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The International Comparative Legal Guide to:

Anti-Money Laundering 2019

2nd Edition

A practical cross-border insight into anti-money laundering law

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PREFACE

We hope that you will find this second edition of *The International Comparative Legal Guide to: Anti-Money Laundering* useful and informative.

Money laundering is a persistent and very complex issue. Money laundering has been said to be the lifeblood of all financial crime, including public corruption and the financing of terrorism. Over the last 30 years, governments around the world have come to recognise the importance of strengthening enforcement and harmonising their approaches to ensure that money launderers do not take advantage of weaknesses in the anti-money laundering (AML) controls. Governments have criminalised money laundering and imposed regulatory requirements on financial institutions and other businesses to prevent and detect money laundering. The requirements are continually being refined and interpreted by government authorities. Because of the often international nature of the money laundering process, there are many cross-border issues. Financial institutions and other businesses that fail to comply with legal requirements and evolve their controls to address laundering risk can be subject to significant legal liability and reputational damage.

Gibson, Dunn & Crutcher LLP is pleased to join a group of distinguished colleagues to present several articles we hope you will find of interest on AML topics. This guide also has included chapters written by select law firms in 31 countries discussing the local AML legal and regulatory/administrative requirements and enforcement requirements. Gibson Dunn is pleased to present the chapter on the United States AML regime.

As with all ICLG guides, this guide is organised to help the reader understand the AML landscape globally and in specific countries. ICLG, the editors, and the contributors intend this guide to be a reliable first source when approaching AML requirements and considerations. We encourage you to reach out to the contributors if we can be of further assistance.

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To Disclose or Not to Disclose: Analyzing the Consequences of Voluntary Self-Disclosure for Financial Institutions

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Introduction

In recent years, the benefits and drawbacks of voluntarily self-disclosing allegations of corporate misconduct to the U.S. Department of Justice ("DOJ" or the "Department") have been a topic of frequent discussion among corporate executives, in-house counsel, and white-collar practitioners. This chapter examines whether and to what extent a financial institution can expect a benefit from DOJ for making a voluntary self-disclosure ("VSD"), particularly in the context of money laundering or Bank Secrecy Act violations.

Although the public discourse regarding VSDs tends to suggest that there are significant benefits to be gained, a closer examination of the issue, specifically with respect to financial institutions, shows that the benefits a company may receive for making a VSD, if any, are neither easy to anticipate nor to quantify. A full consideration of whether to make a VSD to DOJ should include a host of factors beyond the quantifiable monetary benefit, including: (1) the likelihood of independent discovery of the alleged misconduct by law enforcement; (2) the severity, duration, and evidentiary support for a potential violation; and (3) the expectations of prudential regulators and any associated licensing or regulatory consequences, as well as other factors.

VSD decisions arise in many contexts, including in matters involving the Foreign Corrupt Practices Act ("FCPA"), sanctions enforcement, and the Bank Secrecy Act ("BSA"). In certain situations, the benefits of voluntary self-disclosure prior to a criminal enforcement action can be substantial. Prosecutors have at times responded to a VSD by reducing charges and penalties, offering deferred prosecution and non-prosecution agreements, and entering into more favorable consent decrees and settlements. However, as the second-highest official at DOJ stated in recent remarks, enforcement policies meant to encourage corporate disclosures "do not provide a guarantee" that disclosures will yield a favorable result in all cases.[1] The outcome of a prosecution following a VSD is situation-specific, and, as such, the process should not be entered into without careful consideration of the costs and benefits.

In the context of the Bank Secrecy Act and anti-money laundering regulation ("BSA/AML"), VSDs present an uncertain set of trade-offs. The BSA and its implementing regulations already require most U.S. financial institutions subject to the requirements of the BSA[2] to file suspicious activity reports ("SARs") with the U.S. government when the institution knows, suspects or has reason to suspect that a transaction by, through or to it involves money laundering, BSA violations or other illegal activity.[3] DOJ guidance encourages VSDs, and at least one recent BSA/AML non-prosecution agreement ("NPA") entered with the Department has listed self-disclosure as a consideration in determining the resolution amount.[4] Over the past three years, however, no BSA/AML criminal resolution has explicitly given an institution credit for voluntarily disclosing potential misconduct. During this same period, DOJ began messaging an expanded focus on VSDs in the context of FCPA violations, announced the FCPA Pilot Project, and ultimately codified the potential benefits of a VSD for FCPA violations in its manual for federal prosecutors.

