VOLUNTARY DISCLOSURE OF CORPORATE VIOLATIONS OF FEDERAL LAW

I. INTRODUCTION

Late one Friday afternoon you receive a phone call from one of your friends and clients, Dr. Andy Anderson, a well-established radiologist in town. Anderson is the managing physician of a group of radiologists, incorporated as Radiology Associates, Inc. Anderson informs you that the group recently changed billing companies and that the new billing company has informed him of errors made by the prior billing company. Evidently, the prior billing company listed erroneous billing codes on approximately three years worth of bills submitted to every insurer Radiology Associates dealt with during that time: Medicare, Medicaid, Blue Cross Blue Shield, Travelers, Prudential, etc. The erroneous billing apparently resulted in only a few dollars of overcharging per bill, but there were potentially thousands of such bills submitted to the insurers, all over Anderson's signature. Anderson asks you: "What should I do about this? Should I report the errors or keep quiet and do nothing?"[1]

You ascertain that Anderson's Medicare and Medicaid billing errors, if determined to be acts of fraud, violated various criminal and civil, federal and state laws, subjecting Anderson, his partners, and the corporation to imprisonment, millions of dollars in civil damages and penalties, forfeiture of assets, and exclusion from Medicare and Medicaid. You further learn that even if the billing errors were innocent mistakes, such mistakes can potentially become crimes under federal law if left unreported. Thus, the dilemma: if Anderson does nothing and keeps quiet, his overcharging, if discovered, could subject him, his partners and their corporation to severe criminal and civil penalties. Yet, disclosure of the overcharging to federal authorities may subject Anderson, his partners and their corporation to

1. This hypothetical was created with the help of Pamela H. Bucy, Frank M. Bainbridge Professor of Law, The University of Alabama School of Law.

liability for acts the government may not otherwise discover. This Article will attempt to help attorneys sort through such issues by examining the question of whether a corporation should ever voluntarily disclose its wrongdoing to law enforcement officials.

II. VOLUNTARY DISCLOSURE PROGRAMS

In an effort to facilitate voluntary disclosure of violations of federal law, the federal government has initiated formal voluntary disclosure programs in several areas of the law. These programs, discussed below, generally entice voluntary disclosure of corporate wrongdoing by offering affirmative rewards to qualifying organizations.

In order to encourage voluntary disclosure of wrongdoing in the health care industry, the Office of Inspector General ("OIG") of the Department of Health and Human Services ("DHHS") has recently instituted a voluntary disclosure program called Provider Self-Disclosure Protocol ("Protocol").[2] Protocol encourages health care providers to disclose wrongdoing to the OIG by appealing to health care providers' sense of duty concerning the integrity of their dealings with federal health care programs.[3] As "there are no pre-disclosure requirements, applications for admission or preliminary qualifying characteristics that must be met," Protocol is open to all health care providers, including those that are already subject to government inquiry.[4]

Other departments of the federal government have formal voluntary disclosure programs as well. The Departments of Defense ("DOD") and Justice ("DOJ") created the DOD's Voluntary Disclosure Program ("VDP") in an effort to battle defense procurement fraud.[5] The requirements for entry into VDP include the following: (1) disclosure cannot have been prompted by a belief that the government is about to discover the violation; (2) disclosure can only be on behalf of the contractor, not an individ-

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2. Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (1998).

3. *Id.* at 58,399-400.

4. *See id.* at 58,400-01.

5. Laurence A. Urgenson, *Voluntary Disclosure: Opportunities and issues for the mid-1990's*, 943 P.L.I./CORP. 225 (1996), *available in* WL, TP-ALL database.

ual employee or agent of the contractor; (3) the contractor must take prompt and complete corrective action; and (4) the contractor must cooperate fully in any subsequent investigation or audit.[6] After a contractor enters VDP, the government can still decide to prosecute.[7] The decision of whether or not to prosecute is made on a case-by-case basis and is based on a consideration of the following factors: (1) promptness of the disclosure (2) existence of preventative measures (3) extent and pervasiveness of the fraud (5) whether upper-level employees are involved in the fraud (6) the extent of any cooperation and (7) whether there has been any effective remedial action.[8]

