

By Gary S. Lincenberg and Jason D. Kogan

Advising Individuals on When and How to Self-Report Wrongdoing

Unlike corporate entities, individuals who voluntarily come clean face the prospect of jail

In the wake of the corporate scandals that continue to receive intense media scrutiny, more and more corporations and industries are opting to voluntarily disclose their wrongdoing. The same is not true for individuals, however. While corporations are induced by a variety of carrot-and-stick incentives to come forward, individuals face tougher choices. The basic reason why corporations self-report wrongdoing but individuals rarely do so is clear: Individuals face the possibility of incarceration; corporations do not. Still, circumstances may favor voluntary disclosures by individuals, but the difficult assessment leading to this type of decision requires a careful and rigorous balancing of factors.

For corporations, the trend toward self-policing has emerged in response to a host of recent measures supporting voluntary disclosure. Indeed, in the hope of encouraging self-corrective actions by corporations, many federal enforcement agencies have adopted—or expanded preexisting—voluntary disclosure programs.

These programs generally offer a carrot to those who self-report wrongdoing before an investigation begins or becomes imminent. For some offenses, like antitrust violations, the Department of Justice may grant total amnesty.¹ For others, like environmental offenses, the Justice Department does little more than represent that it will consider the voluntary disclosure in its charging decisions and sentencing recommendations.² For government contractor and tax offenses, the disclosure programs fall somewhere in between. Federal sentencing guidelines allow courts to exercise greater leniency when there is a voluntary disclosure.³

Also, the federal government is using a stick to force the regulated communities to police themselves. The EPA, for example, requires businesses to give notice of emissions—and, in some instances, offers immunity to those who truthfully report exceeding established standards.⁴

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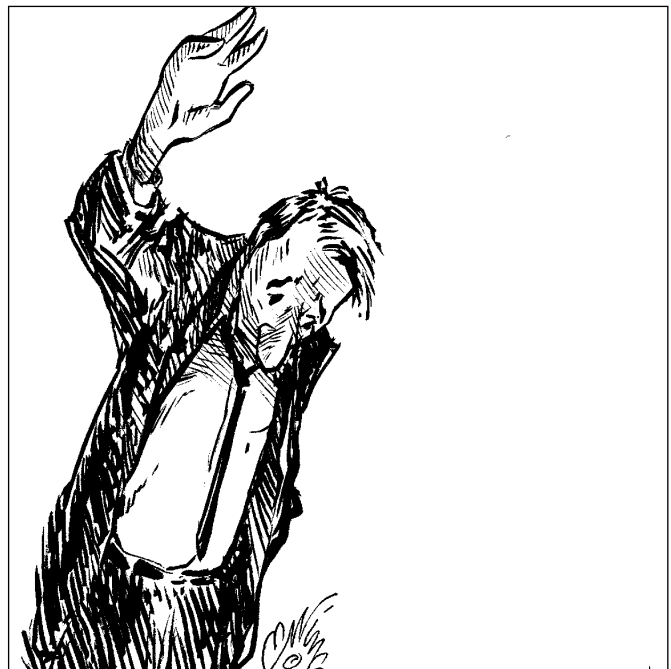
Under the Sarbanes-Oxley Act of 2002, corporate executives are required to certify financial reports.⁵ Companies doing business with the government face loss of government contracts if convicted of an offense, but debarment can often be avoided by voluntary disclosure. Public companies fear loss of investor confidence and the prospect of new penalties under the USA PATRIOT Act of 2001 and the Sarbanes-Oxley Act if

they fail to come clean. These laws encourage corporate employees to come forward to assist in investigating securities fraud by prohibiting a corporation, its officers, and employees from discriminating against a cooperating employee.⁶ Sarbanes-Oxley also added criminal penalties for companies that retaliate or interfere with the employment of a person who provides information about the commission of a federal offense to a law enforcement authority.⁷

Fewer voluntary disclosure programs are tailored for individual wrongdoers, however. In fact, some of the existing voluntary disclosure programs may not have much appeal to individual clients.⁸ Nevertheless, now more than ever counsel will likely be faced with the decision of whether an individual client's best interests are served by turning

himself or herself in. Counsel must analyze a number of issues before advising the client to take the step of voluntary disclosure. Also, counsel must be creative in fashioning a voluntary disclosure that will result in the most beneficial outcome for the client.

