its enforcement manual. In Section 4.3 of the manual, titled ''Waiver of Privilege,'' the SEC reconfirmed that its policies concerning cooperation are those set forth in the Seaboard Report.[52] Section 4.3 of the Manual also includes the following statements concerning self-reporting and cooperation:

> A key objective in the staff's investigations is to obtain relevant information, and parties are, in fact, required to provide relevant information in response to SEC subpoenas. However, both entities and individuals may provide significant cooperation in investigations by voluntarily disclosing relevant information. That voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation, as long as all relevant facts are disclosed.
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> . . .
>
> The SEC encourages and rewards cooperation by parties in connection with staff's investigations. One important measure of cooperation is whether the party has timely disclosed facts relevant to the investigation. Other measures of cooperation include, for example, voluntary production of relevant factual information the staff did not directly request and otherwise might not have uncovered; requesting that corporate employees cooperate with the staff and making all reasonable efforts to secure such cooperation; making witnesses available for interviews when it might otherwise be difficult or impossible for the staff to interview the witnesses; and assisting in the interpretation of complex business records.[53]

When considering the self-reporting issue, the SEC reviews how quickly management informed the company's board of directors (and the board's audit committee) of the misconduct, and whether there was a complete and effective public disclosure of all material facts.[54] The SEC also considers ''whether the company disclosed the wrongdoing on its own initiative to the SEC and the public, or whether [the company] waited until the misconduct was brought to its attention by someone else.''[55]

The entire evaluation process by the SEC is, however, very subjective. Evaluation is done on a case-by-case basis and is entirely subject to the SEC's judgment and discretion, as a result of which the value of self-reporting in any one case is inherently unpredictable. As the SEC stated in the Seaboard Report, there is ''no single, or constant, answer.''[56]

Risk, Benefit Analysis. Although the SEC's treatment of corporate misconduct is wholly dependent upon the facts and circumstances of each individual case, there appears to be a pattern of generally favorable treatment to companies that self-disclose. As noted above, the SEC stated in the Seaboard Report, ''We are not taking action against the parent company, given the nature of the conduct and the company's responses.''[57] One of the primary factors cited by the SEC for not taking such action was that Seaboard ''disclosed publicly and to us that its financial statements would be restated.''[58]

Similarly, in 2000, the SEC decided not to seek fraud-based charges against Boston Scientific Corp. for accounting irregularities that led to the improper recognition of $75 million in revenue.[59] The SEC noted that Boston Scientific had discovered the problem, had initiated an investigation headed by its outside directors, and had publicly disclosed the accounting irregularities.[60] The SEC specifically noted in its release that, ''after determining that the total amount of improperly recognized revenue was more than $75 million, and after consulting with staff of the [SEC's] Office of the Chief Accountant, Boston Scientific restated its financial statements for all of 1997 and for the first three quarters of 1998.''[61]

Conversely, in a 2005 case, the SEC did not treat Titan Corp. leniently for its violations of the FCPA in a case in which Titan *did not* self-report its violations. Titan had paid an estimated $3.5 million to its agent in Benin, Africa, for the purpose of contributing to Benin's presidential campaign, anticipating that, as a result, it would receive assistance in its development of a telecommunications project in Benin.[62] Titan had failed to adequately investigate the background of its agent, and it had also failed to ensure that the services allegedly performed by the agent, and described in his invoices, were in fact provided to Titan.[63] Finally, a former senior Titan officer had allegedly directed that its payments be falsely invoiced by the Benin agent as consulting services, and that the monetary payments be broken down

[48] Seaboard Report at 3 (emphasis added).
[49] *Id*. at 2.
[50] Gourevitch and Taube, *The Securities and Exchange Commission Raises the Cost of Non-Cooperation*, supra at 2.
[51] *Id*. at 2, citing the Seaboard Report.
[52] SEC Enforcement Division ''Enforcement Manual,'' (Oct. 6, 2008) at 99, available at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.
[53] *Id.* at 98-99.
[54] Gourevitch and Taube, supra at 2.
[55] *Id*.
[56] Seaboard Report at 2.
[57] *Id.* at 1.
[58] *Id.*
[59] *In re Boston Scientific Corp*., Exchange Act Release No. 43183, Administrative Proceeding File No. 3-10272 (Aug. 21, 2000), available at http://www.sec.gov/litigation/admin/34-43183.htm.
[60] *Id*.
[61] *Id*.
[62] *Titan Corp. Settles FCPA Criminal and Civil Claims*, White Collar Crime Prof Blog, available at http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/03/titan_corp_sett.html.
[63] *SEC v. Titan Corp.*, No. 05-cv-0411, Litigation Release No. 19107 (March 1, 2005), available at http://www.sec.gov/litigation/litreleases/lr19107.htm.

  WCR ISSN 1559-3185

into smaller increments and spread out over time.[64] The SEC levied a $13 million fine against Titan for the violation.[65]

Overall, it appears that companies that self-report violations to the SEC can generally expect to receive significant benefits. It should also be recognized, however, that the SEC often refers cases with criminal implications to the Justice Department, and the mere fact that a self-disclosure was made will not preclude such a referral. Thus, corporate self-disclosure of regulatory concerns to the SEC could result in a company facing a criminal investigation if the SEC perceives the violations to rise to the level of criminal misconduct and, accordingly, makes a criminal referral to DOJ.

[64] *Id*.

[65] *Id*.; *see also SEC Uses Titan Case to Warn Industry of FCPA Requirements*, Washington Tariff & Trade Letter, Vol. 25, No. 10 at 3 (March 7, 2005), available at http://www.wttlonline.com/ht/a/GetDocumentAction/id/21624.