The Antitrust Division of the DOJ has two voluntary disclosure programs available to corporations that have committed antitrust violations.[9] One program, instituted in 1978, offers leniency for voluntarily disclosing an antitrust violation only when the Antitrust Division has not yet commenced an investigation.[10] Entry into this program requires the following: (1) the Antitrust Division did not have any prior information of the illegal activity when the corporation disclosed; (2) the corporation promptly and effectively withdrew from the activity upon its discovery of the activity; (3) complete candor and cooperation during the ensuing investigation; (4) confession is a corporate act; (5) the corporation makes restitution where possible; and (6) the corporation was not the ringleader and did not coerce others to participate.[11]

The other voluntary disclosure program operated by the Antitrust Division, called Corporate Leniency Policy, was announced in August 1995.[12] This program offers leniency for voluntary disclosure of an antitrust violation even after the Antitrust Division has begun an investigation.[13] Entry into this program requires the following: (1) the corporation must be the first to disclose the activity; (2) at the time of disclosure, the Anti-

6. *Id.* at 230-31.
7. *Id.* at 231.
8. *Id.*
9. Gary G. Lynch & Eric F. Grossman, *Disclosure of Corporate Wrongdoing*, SC73 ALI-ABA 155, 186 (1998), *available in* WL, TP-ALL database.
10. *Id.*
11. *Id.* at 186-87
12. *Id.* at 187.
13. *Id.*

trust Division does not have sufficient evidence to sustain a conviction; (3) prompt and effective termination of the corporation's role in the illegal activity; (4) candor and completeness in reporting and cooperation; (5) confession is a corporate act; (6) restitution where possible; and (7) granting leniency would not be unfair to others.[14]

In the area of environmental law, the Environmental Protection Agency ("EPA") recently issued a Final Policy Statement regarding a voluntary disclosure program entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations."[15] Through this program, the EPA encourages voluntary disclosure of violations of environmental law by offering to either waive or reduce gravity-based civil penalties for offenses that are voluntarily disclosed and to forego recommending voluntarily disclosed offenses for criminal prosecution.[16] The EPA's voluntary disclosure program provides that the following conditions must be met for a regulated entity to qualify for an elimination of the gravity-based civil penalties: (1) the violation is discovered by the entity through an audit or through due diligence; (2) disclosure is prompt and voluntary following discovery; (3) prompt correction and remediation; (4) steps are taken to prevent recurrence; (5) the violation is not a repeat violation; (6) the violation is not an excluded violation; and (7) full cooperation by the organization.[17] All of the conditions must be met for the gravity-based civil penalty to be eliminated;[18] however, if all but the first condition are met, the gravity-based civil penalty can be reduced by seventy-five percent.[19] The EPA will not recommend criminal prosecution of the disclosing entity if all the conditions are satisfied and "so long as the violation does not demonstrate or involve: (i) a prevalent management philosophy or practice that concealed or condoned the environmental violations; (ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations."[20]

14. Lynch & Grossman, *supra* note 9, at 187-88.
15. Final Policy Statement, 60 Fed. Reg. 66,706 (1995).
16. *Id.*
17. *Id.* at 66,708-09.
18. *Id.* at 66,708.
19. *Id.*
20. Final Policy Statement, 60 Fed. Reg. at 66,711.

The federal voluntary disclosure programs discussed above offer vehicles for entry into the voluntary disclosure process and provide a framework for evaluating any potential benefits that can be realized from voluntarily disclosing wrongful conduct in certain federal law contexts. However, voluntary disclosure of corporate wrongdoing in other contexts may not require such formality. A phone call to the local United States attorney or district attorney will likely suffice.

III. BENEFITS OF VOLUNTARY DISCLOSURE

There are many potential benefits to voluntary disclosure. Formal programs aside, disclosure before discovery may convince prosecutors to forego criminal prosecution, go after the offending employees rather than the organization, or file lesser charges against the organization.[21] Although there are only a few published guidelines for withholding corporate criminal prosecutions on the basis of voluntary disclosure, there is strong anecdotal evidence that voluntary disclosure is an important factor considered by prosecutors who are confronted with such decisions.[22] Furthermore, even when voluntary disclosure is unable to shield a corporation from prosecution and conviction, the United States Federal Sentencing Guidelines[23] ("Guidelines") indicate that voluntary disclosure is a mitigating factor to be considered during sentencing.[24]

According to the Introduction to Chapter 8 of the Guidelines, the monetary penalty assessed against corporations, other than those operated primarily for a criminal purpose, "should be based on the seriousness of the offense and the culpability of the

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21. Richard S. Gruner, *Reducing Corporate Criminal Liability Through Post-Offense Responses*, C800 ALI-ABA 159, 167-68 (1992), *available in* WL, TP-ALL database.