This article addresses some of the considerations that financial institutions should weigh when deciding whether to voluntarily self-disclose potential BSA/AML violations to criminal enforcement authorities. In discussing these considerations, we review guidance provided by DOJ and the regulatory enforcement agencies, and analyze recent BSA/AML criminal resolutions, as well as FCPA violations involving similar defendants.

Uncertain Guidance from the Department of Justice

DOJ guidance documents describe the Department's general approach to VSDs, but, until recently, many questions specifically related to self-disclosures by financial institutions were left unanswered. The Department's high-level approach to voluntary self-disclosure is described in the Justice Manual ("JM"), formerly known as the United States Attorneys' Manual ("USAM"). The JM notes that "[c]ooperation is a mitigating factor" that can allow a corporation to avoid particularly harsh penalties and gives prosecutors the discretion to "consider a corporation's timely and voluntary disclosure" in deciding whether and how to pursue a corporate prosecution.[5]

In the FCPA context, the JM provides that a self-disclosure is "voluntary", and therefore potentially eligible for cooperation credit, if: (1) the company discloses the relevant evidence of misconduct prior to an imminent threat of disclosure or government investigation; (2) the company reports the conduct to DOJ and relevant regulatory agencies "within a reasonably prompt time after becoming aware of the offense"; and (3) the company discloses all relevant facts known to it, including all relevant facts about the individual wrongdoers involved.[6]

DOJ has not yet offered specific instruction, however, on how prosecutors should treat voluntary self-disclosure in the BSA/AML context and no formal self-disclosure program currently exists in the money laundering context. Indeed, the only guidance document to mention VSDs and financial institutions – issued by DOJ's National

Security Division in 2016[7] – specifically *exempted* financial institutions from VSD benefits offered to other corporate actors in the sanctions context, citing the "unique reporting obligations" imposed on financial institutions by their regulators.[8]

Despite this lack of guidance, the recent adoption of DOJ's FCPA Corporate Enforcement Policy may be indicative of how prosecutors might regard VSDs by financial institutions going forward. Enacted in the fall of 2017, the Corporate Enforcement Policy arose from DOJ's 2016 FCPA Pilot Program, which was created to provide improved guidance and certainty to companies facing DOJ enforcement actions, while incentivizing self-disclosure, cooperation, and remediation.[9] One year later, based on the success of the program, many of its aspects were codified in the USAM (now the JM).[10] Specifically, the new policy creates a presumption that entities that voluntarily disclose potential misconduct and fully cooperate with any subsequent government investigation will receive a declination, absent aggravating circumstances.[11]

Although this policy was adopted specifically in the FCPA context, DOJ's recent enforcement activity suggests the policy may be applied in other contexts, including to financial institutions. In March 2018, after an investigation by DOJ's Securities and Financial Fraud Unit, the Department publicly announced that it had opted not to prosecute a financial institution in connection with the bank's alleged front-running of certain foreign exchange transactions,[12] in part because the company had made a "timely, voluntary self-disclosure" of the alleged misconduct.[13] Principal Deputy Assistant Attorney General John Cronan, in subsequent remarks at an American Bar Association white-collar conference in which he explained DOJ's declination rationale, noted that "[w]hen a company discovers misconduct, quickly raises its hand and tells us about it, that says something.... [i]t shows the company is taking misconduct seriously...and we are rewarding those good decisions".[14] During the same speech, Cronan formally announced that the Corporate Enforcement Policy would serve as nonbinding guidance for corporate investigations beyond the FCPA context.[15]

Other Agency Guidance

Guidance issued by other enforcement agencies similarly may offer clues as to how financial institutions can utilize VSDs to more successfully navigate a criminal enforcement action.

In the context of export and import control, companies that self-disclose to the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC") can benefit in two primary ways. First, OFAC may be less likely to initiate an enforcement proceeding following a VSD, as OFAC considers a party's decision to cooperate when determining whether to initiate a civil enforcement proceeding.[16] Second, if OFAC decides it is appropriate to bring an enforcement action, companies that self-disclose receive a 50 percent reduction in the base penalty they face.[17]

Other agencies tasked with overseeing the enforcement of financial regulations also have issued guidance encouraging voluntary disclosures. Although the Financial Crimes Enforcement Network ("FinCEN") has not provided guidance on how it credits voluntary disclosures,[18] guidance issued by the Federal Financial Institutions Examination Council ("FFIEC"), consisting of the Office of the Comptroller of the Currency ("OCC"), the Federal Reserve, the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA"), has made clear that "voluntary disclosure of the violation" is among the factors the agencies will consider in determining the amount and appropriateness of a civil money penalty to be assessed against a financial institution in connection with various types of violations.[19]