When deciding whether to self-report, multiple concerns may flash through the mind of a client: Will I go to prison? How will this action affect my family? My employment? My reputation? My future earnings capacity? Will a plea of guilty lead to a civil suit against me or have other collateral consequences, such as the loss of child custody or the loss of a professional license? Am I willing to incriminate friends and coworkers? Do I feel guilty about what I have done? Do I feel that, even if technically a crime, what I have done should not be criminally prosecuted—or not prose-



cuted with severity?

Individuals will likely think about what will happen if there is no voluntary disclosure: Will I be found guilty if I go to trial? How much will it cost to defend the case? Will I serve less time in prison if I self-report than if I go to trial and am found guilty? What are the chances that I will get caught if I do not self-report?

The current focus on certain white collar offenses, such as financial crimes, has increased the risk of exposure for white collar wrongdoers, especially for those working in otherwise legitimate businesses. Even if a corporate executive does not want to disclose wrongdoing, the individual's company is more likely to disclose—and less likely to be protective of its employees when it does so.

Complicating these concerns for individuals contemplating self-reporting of federal offenses are the U.S. Sentencing Guidelines (USSG). While they contain provisions for “downward departures”—reductions in the points used to calculate the final sentence—over the past 15 years the guidelines steadily have grown tougher. Indeed, the November 2001 guidelines significantly increased the sentences for convicted white collar offenders, particularly those found guilty of financial crimes. Congress recently showed its propensity to reduce the availability of downward departures.⁹ In short, the hope of probation for those charged with federal white collar crimes—particularly those charged in jurisdictions where prosecutions typically involve large-scale financial loss—is diminishing.

Still, while the consequences stemming from white-collar wrongdoing may be dire, there are some considerations favoring self-reporting. It affords an opportunity for the individual to make a deal resulting in a more lenient sentence. Acceptance of responsibility, cooperation against other wrongdoers, and voluntary disclosure often are the only viable avenues for reducing a sentence (particularly for a federal crime), so it may be more palatable for a client to settle a criminal case by self-reporting. A prosecutor should look favorably upon self-reporting, because it will conserve prosecutorial resources and make the government's work much easier. Demonstrating remorse by self-reporting will likely engender some sympathy from the prosecutor.

Determining Exposure and Penalties

The essential initial query is whether the individual client in fact actually committed any criminal offense. Counsel must first ascertain the facts about the client's potential criminal exposure. The client should be cautioned to tell counsel everything; failure of the client to reveal everything about the situation at

issue is a portent of disaster. At this stage in the process of determining whether or not to self-report, it is also critical that counsel consult with experienced criminal defense practitioners. The assessment of a client's potential criminal exposure will, in the white collar area, often involve the consideration of multiple issues, including technical defenses, applicable sentencing guidelines, and the client's value as a potential government witness.

Counsel must examine all relevant documents. These materials may fill in any gaps in the client's presentation and may be critical to substantiating the client's story.

Practitioners must also review and analyze all statutes under which criminal liability may be imposed. Indeed, the identification of the relevant criminal offenses is crucial to determining potential penalties—probably the most important factor in considering whether a client should self-report.

The client will certainly want to know what sentence the court could impose if the client admits wrongdoing. Perhaps the most difficult challenge is determining the potential sentencing range applicable to the client's offenses if the client were to self-report. In the federal courts, the U.S. Sentencing Guidelines are controlling. Although there may be a number of sentencing guidelines to be considered,¹⁰ there are three guidelines, in particular, that merit attention in the context of a voluntary disclosure.

The first of these is USSG Section 5K2.16: If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply if the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

Some courts have applied this language literally, while others have upheld a downward departure for voluntary disclosure even if the offense would ultimately have been discovered.¹¹

Second, pursuant to USSG Section 3E1.1, “acceptance of responsibility”—that is, simply pleading guilty to, rather than contesting, a

charge—results in a reduced sentence. The credit for acceptance of responsibility is not subject to the same limitations as the voluntary disclosure sentencing guideline and is available to a defendant who provides no information to the government beyond a factual basis for his or her guilty plea. USSG Section 3E1.1 authorizes a downward adjustment for acceptance of responsibility for a number of events, including the truthful admission of criminal conduct and voluntarily assisting the prosecution in recovering any fruits of a criminal act.