22. *Id.* at 168.

23. U.S. SENTENCING GUIDELINES MANUAL (1996) [hereinafter cited as "U.S.S.G."]. Chapter 8 of the Guidelines, which was enacted on November 1, 1991, makes the Guidelines applicable to "organizations." *Id.* § 8A1.1. An "organization," for the purposes of the Guidelines, is a person other than an individual, including "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations . . . and non-profit organizations." *Id.* § 8A1.1 cmt. n.1.

24. *Id.* §§ 8C2.5(f), (g).

organization."[25] Accordingly, the Guidelines provide a scoring system for assessing culpability—the higher the score, the greater the culpability.[26] In addition to listing various aggravating factors that increase culpability, the Guidelines list certain mitigating factors that reduce culpability.[27] One such mitigating factor is entitled "Self-reporting, Cooperation, and Acceptance of Responsibility."[28] Under this provision, an organization can receive up to five mitigating points for voluntarily disclosing wrongdoing "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense."[29] In order to receive the full five mitigating points under this provision, the organization must cooperate fully during the investigation and accept responsibility for its wrongful conduct.[30]

However, a disclosing corporation does not always have to helplessly rely on the good graces of the prosecutor and the mercy of the Guidelines. As discussed above, there are several formal voluntary disclosure programs operated by the federal government that offer affirmative rewards for voluntary disclosure by qualifying corporations.[31] The OIG's Protocol, unlike many other formal voluntary disclosure programs, has no predisclosure requirements for entry into the program.[32] Touting the benefits of its program, the OIG indicated that Protocol offers an "opportunity to minimize potential cost and disruption of a full scale audit and investigation, to negotiate a fair monetary settlement, and to avoid an OIG permissive exclusion preventing the provider from doing business with Medicare, Medicaid or other Federal health care programs."[33]

The other formal voluntary disclosure programs offer attractive incentives as well. Under the DOD's VDP, the vast majority of defense contractors that disclose wrongdoing under the pro-

25. *Id.* § ch. 8 intro. cmt.
26. U.S.S.G., *supra* note 23, § 8C2.5.
27. *Id.*
28. *Id.* § 8C2.5(g).
29. *Id.* § 8C2.5(g)(1).
30. *Id.*
31. *See supra* text accompanying notes 2-20.
32. *See supra* text accompanying notes 2-4.
33. Andrew B. Wachler & Phyllis A. Avery, *OIG Issues New Voluntary Disclosure Protocol*, 11 HEALTH L. 1, 3 (1998), *available in* WL, TP-ALL database.

gram manage to avoid criminal prosecution.[34] The voluntary disclosure programs operated by the Antitrust Division offer leniency for qualifying corporations.[35] "Leniency," for the purposes of the Antitrust Division's voluntary disclosure programs, means "'not charging such a firm criminally for the activity being reported' and amounts to a grant of amnesty."[36] The incentives offered by the EPA's voluntary disclosure program include waived or considerably reduced fines for qualifying organizations and possible avoidance of criminal prosecution.[37]

Another important benefit of voluntary disclosure is that such disclosure may significantly reduce any penalties assessed under the False Claims Act ("FCA").[38] The FCA, a civil law, proscribes the filing of false claims with the federal government.[39] Therefore, any corporate wrongdoing that involves a contract with the federal government could potentially violate the FCA, in addition to any other applicable law.[40] FCA law-

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34. As of December 1995, only three of the more than 300 corporations to voluntarily disclose under VDP have received a criminal conviction. Urgenson, *supra* note 5, at 232.

35. *Id.* at 236.

36. *Id.* at 238 (quoting ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY (1993)).