In 2016, the OCC published a revised Policies and Procedures Manual to "enhance the consistency" of its enforcement decisions, including by ensuring the FFIEC factors and other relevant considerations are taken into account in its enforcement decisions.[20] That guidance includes a matrix with several factors, one of which is "concealment".[21] In the event that a financial institution self-discloses, they are not penalized for concealment. Thus, while not directly reducing potential financial exposure, a VSD ensures that a financial institution is not further penalized for the potential violation.

It is also worth noting that, unlike DOJ, these financial regulators do not appear to draw distinctions regarding the type of offense at issue (i.e., FCPA, BSA/AML, sanctions, etc.). However, financial institutions considering not disclosing potential misconduct must be mindful of whether the nature of the potential misconduct at issue goes to the financial institution's safety and soundness, adequacy of capital, or other issues of interest to prudential regulators such as the Federal Reserve, OCC, and FDIC. To the extent such prudential concerns are implicated, a financial institution may be required to disclose the underlying evidence of misconduct and may face penalties for failing to do so.

The Securities and Exchange Commission ("SEC") also has indicated that it will consider VSDs as a factor in its enforcement actions under the federal securities laws. In a 2001 report (the "Seaboard Report"), the SEC confirmed that, as part of its evaluation of proper enforcement actions, it would consider whether "the company voluntarily disclose[d] information [its] staff did not directly request and otherwise might not have uncovered".[22] The SEC noted that credit for self-reporting and other forms of self-policing could include "the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents...use[d] to announce and resolve enforcement actions".[23] In 2010, the SEC formalized its cooperation program, identifying self-policing, self-reporting, remediation, and cooperation as the primary factors it would consider in determining the appropriate disposition of an enforcement action.[24] In 2015, the former Director of the SEC's Division of Enforcement reaffirmed the importance of self-reporting to the SEC's enforcement decisions, stating that previous cases "should send the message loud and clear that the SEC will reward self-reporting and cooperation with significant benefits".[25]

Finally, like its federal counterparts, the New York Department of Financial Services ("NYDFS") has previously signaled, at least in the context of export and import sanctions, that "[i]t is vital that companies continue to self-report violations",[26] and warned that "those that do not [self-report] run the risk of even more severe consequences".[27] The NYDFS has not directly spoken to money laundering enforcement, but financial institutions considering disclosures to New York state authorities should keep this statement in mind. As with federal banking regulators, to the extent DFS prudential concerns are implicated, a financial institution may be required to disclose the underlying evidence of misconduct and face penalties for failing to do so.

Recent BSA/AML and FCPA Resolutions

Even against this backdrop, over the last few years, voluntary self-disclosure has not appeared to play a significant role in the resolution of criminal enforcement proceedings arising from alleged BSA/AML violations. Since 2015, DOJ, in conjunction with other enforcement agencies, has resolved BSA/AML charges against 12

financial institutions.[28] In 11 of those cases, the final documentation of the resolution – the settlement agreements and press releases accompanying the settlement documents – make no mention of voluntary self-disclosure. Even in the FCPA context, where DOJ has sought to provide greater certainty and transparency concerning the benefits of voluntary disclosure, there is a scant track record of financial institutions making VSDs in connection with FCPA resolutions. Since 2015, DOJ has announced FCPA enforcement actions with six financial institutions, none of which were credited for voluntarily self-disclosing the conduct at issue.[29]

Despite the paucity of recent examples of financial institutions receiving credit for VSDs, entities facing such enforcement actions should nonetheless consider how such a disclosure might affect the nature of a potential investigation and the ultimate disposition of an enforcement action. It is worth noting that in the only recent BSA/AML resolution with a financial institution in which voluntary self-disclosure *was* referenced – DOJ's 2017 resolution with Banamex USA – it was in the course of explaining why the financial institution did *not* receive disclosure credit.[30] Although there is no recent example of a financial institution receiving a lesser penalty as the result of a VSD, the fact that the Banamex USA resolution affirmatively explains why the defendant did *not* receive VSD credit may imply that this type of credit may be available to financial institution defendants when they *do* make adequate and timely VSDs.