Third, under USSG Section 5K1.1, providing “substantial assistance” to the government (in the vernacular, “turning state's evidence”) could lead to a downward departure that could further reduce the client's sentence beyond the reductions available for self-surrender and acceptance of responsibility. If the client's assistance would aid the government in prosecuting other offenders, particularly the individual's superiors and others higher up in the individual's organization or industry, a greater benefit is likely.¹² Because the downward departure for assisting authorities is only available via a motion by the prosecutor, it is critical for counsel for the client to engage in negotiations and discussions with the U.S. Attorney's Office if the client possesses knowledge that could aid in the prosecution of others.

If the offense involves a large monetary loss, such as a financial crime, the amount of loss will be the single most significant factor in determining the range of imprisonment. Counsel should carefully analyze the range of loss in the federal sentencing guidelines, because the higher the loss the greater the incentive may be to self-report.¹³ Subjective aspects of the loss computation should also be explored. For example, losses suffered by victims after a client withdrew from a conspiracy or fraud scheme may in some instances be excluded from the loss computation.

California has no sentencing guidelines that are comparable to the federal sentencing guidelines. While some of the same factors considered under federal sentencing guidelines may be relevant to sentencing in a California state court, state judges have far more discretion in affording leniency for self-reporting.¹⁴

Once a determination is made regarding potential criminal liability and the range of potential penalties, counsel needs to assess the likelihood of discovery of the client's wrongdoing. The greater the number of potential witnesses who are aware of and troubled by the the client's wrongdoing, the greater the chance of the client's getting caught. Counsel needs to assess whether there are victims, employees, family, friends,

or anyone else who knows of the client's wrongdoing or is likely to learn of it, and what any of these persons is likely to do with this knowledge. If the client is involved in a Ponzi scheme or another type of investment scam affecting multiple victims, the likelihood increases that at least one victim will discover and report the misfeasance.

Similarly, if the individual is employed by a corporation and its lawyers have been advised of wrongdoing or are conducting an internal investigation, there is a significant chance the wrongdoing will be revealed to the board of directors, and a greater likelihood it will thereafter be divulged to public authorities. Companies that do internal investigations increasingly are agreeing to waive their privileges when they are being investigated by the government. In settling a government investigation, these companies are cooperating with the government in providing information for the investigation of individuals working in the company. Even when companies do not waive their privileges, prosecutors may challenge the validity of an assertion of the attorney-client privilege, using waiver and crime-fraud exceptions to pierce it.

An exploration of the client's criminal liability and the risks involved if the client does not self-report is crucial. Among the various factors to be considered are the strength of the potential case against the client, the danger of discovery, the client's willingness to cooperate, and the client's ability to help the government apprehend others.

During this process, counsel must ensure compliance with ethical duties. A client's authorization to counsel to make a voluntary disclosure requires the client's informed consent.¹⁵ Before any voluntary disclosure can be made, counsel must inform the client of any risks and benefits that would result from a voluntary disclosure. Any other factors or facts relevant to the client's decision to proceed with the voluntary disclosure should be discussed with the client.¹⁶ Failure to obtain the client's consent before disclosing information to the government may subject counsel to sanctions for failing to comply with Section 6068(e) of the California Business and Professions Code.¹⁷

A client with a guilty conscience may be in a state of panic, afraid of the unknown, and often is not thinking clearly. Clients may not fully appreciate what the criminal justice system has in store for them. Moreover, clients may change their minds. Unless unusual circumstances exist, it will take at least several meetings with a client, as well as independent analysis, for counsel to assess and inform the client of the benefits and risks of voluntary disclosure.

Unlike some areas of the law, there are no

hard and fast rules that govern what the client should do. The risks of investigation, prosecution, and conviction involve multiple subjective considerations. Extraneous factors are extremely difficult to calculate, such as a law enforcement agency's resources, the personality of the agent or prosecutor, and the strengths and weaknesses (and, in some instances, sheer availability) of potential witnesses against the client.

Strategies for Making a Voluntary Disclosure

If, after full consultation with counsel, the client wants to confess, counsel must then determine to whom that confession should first be made in order to maximize the potential benefit to the client. A perpetrator of an investment scheme, for example, could confess first to his or her investors, to state authorities, or to federal authorities. Determining how to proceed may be the most important decision counsel and the client make.