37. Final Policy Statement, 60 Fed. Reg. 66,706 (1995).

38. The False Claims Act is codified at 31 U.S.C. §§ 3729-31 (1994). President Lincoln enacted the FCA in 1863 as the Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

39. The FCA proscribes "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Section 3729(a)(2) proscribes the use of false records or statements "to get a false or fraudulent claim paid or approved by the Government." Section 3729(a)(3) is a conspiracy provision. Mere negligence and innocent mistakes are not actionable under the FCA. Wang v. FMC Corp. 975 F.2d 1412, 1420 (9th Cir. 1992); United States *ex rel.* Rueter v. Sparks, 939 F. Supp 636, 638 (C.D. Ill. 1996). For purposes of the FCA, a "claim" "includes any request or demand . . . for money or property." 31 U.S.C. § 3729(c); *see, e.g.*, United States v. Van Oosterhout, 96 F.3d 1491, 1494 (D.C. Cir. 1996) (indicating that a claim must be a demand for payment). However, it has also been held that "the mere receipt and deposit of government funds known to have been paid by mistake constitutes a false claim under the [FCA]." Covington v. Sisters of the Third Order of St. Dominic of Hanford, 61 F.3d 909 (9th Cir. 1995) (citing State v. McLeod, 721 F.2d 282, 283 (9th Cir. 1983)). When the claim is not false on its face, an inference of falsity can be made from an objective examination of the relevant government regulation, contract or agreement. *See* Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1477 (9th Cir. 1996); *see also* United States *ex rel.* Lindenthal v. General Dynamics, 61 F.3d 1402, 1410-12 (9th Cir. 1983).

40. The original purpose of the FCA was to combat fraud by defense contrac-

suits can be brought either by the United States[41] or by a private citizen on behalf of the United States.[42] Citizens who bring FCA lawsuits on behalf of the federal government receive a share of any recovery as a result of the lawsuit.[43] Despite this attractive citizen-enforcer provision, the FCA was not terribly effective at fighting government fraud until after Congress revitalized it in 1986.[44] The success of the 1986 amendments is illustrated by the size of some recent settlements of FCA lawsuits.[45]

The primary advantage to be gained by voluntarily disclosing violations of the FCA is a significant reduction in the penalties statutorily provided under the Act.[46] Such a reduction in

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tors. *See* S. REP. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. For example, during the Civil War corrupt vendors defrauded the Union Army by billing it two or three times for the same horses and by providing boxes of sawdust to outfits that had paid for firearms. 132 CONG. REC. H22339 (daily ed. Sept. 9, 1986) (statement of Rep. Berman). However, the majority of FCA lawsuits today involve allegations of health care fraud. Pamela H. Bucy, *Where To Turn In A Post-Punitive Damages World: The "Qui Tam" Provisions of the False Claims Act*, ALA. LAW., Nov. 1997, at 356.

41. The United States Attorney General has this responsibility. 31 U.S.C. § 3730(a) (1994).

42. *Id.* § 3730(b). FCA lawsuits brought by private citizens are called *qui tam* actions, and the citizen-plaintiff is called a *qui tam* relator. The phrase "*qui tam*" comes from the larger Latin phrase "*qui tam* pro domino rege quam pro si ipso in hac parte sequitur," which translates as "who sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990). The federal government has the option of intervening in and taking over an FCA lawsuit brought by a *qui tam* relator. 31 U.S.C. § 3730(b)(4). If the federal government declines to intervene, the *qui tam* relator is free to conduct the lawsuit. *Id.*

43. 31 U.S.C. § 3730(d).

44. Bucy, *supra* note 40, at 356. Among other things, the 1986 amendments increased the *qui tam* relator's share in any recovery as a result of the lawsuit and allow the *qui tam* relator to continue as a party even if the government intervenes in the lawsuit. 31 U.S.C. § 3730(d).