Furthermore, over the same time period, financial institutions have been credited for other forms of cooperation in recent BSA/AML resolutions. For example, in 2015, the Department of Justice deferred prosecution of CommerceWest Bank officials for a BSA charge arising from their willful failure to file a SAR, in part because of the bank's "willingness to acknowledge and accept responsibility for its actions" and "extensive cooperation with [DOJ's] investigation".[31] Similarly, a 2015 NPA with Ripple Labs Inc. credited the financial institution with, among other factors, "extensive cooperation with the Government".[32] These favorable dispositions signal that the government is willing to grant mitigation credit for cooperation, even when financial institutions are not credited with making VSDs.

Other Relevant Considerations Relating to VSDs

As discussed above, the government's position regarding the value of VSDs and their effect on the ultimate resolution of a case may vary based on the agency and the legal and regulatory regime(s) involved. Given the lack of clear guidance from FinCEN about how it credits VSDs and the fact that BSA/AML resolutions tend not to explicitly reference a company's decision to disclose as a relevant consideration, the decision of whether to self-report to DOJ is a fraught one. Beyond the threshold question of whether or not to self-disclose to DOJ, financial institutions faced with potential BSA/AML liability should be mindful of a number of other considerations, always with an eye on avoiding a full-blown criminal investigation and trying to limit institutional liability to the extent possible.

- **Likelihood of Discovery:** A financial institution deciding whether to self-disclose to DOJ must contemplate the possibility that the government will be tipped off by other means, including by the prudential regulators, and will investigate the potential misconduct anyway, without the financial institution receiving credit for bringing a case to the government's attention and potentially before the financial institution has had the opportunity to develop a remediation plan. A financial institution planning to forego self-disclosure of possible misconduct will have to guard against both whistleblower disclosures and the possibility of another institution aware of the potential violation implicating it in a SAR filing.
- **Timing of Disclosure:** Even after a financial institution has decided to self-report to DOJ, it will have to think through the implications of when a disclosure is made. A financial institution could decide to promptly disclose to maximize cooperation credit, but risks reporting without developing the deeper understanding of the underlying facts that an internal investigation would provide. Additionally, a prompt disclosure to DOJ may be met with a deconfliction request, in which the government asks that the company refrain from interviewing its employees until the government has had a chance to do so, which can slow down the company's investigation and impede its ability to take prompt and decisive remedial actions, such as personnel decisions. Conversely, waiting until the investigation is completed, or at least more fully developed, presents the aforementioned risk of the government discovering the issue on its own. Financial institutions must also decide whether to wait until a remediation plan has already been set in motion to disclose or to disclose while the plan is still being developed.
- **Selective or Sequential Disclosures:** Given the number of agencies with jurisdiction over the financial industry and the overlaps between their respective spheres of authority, financial institutions contemplating self-disclosure will often have to decide how much to disclose, to which agencies, and in what order. In some cases, a financial institution potentially facing both regulatory and criminal liability may be well-advised to engage civil regulators first in the hope that, if DOJ does get involved, they will stand down and join a global resolution with other regulators rather than independently seeking more serious penalties. Indeed, DOJ prosecutors are required to consider the adequacy of noncriminal alternatives – such as civil or regulatory enforcement actions – in determining whether to initiate a criminal enforcement action.[33] For example, the BSA/AML NPA that DOJ entered with Banamex USA in May 2017 recognized that Citigroup, Banamex's parent, was already in the process of winding down Banamex USA's banking operations pursuant to a 2015 resolution with the California Department of Business Oversight and FDIC and was operating under ongoing consent orders with the Federal Reserve and OCC relating to BSA/AML compliance; consequently, DOJ sought only forfeiture rather than an additional monetary penalty.[34] Of course, any decision to selectively disclose must be balanced carefully against the practical reality that banking regulators will, in certain instances, notify DOJ of potential criminal violations whether self-disclosed or identified during the examination process. Whether that communication will occur often is influenced by factors such as the history of cooperation between the institutions or the relationships of those involved. In any event, a regulatory referral to DOJ might nullify any benefit to the financial institution from a selective or sequential disclosure.