Clients may feel safest revealing their wrongdoing to their victims, because the victims are one step removed from law enforcement and may agree to work things out. Clients who have decided to self-surrender may, for emotional reasons, want to contact their victims or former colleagues simply to unburden their consciences. However, such informal confessions to individuals other than law enforcement or the prosecutor may have severe adverse consequences.

Individuals may misunderstand or intentionally distort a client's admissions. If a client starts telling investors that he or she has been deceiving them for years and has lost their savings, the investors will be furious. Some may push the client to pay them off with whatever assets remain, even if other investors suffer as a result. Some may immediately contact the local police or federal law enforcement, which could result in the immediate arrest of the client. The client's office might be searched, and the client might lose control over his or her financial records. If that happens, the client's ability to assist counsel in defending the case would then be compromised. Also, a voluntary disclosure to a victim is not a disclosure to "the authorities" and thus may not qualify under the federal sentencing guidelines as a factor for leniency.¹⁸

Going to state rather than federal authorities may be appealing because there are fewer sentencing requirements. In California, the client who confesses may have a better chance of being sentenced to probation. However, before choosing to confess to state officials, counsel needs to have a good feel for the practices and policies of the local district attorney's office. If the client lives in a county with an aggressive district attorney's office,

and if many victims live in that county, there is a high risk that the district attorney will feel pressure to come down hard on the client. And with a confession in hand, the district attorney may see the potential for a newsworthy conviction without a heavy expenditure of resources.

Still, for most large cases in California, it is becoming relatively more advantageous to self-report. While each case must be judged on its own, it is now more likely that a client exploring self-surrender will receive greater leniency in state court. California state judges, unlike their federal counterparts, still enjoy wide discretion. Also, not only are the resources of district attorneys' offices being stretched thin, but a district attorney may be satisfied simply by having a voluntary disclosure, especially since it seems that more voluntary disclosures are made to the federal government than to the local prosecutor. Even though both federal and state restitution statutes can be strict, the state generally will spend less time combing through all the details of an offense. Moreover, in the state system, concerns about overcrowded prisons may reduce the time a client may actually spend in prison.¹⁹

Contacting federal authorities has risks and rewards as well. A prosecutor may feel constrained from showing any leniency toward the client by the sentencing guidelines and by rigid office policies. The high profile nature of a client's offenses, such as financial crimes in today's law enforcement climate, and public pressure may make a deal with a light sentence unlikely. The FBI and the U.S. attorney also may have considerable resources to devote to the case because of the nature of the offense.

Federal prosecutors are more likely to make an individual disclose everything before offering anything. Also, the federal sentencing guidelines, particularly regarding financial crimes, are extremely harsh. In addition, federal judges have less and less discretion to impose alternatives to incarceration, such as probation, home detention, or confinement in a community correctional center.

However, the federal sentencing guidelines explicitly give credit for extraordinary acceptance of responsibility, voluntary disclosure of wrongdoing, and for disclosing information that may assist in prosecuting others. Also, in the federal system, a white collar offender may be incarcerated in a prison camp or a minimum security facility.

Counsel must determine whether the client's interests are best served by self-reporting a federal crime or a state crime. After that, counsel must decide which official to approach. Identifying particular prosecutors or law enforcement agents who will

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appreciate and appropriately credit the rarity of a self-surrender and view rewarding the client as serving the interests of law enforcement is a particularly delicate task. If the offense has occurred in more than one geographic location, counsel may be able to forum shop for the prosecutorial office likely to be most reasonable in handling the voluntary disclosure of the client's offense. Nevertheless, counsel must be creative and careful. While prosecutorial offices generally try to avoid duplicating efforts and wasting resources, counsel will want to avoid instigating prosecutions in more than one jurisdiction.

The issue of timing—that is, deciding when to approach the authorities with a confession—is crucial. Several factors must be addressed. First, a voluntary disclosure should be made, if at all possible, before the government discovers the client's criminal offenses. Indeed, the downward departure afforded by federal sentencing guidelines for self-surrender explicitly requires that the government not otherwise be informed of the individual's criminal responsibility.²⁰ Moreover, if there are other individuals involved in the criminal offenses, the first person who walks in the door and exposes the criminal acts to the government may get the best deal.