45. *See, e.g.*, *Hospital Company Settles Claims For $7.3 Million*, MEALEY'S LITIG. REPORTS: INS. FRAUD (1998), *available in* WL, TP-ALL database (reporting $7.3 million paid by Paracelsus Healthcare Corp. to settle an FCA *qui tam* action in which it was alleged that Paracelsus submitted fraudulent Medicare bills to the federal government); *GA Hospital Settles False Medicaid Claims For $4.3 Million*, ANDREWS GOV'T CONTRACT LITIG. REPORTER 10 (1998), *available in* WL, TP-ALL database (reporting $4.3 million paid by Grady Memorial Hospital to settle an FCA *qui tam* action in which it was alleged that Grady submitted false Medicaid claims to the federal government).

46. 31 U.S.C. § 3729(a)(A)-(C). To qualify under these subsections, the violating party must furnish all information relating to the violation to the government within 30 days of obtaining the information and must fully cooperate with the government

the penalty is meant to "provide [an] incentive for self-policing among those who conduct business with the Government."[47] Indeed, the reduction, which can be quite significant, is a delicious incentive to voluntary disclosure. Fines normally assessed under the FCA are statutorily mandated at $5000 to $10,000 per violation, plus three times the amount of damages sustained by the government as a result of the violation.[48] However, when there is a qualifying voluntary disclosure, "the court may assess not less than two times the amount of damages which the Government sustains" as a result of the violation.[49] The significant part of this provision is the elimination of the $5000 to $10,000 penalty assessed for each violation. In a case where there are multiple violations, each constituting a small amount of actual damages to the government, it is easy to see how such an elimination of the penalty can make a substantial difference in the fine levied on the offending corporation. Using the Anderson hypothetical, suppose that Radiology Associates knowingly sent out 2000 erroneous claims to Medicare and Medicaid with an average overcharge of three dollars per claim. The potential penalty under the FCA can go from a maximum of $20,018,000, without voluntary disclosure, to a minimum of $12,000, with voluntary disclosure.

Another benefit of voluntary disclosure is that such disclosure may help a provider avoid the severe penalty of "exclusion."[50] "Excluded" providers can no longer receive reimbursement "under Medicare, Medicaid and all other Federal health care programs until the [provider] is reinstated by the OIG."[51] There are two kinds of exclusion, mandatory and permissive.[52] Under mandatory exclusion, the provider must be excluded for

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investigation. *Id.* § 3729(a)(A)-(B). Furthermore, the government cannot have already initiated a criminal prosecution or a civil or administrative action, and the person cannot have actual knowledge of an investigation into the violation. *Id.* § 3729(a)(C).

47. 132 CONG. REC. S11245 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).

48. 31 U.S.C. § 3129(a).

49. *Id.*

50. *See* Notice, 62 Fed. Reg. 67,392, 67,393-94 (1997).

51. 42 C.F.R § 1001.2. (1998).

52. PAMELA H. BUCY, HEALTH CARE FRAUD § 5.02[2], at 5-9 (1996 & Supp. 1999).

at least five years;[53] under permissive exclusion, the DHHS "has greater discretion not to impose exclusion at all, or if exclusion is imposed, the period of exclusion may be shorter."[54]

When permissive exclusion is the appropriate consequence, the existence of certain mitigating factors may enable a provider to either enjoy a reduction in the length of exclusion or avoid exclusion altogether.[55] Questions the OIG considers when investigating the existence of possible mitigating factors include the following: (1) "Did the defendant respond appropriately and credibly?"[56] (2) "Did the defendant cooperate with investigators and prosecutors . . . thereby demonstrating trustworthiness?"[57] (3) "Has the defendant acknowledged its wrongdoing and changed its behavior, thereby demonstrating future trustworthiness?"[58] Voluntary disclosure by an offending provider should help the provider satisfy one or more of these mitigating factors.

IV. DISADVANTAGES OF VOLUNTARY DISCLOSURE

There are also severe risks and disadvantages associated with voluntary disclosure of corporate wrongdoing. First, by alerting the government to criminal activity, voluntary disclosure may be the impetus for a criminal prosecution when such prosecution would not otherwise occur. This is a significant risk because the results of a corporate criminal prosecution can be severe. Any individual who is convicted of fraud or other wrongdoing potentially faces jail time, fines and even the mandatory forfeiture of assets.[59] Although corporations cannot receive jail time, they can receive heavy fines and can even receive the corporate "death penalty," which involves divesture of all assets.[60] The prosecution and conviction of a healthcare provider

53. SARAH N. WELLING ET AL., FEDERAL CRIMINAL LAW § 33.6, at 663 (1998).

54. *Id.* at 664.