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Endnotes

1. Rod Rosenstein, Deputy Att'y Gen., Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/

deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

2. Throughout this article, we use the term "financial institution" as it is defined in the Bank Secrecy Act. "Financial institution" refers to banks, credit unions, registered stock brokers or dealers, currency exchanges, insurance companies, casinos, and other financial and banking-related entities. *See* 31 U.S.C. § 5312(a)(2) (2012). These institutions should be particularly attuned to the role that voluntary disclosures can play in the disposition of a criminal enforcement action.
3. *See, e.g.*, 31 CFR § 1020.320 (FinCEN SAR requirements for banks); 12 C.F.R. § 21.11 (SAR requirements for national banks).
4. *See* Non-Prosecution Agreement with Banamex USA, U.S. Dep't of Justice (May 18, 2017), https://www.justice.gov/opa/press-release/file/967871/download (noting that "the Company did not receive voluntary self-disclosure credit because neither it nor Citigroup voluntarily and timely disclosed to the Office the conduct described in the Statement of Facts").
5. U.S. Dep't of Justice, Justice Manual § 9-28.700 (2017).
6. *Id.* § 9-47.120 (2017). DOJ applies a substantially identical definition in the sanctions context. *See* U.S. Dep't of Justice, Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.
7. U.S. Dep't of Justice, Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations, at 4 n.7 (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download. Gibson Dunn's 2016 Year-End Sanctions Update contains a more in-depth discussion of this DOJ guidance.
8. *Id.* at 2 n.3.
9. Press Release, U.S. Dep't of Justice, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program. For a more in-depth discussion of the original Pilot Program, see Gibson Dunn's 2016 Mid-Year FCPA Update, and for a detailed description of the FCPA Corporate Enforcement Policy, see our 2017 Year-End FCPA Update. For discussion regarding specific declinations under the Pilot Program, in which self-disclosure played a significant role, see our 2016 Year-End FCPA Update and 2017 Mid-Year FCPA Update.
10. Rod Rosenstein, Deputy Att'y Gen., Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (announcing that the FCPA Corporate Enforcement Policy would be incorporated into the U.S. Attorneys' Manual); U.S. Dep't of Justice, Justice Manual § 9-47.120 (2017).
11. *Id.*
12. Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, Law360 (Mar. 1, 2018), https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off.
13. U.S. Dep't of Justice, Letter to Alexander Willscher and Joel Green Regarding Investigation of Barclays PLC (Feb. 28, 2018), https://www.justice.gov/criminalfraud/file/1039791/download.
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15. *Id.*
16. 31 C.F.R. Pt. 501, app. A, § III.G.1 (2018).
17. *Id.* § V.B.1.a.iv (2018).
18. Robert B. Serino, *FinCEN's Lack of Policies and Procedures for Assessing Civil Money Penalties in Need of Reform*, Am. Bar Ass'n (July 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/07_serino/. It is worth noting, however, that there are certain circumstances in which FinCEN imposes a continuing duty to disclose, such as when there has been a failure to timely file a SAR (31 C.F.R. § 1020.320(b)(3)); failure to timely file a Currency Transaction Report (31 C.F.R. § 1010.306); and failure to timely register as a money-services business (31 C.F.R. § 1022.380(b)(3)). In circumstances in which a financial institution identifies that it has not complied with these regulatory requirements and files belatedly, the decision whether to self-disclose to DOJ is impacted by the fact that the late filing will often be evident to FinCEN.
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30. *See* Non-Prosecution Agreement with Banamex USA, U.S. Dep't of Justice, at 2 (May 18, 2017), https://www.justice.gov/opa/press-release/file/967871/download (explaining that Banamex "did *not* receive voluntary disclosure credit because neither it nor [its parent company] Citigroup voluntarily and timely disclosed to [DOJ's Money Laundering and Asset Recover Section] the conduct described in the Statement of Facts") (emphasis added).

31. Deferred Prosecution Agreement Between United States and CommerceWest Bank, U.S. Dep't of Justice, at 2–3 (Mar. 9, 2015), https://www.justice.gov/file/348996/download.

32. Settlement Agreement Between United States and Ripple Labs Inc., U.S. Dep't of Justice (May 5, 2015), https://www.justice.gov/file/421626/download; *see also* Press Release, U.S. Dep't of Justice, Ripple Labs Inc. Resolves Criminal Investigation (May 5, 2015), https://www.justice.gov/opa/pr/ripple-labs-inc-resolves-criminal-investigation.

33. See Justice Manual § 9-28.1200 (recommending the analysis of civil or regulatory alternatives).

34. Non-Prosecution Agreement Between U.S. Dep't of Justice, Money Laundering and Asset Recovery Section and Banamex USA, at 2 (May 18, 2017), https://www.justice.gov/opa/press-release/file/967871/download.

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