Second, the client must stop all illegal activities as soon as possible. Prosecutors most likely will not be sympathetic to wrongdoers who, after turning themselves in, fail to cease the offending activities and continue to profit from them.

Third, counsel must evaluate the impact of self-surrender on victims. For example, if a client has defrauded many individuals, the self-surrender may trigger civil litigation. Further problems may arise if the client apologizes to some but not all of the victims. Some victims may assert a priority over the rights of other victims. If the client has been running a Ponzi scheme or some other type of extensive fraud, the client likely will not be able to repay everything to the victims and may wish to consider filing for bankruptcy protection in connection with his or her self-reporting, so that a neutral trustee takes over the role of dividing up the client's assets.²¹

Finally, the client's personal obligations must be considered. The timing of a voluntary disclosure may be affected by the necessity of caring for a relative or an upcoming graduation or wedding. Still, counsel should remember that early self-surrender will be to the client's advantage. Thus, counsel may decide that the client's personal issues may be better handled in the context of negotiating a date for the client to begin his or her prison service rather than in considering when to self-surrender.

Building trust between a prosecutor and defense counsel is a gradual process. Counsel

should begin by determining what type of leniency will be requested for the client. For example, if warranted by the facts, counsel should consider seeking full immunity if the client can provide valuable assistance to the government in pursuing bigger fish. Counsel should discuss this request with the prosecutor in the context of a general discussion of the facts of the case.

The prosecutor will likely want as many details as possible. However, it may be advisable for counsel to enter into discussions with the prosecutor without disclosing the name of the client—and, at a minimum, with a commitment from the prosecutor that the discussions do not constitute any waiver of the attorney-client privilege by the client.²² Counsel should make sure any understanding regarding the attorney-client privilege is in writing. While there are times that verbal agreements will ensure more flexibility on the part of the prosecutor, without any written record, misunderstandings may occur.²³

The prosecutor most likely will require a meeting with the client before reaching a final agreement. Generally, prosecutors will agree to grant the client a limited form of immunity during this interview. If negotiations break down, and the case proceeds to trial, the limited immunity bars the prosecu-

tor from using any of the client's statements in the government's case-in-chief but may permit the government to make derivative use of the information provided by the client and to use the client's statements to cross-examine the client if he or she takes the witness stand.

Counsel should plan to spend long sessions with the client before meeting with the government. The client's records may be in disarray, the client no doubt will not remember details that some victims will view as important, and the prosecutor and law enforcement agents will be scrupulously judging the client to determine whether he or she is intentionally holding back in any way. Failure to tell the truth during the interview with the prosecutors may subject the client to prosecution for making a false statement during the interview itself and may also destroy the prospects for a favorable disposition.

A prosecutor's agreement to grant immunity is the best possible result for the client. But immunity is only rarely granted and if the client is indeed responsible for criminal conduct causing significant harm, it is more than likely that the government will require that the client plead guilty to a felony.

Even if the government agrees to credit the client for self-reporting in connection with

a plea, that is not the end of the negotiations. Counsel still has work to do. Counsel must push for the best possible terms in connection with making a plea agreement. Cooperation is required to obtain the benefit of the downward departure for "substantial assistance" under federal sentencing guidelines; in fact, it has become so important that the Ninth Circuit recently held that a defendant had a claim for the ineffective assistance of counsel due to "an attorney's failure to properly assist the defendant in cooperating with the government" to obtain a reduced sentence.²⁴ Resolving the guideline issues with the prosecutor in a federal court or reaching agreement on sentencing in a California state court may take far longer than the process for making the voluntary disclosure.

The current emphasis upon self-policing, along with more aggressive prosecution of white collar crime, makes it increasingly likely that civil practitioners as well as criminal defense attorneys will encounter clients who would be well served by self-reporting their crimes to authorities. Representing such individuals requires consideration of myriad criminal law issues as well as collateral consequences to the client.

There are no easy answers as to whether a client should self-report. Devising the best

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approach for a voluntary disclosure is difficult as well. For counsel, determining what steps are in the client's best interests ultimately will require the careful analysis of a number of complex and subjective issues. ■

¹ ANTITRUST DIVISION MANUAL 7-1.100 A, ch. III, F.9.A.

² U.S. DEPARTMENT OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR, available at www.usdoj.gov/enrd/factors.htm ("The attorney for the Department should consider whether the person made a voluntary, timely and complete disclosure of the matter under investigation.")