55. Notice, 62 Fed. Reg. at 67,393; *see also* BUCY, *supra* note 52, § 5.02[2], at 5-33.

56. Notice, 62 Fed. Reg. at 67,393.

57. *Id.*

58. *Id.*

59. BUCY, *supra* note 52, § 3.02[15][a], at 3-58 to 3-64.2.

60. *Id.* § 3.02[15]b], at 3-64.3 to 3-64.4.

can lead to exclusion from federal health care programs.[61]

Second, another disadvantage to voluntary disclosure that the prosecutor may decide to prosecute, regardless of the voluntary disclosure. Because many of the various requirements and circumstances that must be met in order to gain entry into the federal voluntary disclosure programs are broad enough to allow significant prosecutorial discretion, there is a certain amount of risk inherent in making a disclosure pursuant to any of these programs. Especially risky is disclosure of wrongdoing by health care providers under the OIG's Protocol. Although Protocol is extremely easy to enter, this ease of entry has its price: Protocol does not guarantee that voluntary disclosure of wrongdoing by a health care provider will prevent the federal government from subsequently filing a criminal or civil lawsuit against the disclosing provider.[62] In fact, Protocol itself indicates that "the OIG cannot reasonably make firm commitments as to how a particular disclosure will be resolved or the specific benefit that will enure to the disclosing entity."[63] One commentator urged only cautious entry into Protocol, stating that Protocol "involves significant risks without any guaranteed benefit."[64]

A third disadvantage of voluntary disclosure of corporate wrongdoing is potential exposure to liability under the FCA. Whenever government contracts are involved, fraudulent acts may implicate the FCA.[65] Thus, voluntary disclosure of such acts may alert the federal government to FCA violations which, as previously discussed, may result in substantial civil liability.[66] Furthermore, internal investigations in preparation for voluntary disclosure may make a corporation susceptible to a *qui tam* lawsuit under the FCA.[67] This is a serious threat because employees participating in the disclosure process may become *qui tam* relators.[68] The potency of this risk is illustrat-

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61. *Id.* § 5.02, at 5-6, 5-7.

62. *See* Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (1998).

63. *Id.* at 58,400.

64. Wachler & Avery, *supra* note 33, at 7.

65. *See supra* text accompanying notes 39-40.

66. *See supra* text accompanying note 48. These penalties may be reduced, however, if the voluntary disclosure qualifies under 31 U.S.C. § 3729(a)(A)-(C).

67. BUCY, *supra* note 52, § 8.13, at 8-27.

68. *Id.* (citing John Holusha, *Whistle-Blower Gets $2.5 Million*, N.Y. TIMES, Apr.

ed by the fact that company employees file most of the *qui tam* lawsuits that arise.[69]

A fourth disadvantage associated with voluntary disclosure is that such disclosure will likely waive the attorney-client privilege.[70] Only the Eighth Circuit allows a "'limited' waiver of privilege whereby disclosure of privileged material to government agencies does not constitute a waiver of the privilege as to other parties."[71] However, disclosure to a third party does not necessarily waive work-product protection.[72]

Waiver of the attorney-client privilege is significant because disclosure may alert third parties to potential lawsuits against the disclosing corporation. For example, the billing errors in the Anderson hypothetical have caused Blue Cross Blue Shield, Travelers, and Prudential, in addition to Medicare and Medicaid, to overpay Radiology Associates. Once these other private organizations become privy to Radiology Associates' billing errors, they may decide to sue Anderson under a variety of causes of action, including civil RICO, breach of contract or unjust enrich-

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1, 1994, at D1).

