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## SELF-REPORTING

Three former prosecutors, now partners at Perkins Coie LLP, examine the process of self-reporting violations of the law to the government. The authors provide 10 rules for companies to follow as the best path forward.

### INSIGHT: Voluntary Disclosure to the Government—10 Rules to Live By



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Commonly, and frequently for some, companies find themselves facing the daunting proposition of reporting an actual or potential violation of law to a government authority. Few other such heart-dropping quandaries face senior in-house counsel. Risks abound that self-reporting may cascade into a government investigation and sanction, civil lawsuits, bad press, market cap loss, or worse. Yet, the adverse consequences can be dramatically magnified by:

- Not reporting;
- Facing accusations of delay and coverup; and/or, more innocently but no less deleterious,
- Being asleep at the helm.

The road posts for effectively self-reporting to government agencies arise time and again across multiple clients, industries, and practice areas. Done correctly, self-reporting makes the best of a bad situation, and allows your company to benefit under the relevant legal framework, whether the SEC's Seaboard factors, the U.S. Sentencing Guidelines, or otherwise. Based on our combined experience as government lawyers, law firm practitioners, and in-house counsel, we set out below

considerations we recommend that every company evaluate before picking up the phone to self-report to a government official.

#### 1. Be Ready Before the Potential Violation Occurs

In addressing any crisis management matter, identifying your relevant resources *before* a future event arises can greatly enhance your success when, in exigent circumstances, you must evaluate your situation and determine whether and how to self-report to a government authority. Generally, you should always have ready a pre-screened set of “go to” professionals including:

- Investigators — both internal (legal and compliance) and external (law firms) — experienced and capable of promptly conducting interviews, reviewing documents, and analyzing the facts and law. You don't want to be seeking referrals or running conflicts checks with a new law firm when time is of the essence.
- Key partners including: (a) Human Resources; (b) Technology and Cybersecurity; (c) Government Relations; and (d) Communications. Identify individuals,

both internally and externally, experienced and knowledgeable about addressing a crisis, and establish a relationship before you need them.

To bolster your crisis response team's cohesion and experience working through the myriad of issues inherent in crises without the real-world consequences, you should consider conducting periodic trainings, including hypotheticals and tabletop exercises. This will allow opportunities to identify gaps and incorrect assumptions in your crisis response plan, as opposed to having to do so (or, as much) during an actual event.

## 2. Be Accurate and Thorough

Obtaining the benefits of self-reporting turns on demonstrating to the government that your company possesses integrity and is fully invested in achieving the right outcome. How can this be accomplished?

First, be accurate. Nothing will undermine your relationship with the government more than making misstatements which later need to be corrected. What may seem like an innocuous error to you, could cause the government to question the credibility and the bona fides of your company. Indeed, merely making a false statement can be investigated as a criminal offense.

Second, come with a game plan and "own" the problem. Yes, you probably will not know all the facts or have a proposed resolution when you first self-report, but your team (see point 1 above) will have provided you with a general sense of scope and significance and proposed next steps for investigation. It's much better to offer the government a plan of action — e.g., let the company complete its investigation by X date — than arriving empty-handed and effectively inviting the government to rouse its resources and limit (if not quash) your team's ability to complete its review and provide the company's own recommendations for resolution.

## 3. Be Swift

As a counterpoint to coming to the government prepared, waiting too long to approach the government can undermine the benefits of self-reporting. Perceived delay could cause the government to second-guess your company's integrity and sincerity in self-reporting. And should a time lag result in the government independently discovering the matter, your company may receive no credit, or much less credit, for its (later) self-reporting. For example, under Section 8C2.5(g) of the U.S. Sentencing Guidelines, an organizational defendant may only receive self-reporting credit if, among other things, it does so "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense."

## 4. Don't Repeat Errors

Insofar as the problem that sparked self-reporting is susceptible to repetition, make sure prompt, concrete steps are taken to avoid a recurrence. Glitch in the IT system? Make sure the relevant applications are suspended pending a fix. Questionable trading practice? Cease its use until further investigation or guidance. Senior executive facing a "#metoo" allegation? Consider suspension, and certainly provide strong, documented

warnings about retaliation against the complainant. Bribery claim? Make sure you understand who did what and remediate the problem to the best of your ability.