³ See U.S. SENTENCING GUIDELINES MANUAL §5K2.16 (hereinafter U.S.S.G.).

⁴ See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9603(b) (3).

⁵ 18 U.S.C. §1350.

⁶ 18 U.S.C. §1514A(a) (1).

⁷ 18 U.S.C. §1513(e).

⁸ See, e.g., United States v. Tenzer, 312 F. 3d 34 (2d Cir. 2000). In *Tenzer*, a prosecution was initiated while the defendant was negotiating an arrangement with the IRS to pay outstanding taxes arising from a failure to file tax returns. The court held that the IRS voluntary disclosure policy was not satisfied until there was a final agreement for the payment of taxes.

⁹ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No 108-21 (S. 151, Enhance AMBER Alert bill, 108th Cong. (Apr. 30, 2003)).

¹⁰ Federal sentencing guidelines that may be pertinent

to white collar offenses include adjustments for use of a special skill, violating a preexisting administrative order (e.g., a consent decree), and perpetrating a scheme that affects multiple victims. See U.S.S.G. §§2B1.1(b)(2), 2B1.1(b)(7), 3B1.3.

¹¹ Compare United States v. Lovaas, 241 F. 3d 900 (7th Cir. 2001) (A guideline should be read literally.) with United States v. Jones, 158 F. 3d 492 (10th Cir. 1998) (Departure under U.S.S.G. §5K2.16 may be warranted for voluntary disclosure even if the offense would inevitably have been discovered).

¹² U.S.S.G. §5K1.1.

¹³ See, e.g., U.S.S.G. §2B1.1.

¹⁴ People v. Scott, 9 Cal. 4th 331, 349 (1994) ("[The] trial court often has broad discretion to tailor the sentence to the particular case.")

¹⁵ California law imposes a duty on an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." BUS. & PROF. CODE §6068(e). A "confidence" is an attorney-client communication, while "secrets" include "any information obtained by the lawyer during a professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." State Bar of Cal. Formal Op. No. 1993-133. Essentially, an attorney must protect the confidentiality of any information obtained from a client. This requirement applies to every member of the State Bar of California, whether the attorney is practicing in a California state court or in a federal court. Section 6068(e) is relevant in the context of a voluntary disclosure because such a disclosure could reveal client confidences and secrets. See Mark L. Tuft, "For Your Eyes Only," LOS ANGELES LAWYER, Dec. 2002, at 26.

¹⁶ See, e.g., Los Angeles County Bar Association Prof'l

Responsibility and Ethics Committee Formal Op. 409 (1983).

¹⁷ See Dixon v. State Bar of Cal., 32 Cal. 3d 728 (1982).

¹⁸ United States v. Ekeland, 174 F. 3d 902 (7th Cir. 1999).

¹⁹ Under the U.S. Department of Justice's "Petite Policy," in certain circumstances a federal prosecution may be based on the same transactions or acts underlying a plea of guilty in state court. U.S. ATTORNEY'S MANUAL 9-2.031. Determining whether prosecutorial discretion warrants instituting this type of prosecution in a federal court involves an evaluation of various criteria. Counsel should consider the likelihood of a dual prosecution in determining whether a client should self-report to the state.

²⁰ See U.S.S.G. §5K2.16 (The downward departure is not available if the individual is motivated by imminent discovery).

²¹ The client's counsel should consult with bankruptcy counsel for this option. It is axiomatic that debts incurred by fraud are not dischargeable in bankruptcy. See 11 U.S.C. §523. Thus, a bankruptcy filing would only ensure that creditors similarly situated are treated fairly. It also might relieve the client of the obligation and stress of responding to multiple creditors.

²² See, e.g., United States v. Aronoff, 466 F. Supp. 855 (S.D. N.Y. 1979); United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1999).

²³ See, e.g., *Crystal* v. United States, 172 F. 3d 1141 (1999). In *Crystal*, defense counsel was orally assured by the chief of the IRS Criminal Investigation Division that the client qualified for the IRS voluntary disclosure policy, but the IRS backed away from its assurance after the chief learned that a field agent had opened an investigation.

²⁴ United States v. Leonti, 326 F. 3d 1111, 1117-18 (9th Cir. 2003).

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