69. W. Jay DeVecchio, *Qui Tam Actions: Some Practical Considerations*, SC04 ALI-ABA 315, 322 (1998), *available in* WL, TP-ALL database. Corporations, however, can take steps to prevent employees from becoming *qui tam* whistleblowers. For example, a corporation may want to include a provision in its employment contract that requires the immediate reporting of any discovered wrongdoing to corporate officials. Furthermore, a corporation should carefully select any employees who will be involved in an internal investigation of corporate affairs. Additionally, there is an important jurisdictional bar to *qui tam* litigation: a person cannot become a *qui tam* relator if his or her allegations are based upon information that was "publicly disclosed," unless the prospective *qui tam* relator was the original source of the information. 31 U.S.C. § 3730(e)(4). The FCA indicates, and courts have generally held, that "public disclosure" is disclosure in a criminal, civil or administrative proceeding or investigation or in the news media. *Id.* § 3730(e)(4)(A); *see, e.g.*, United States *ex rel.* Stinson v. Lyons, 944 F.2d 1149, 1154-57 (3d Cir. 1991). Thus, when wrongdoing is discovered, a quick response involving disclosure can preempt a *qui tam* lawsuit. However, it is important to note that quick public disclosure of potential wrongdoing before a thorough investigation is completed may generate negative publicity unnecessarily.

70. Gary G. Lynch & Robert E. Underhill, *Internal Investigations*, 1085 PLI/Corp 369, 378 (1998), *available in* WL, TP-ALL database; *see also* BUCY, *supra* note 52, § 8.13, at 8-27.

71. BUCY, *supra* note 52, § 8.13, at 8-27 (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977)).

72. Lynch & Underhill, *supra* note 70, at 397-98 (discussing the court's conclusions regarding waiver in *In re* Steinhardt Partners, L.P., 9 F.2d 230 (2d Cir. 1993)).

ment. If Anderson has disclosed any privileged information to the government via his voluntary disclosure, such disclosure may constitute a waiver of the privilege with respect to those other private organizations. Such a waiver may provide Anderson with substantial exposure in subsequent lawsuits.

V. CORPORATE COMPLIANCE PLANS

Somewhat akin to voluntary disclosure programs are corporate compliance plans. Such plans attempt to educate employees about current law and to encourage employees to comply with the law.[73] Ideally, compliance plans prevent violations of the law; short of prevention, however, such plans strive for early detection of illegal activity.[74]

Many of the formal voluntary disclosure programs discussed above implicitly offer incentives for instituting and operating an effective corporate compliance plan.[75] For instance, under the DOD's VDP, the existence of preventative measures is one factor that is considered in the decision of whether to prosecute a disclosing offender.[76] Likewise, under the EPA's voluntary disclosure program, whether the violation was discovered through an audit or through due diligence is perhaps the most important circumstance that must be present if a disclosing corporation hopes to avoid or lessen gravity-based penalties and to avoid being referred for criminal prosecution.[77] Furthermore, by enabling early discovery and prompt corrective action, an effective compliance plan will likely help a disclosing corporation to fulfill many of the other requirements for entry into the various federal voluntary disclosure programs.[78]

Another benefit of an effective corporate compliance plan is that such a plan should help the corporation to detect violations of the FCA. Given the severity of fines that can be assessed under the FCA and the fact that private citizens, including the offending corporation's employees, can bring suit under the FCA,

73. BUCY *supra* note 52, § 9.02, at 9-4.
74. *Id.* at 9-5.
75. *See supra* text accompanying notes 2-20.
76. *See supra* text accompanying notes 5-8.
77. *See supra* text accompanying notes 15-20.
78. *See supra* text accompanying notes 2-20.

prevention and early detection of violations of the FCA is absolutely essential.

Yet another benefit of an effective compliance plan can be realized during sentencing. Under the Guidelines, an "Effective Program to Prevent and Detect Violations of Law" is a mitigating factor to be considered during sentencing.[79] According to this provision, three points are subtracted from an organization's culpability score when the offense occurred despite the existence of an effective compliance program.[80] Furthermore, the existence of an effective compliance plan may enable a health care provider to avoid or reduce the time period of a permissive exclusion penalty.[81]

VI. WHEN NONDISCLOSURE IS A CRIMINAL ACT

In some instances the law may require voluntary disclosure of wrongdoing. For example, 42 U.S.C. § 1320a-7b(a)(3) requires health care providers to disclose any "knowledge of the occurrence of any event affecting [the providers'] initial or continued right to any such benefit or payment."[82] Under this provision, even simple billing errors, which presumably involve no criminal intent, can become criminal if the provider fails to report the errors once they are discovered or accepts subsequent payment for any claims that remain unpaid at the time of discovery.[83]

It is important to note that if nondisclosure of false claims and failure to repay funds paid on the basis of false claims are violations of the law, attorneys who counsel such action violate

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79. U.S.S.G., *supra* note 23, § 8C2.5(f).