## 5. Follow-Up, Follow-Up, Follow-Up

Once your company self-reports, take efforts to demonstrate its commitment to working with the government — e.g., offering periodic updates, completing your investigation on time, providing timely responses to any government query — or you ultimately may lose the potential benefits from having self-reported in the first place. In fact, receipt of the Sentencing Guidelines' self-reporting credit is contingent on the organizational defendant's cooperation in the government's investigation, as well as its demonstrated recognition and acceptance of responsibility for its criminal conduct. In short, once you cross the reporting threshold you need to be prepared to be "all-in," as half-hearted, halting, or (worse) incomplete or inaccurate cooperation will in most cases put you in a far worse position than no reporting at all.

## 6. Don't Inadvertently Waive Attorney-Client Privilege or Work Product

You and your team may struggle with the question of making a knowing waiver of attorney-client privilege and work product. Do the benefits of gaining good will and favor with the government outweigh the risks of disclosing potentially harmful materials to the government and perhaps ultimately to plaintiffs' lawyers?

Whatever the answer in your situation, never inadvertently waive privilege. In a rush to self-report and be cooperative with the government, be sure not to share, or promise to share, materials which ultimately you wish to protect from disclosure. Waiver of privilege generally cannot be reversed, so remain constantly cognizant of what investigation reports or other materials you wish to remain protected, and have a strategy for keeping them so. You need not be shy about this topic with government lawyers — who fully understand the tension between attorney-client privilege and your company's cooperative stance — and can engage in a professional dialogue about the company's position and options.

## 7. Report to the Best Appropriate Government Authority

Government agencies run the gamut of missions, legal frameworks, geographies (including, of course, outside of the US) and personnel, and your company may already have a history and relationship with one or more of them. All of these factors need to be considered when making a reporting determination.

If your company is regulated, then reporting to your regulator may be the natural course and avoid criticism were another government agency approached instead. Having said that, what if the subject matter arises in an area where your regulator lacks primary or any authority? And what if you operate in multiple countries and deal with numerous government agencies around the globe? (For more on international double-jeopardy

and other key “carbon copy prosecution” considerations, see T. Markus Funk and A. Boutros, “‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World,” University of Chicago Legal Forum (2012), available at <https://www.perkinscoie.com/images/content/2/7/v2/27541/12-10-Boutros-Funk-Final.pdf>.

At bottom, we recommend identifying the government agency most likely to provide the broadest level of engagement. Which government entity can bring the matter to a full resolution, and take the lead among other domestic or foreign agencies? While the answer may or may not be your regulator (if regulated), you also can report to one government entity initially and then another in a phased approach (typically with the knowledge of the first entity notified). On the flip side, you will not win points by over-reporting to agencies without jurisdiction or authority, which could frustrate the pursuit of the matter by those with a true interest, as well as cause unnecessary resource expenditures dealing with duplicative or otherwise uncoordinated inquiries from curious agencies on fishing expeditions.

## 8. Who Else Needs to Know?

In conjunction with self-reporting to a government authority, consider whether additional disclosures may be required or appropriate. If a public company, are any regulatory filings required given the nature of the matter? Does the underlying matter otherwise trigger a reporting obligation to the public given your company’s goods or services? Should you notify auditors? Insurers?

## 9. Have a Press Strategy

Inescapably, a company’s self-reporting of a potential violation of law will interest the press. Also axiomatic, your company will wish to avoid publicity. From the outset, your company’s internal and, if applicable, external communications professionals should be consulted on a press strategy. Inaccurate, imprecise, and imprudent statements can provide government and plaintiffs’ counsel with fodder for complaints and charging documents.

To avoid getting caught flat-footed should the matter become public (deliberately or through a leak), your company should prepare message points and a press release, vetted by key stakeholders, for delivery when and if necessary. In these situations, your communications

staff should work with the legal team, and steps should be taken to maximize the possibility that internal materials generated in this effort will be covered by the attorney-client privilege.

## 10. Not Everything Is Reportable

Now that you’re fully geared up to self-report potential violations of law, remember that not everything merits such action. Depending on the significance of the matter and the likelihood of it being found to constitute a violation of law, some situations can be fully addressed internally. Indeed, even some regulators having direct oversight responsibility would rather hear about insignificant violations during a routine exam cycle than through special reporting.

## Conclusion

Evaluating whether to self-report to a government entity can be one of the most frazzling tasks faced by a company’s in-house counsel and executive team. In many cases the possible downsides are far clearer and, in some cases, more certain than the hoped-for upsides. However, potential violations of law cannot be unwound or ignored, and risks abound whether a company self-reports, or not. So, roll up your sleeves, collect your team, and identify the best path forward.

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