80. *Id.* Under the Guidelines, an "effective" compliance program is one that "has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct." *Id.* § 8A1.2 cmt. n.3(k). Furthermore, "[t]he hallmark of an effective [compliance] program . . . is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents." *Id.* The Guidelines go on to list the minimum seven types of measures that an organization must take in order to show that it has exercised due diligence. *Id.*

81. *See* Notice, 62 Fed. Reg. 67,392, 67,393 (1998).

82. 42 U.S.C. §1320a-7b(a)(3) (1994 & Supp. III 1997).

83. Marc N. Garber, *Nondisclosure of Billing Errors May Be a Federal Crime*, 1999 HEALTH CARE FRAUD & ABUSE NEWSLETTER 6.

the law as well.[84] Furthermore, attorneys who counsel violations of the law breach the Rules of Professional Conduct.[85] Thus, in some instances, even if it is against the client's interests to voluntarily disclose wrongdoing (perhaps because the possibility of discovery is small while the risks associated with voluntary disclosure are large), the law may compel the attorney to counsel disclosure. Attorneys, therefore, should carefully review the relevant statutes before counseling against voluntary disclosure.

VII. CONCLUSION

When a corporation discovers that it has engaged in wrongdoing, through either intentional or unintentional conduct, it will have to decide whether or not to disclose that wrongdoing to law enforcement officers. In an effort to encourage such disclosure, the federal government has initiated several formal voluntary disclosure programs. While these programs offer affirmative rewards as an incentive to voluntary disclosure of corporate wrongdoing, they generally do not guarantee clemency by prosecutors.

The corporation should make its disclosure decision based on an analysis of the advantages and disadvantages of voluntary disclosure. Advantages of voluntary disclosure include the following: avoidance of criminal prosecution, sentencing relief, avoidance of further criminal liability when disclosure is required, the possibility of preempting a *qui tam* lawsuit under the FCA, significantly reduced penalties under the FCA, and in the case of health care providers, possible avoidance of permissive exclusion from federal health care programs. Disadvantages associated with voluntary disclosure include the possibility of bringing about a criminal prosecution when one would not otherwise occur, alerting the federal government or prospective *qui tam* relators to potential lawsuits under the FCA, alerting other private entities to potential lawsuits against the disclosing corporation, and waiver of the attorney-client privilege. Given these

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84. 18 U.S.C. § 2 (1994).

85. ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1996) (prohibiting attorneys from counseling illegal conduct).

disadvantages to voluntary disclosure, such disclosure may not be wise when the violation is minor and the risk of detection is small, provided of course that the law does not require disclosure. On the other hand, when the violation is severe and the risk of detection is high, the advantages of voluntary disclosure will likely outweigh the disadvantages of making such a disclosure.

Corporate compliance plans are another way for corporations to mitigate the penalties associated with corporate wrongdoing. Ideally, compliance plans prevent wrongdoing before it occurs. If wrongdoing occurs despite the existence of a compliance program, such a program will likely enable quick discovery of the wrongdoing and help the corporation respond with prompt and effective remedial action. Furthermore, the existence of an effective compliance program is a mitigating factor under the Guidelines and is also one of the factors considered by the OIG in making its decision regarding a provider's permissive exclusion from federal health care programs.

Returning to the Anderson hypothetical, nondisclosure of Radiology Associates' billing errors may violate 42 U.S.C. § 1320a-7b(a)(3), which means that counseling nondisclosure, in addition to the act of nondisclosure itself, may be a crime. Moreover, given the relatively small dollar amount of the overcharging (for instance $20,000 cumulative to all insurers), disclosure and reimbursement may not be all that costly. Therefore, disclosure of Radiology Associates' billing errors will likely involve less cost and risk than nondisclosure in the hope that neither the federal government nor any of the private insurers finds out about the overcharging and that none of Anderson's employees decide to become a *qui tam* relator. Therefore, in Anderson's case, voluntary disclosure is probably the wisest choice.

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