COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

ROBERT K. KELNER
TEL 202.662.5503
FAX 202.778.5503
RKELNER@COV.COM

January 30, 2007

BY HAND DELIVERY AND ELECTRONIC MAIL

Mr. Mark Shonkwiler, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: *Comments to Proposed Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions)*

Dear Mr. Shonkwiler:

The following comments are submitted on behalf of the Pharmaceutical Research and Manufacturers Association ("PhRMA") and the National Association of Manufacturers ("NAM") in response to the Federal Election Commission's request for comment on the proposed policy statement regarding the self-reporting of campaign finance violations. *See* 71 F.R. 71090 (Dec. 8, 2006).

PhRMA represents the country's leading pharmaceutical research and biotechnology companies. Its mission is to advocate for public policies that encourage discovery of important new medicines for patients by pharmaceutical/biotechnology research companies.

The NAM represents many of the Nation's major manufacturing companies. Its mission is to advocate on behalf of its members to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing in America's economic and national security for today and in the future.

Both PhRMA and NAM appreciate the opportunity to comment on the Commission's proposed policy statement. In its proposed policy statement, the Commission seeks to clarify its approach to enforcement actions arising from self-reported violations, otherwise known as *sua sponte* submissions. The proposal identifies seven factors that the Commission intends to consider when addressing self-reported violations. It also proposes specific reductions in civil penalties for those entities that self-report violations, as well as an expedited "Fast-Track Resolution" process for certain violations.

For many years, even as numerous other federal agencies adopted voluntary disclosure policies, the Commission has operated without one. Indeed, as the Commission appears to recognize, there has been a widespread and continuing perception among federal election law practitioners and regulated entities that the Commission does not reward those that self-report violations. An important goal of any new voluntary disclosure policy should be to provide reasonable assurance to the regulated community that self-reporting will be rewarded, and certainly not penalized. Toward that end, PhRMA and NAM support the Commission's proposed policy statement, with the considerations and modifications suggested below.

Transparency and Predictability in Calculating Sanctions

PhRMA and NAM applaud the Commission's move toward transparency in the calculation of appropriate sanctions. Transparency ensures predictability, and the more predictable the outcome of a decision to self-report a violation, the more likely the decision to self-report will be made.

PhRMA and NAM also commend the Commission's efforts to provide clear, quantifiable incentives for entities that make the choice to self-report violations. The decision whether to self-report will often turn on an assessment of whether there are clear benefits to self-reporting. Where there is great uncertainty as to the sanction the Commission is likely to impose, self-disclosure is far less likely. In evaluating a proposed voluntary disclosure policy, a key question therefore is the extent to which the policy enables the prospective self-disclosing entity to quantify in advance, with a reasonable degree of certainty, how the self-disclosure will impact the ultimate resolution of the case.

Many federal agencies have adopted voluntary disclosure policies in which self-disclosure of potential violations and subsequent cooperation on the part of the respondent are considered formal factors in setting a penalty.[1] Fewer agencies have set specific, quantifiable incentives provided in return for self-disclosure and cooperation. In general, these specific policies provide greater clarity, and therefore a greater incentive to self-disclose. Among the agencies in this latter category:

- *The Department of Commerce's Bureau of Industry and Security ("BIS") and Office of Export Enforcement ("OEE").* BIS has outlined specific incentives for entities that self-disclose potential violations of the Export Administration Regulations ("EAR"). *See* 15 C.F.R. § 764.5 (2006). Self-disclosure is a

[1] Prominent examples include the voluntary self-disclosure policies of the Department of Justice, the Securities and Exchange Commission, the Department of Health and Human Services Office of Inspector General, the Department of Defense Office of Inspector General, and the Federal Energy Regulatory Commission.

mitigating factor to be afforded "great weight" when calculating a sanction. *See* 15 C.F.R. § 766 Supp. No. 1 (2006). Further, BIS applies a specific, quantifiable incentive to self-disclosers: "BIS affords 'great weight' to voluntary disclosures in the settlement phase of administrative cases by beginning the penalty calculation at 50% of the maximum fine. In cases where no [voluntary self disclosure] has been submitted, the [Administrative Case Review Board] will not generally approve of any penalty below 50% of the maximum."[2] In determining appropriate administrative sanctions, BIS will also consider (1) the degree of willfulness involved; (2) whether there are other related or unrelated violations; (3) the timing of a settlement; (4) the presence of an effective export compliance program and the quality of compliance efforts; and (5) the degree of cooperation exhibited with respect to the BIS investigation.

- *The Treasury Department's Office of Foreign Assets Control ("OFAC").* OFAC's Economic Sanctions Enforcement Guidelines specifically provide that "[w]hen apparent violations are voluntarily disclosed by the actor to OFAC, the proposed penalty generally will be mitigated at least 50% from the amount that would otherwise be proposed under these Guidelines." *Dep't of the Treasury, Office of Foreign Assets Control, Reporting and Procedures Regulations; Cuban Assets Control Regulations: Publication of Economic Sanctions Enforcement Guidelines*, 68 F.R. 4422, 4427 (Jan. 29, 2003). In addition to voluntary disclosure, OFAC will consider other factors in determining an appropriate penalty, including (1) whether the violation is a first offense; (2) whether the respondent had in place a compliance program at the time of the violation; (3) other remedial measures taken after the violation is discovered; and (4) the extent of cooperation exhibited during the OFAC investigation. *See id.*

- *The Treasury Department's Office of Thrift Supervision ("OTS").* The OTS' Enforcement Policy Statement provides for the consideration of self-disclosure when calculating civil money penalties. *See Office of Thrift Supervision, U.S. Department of the Treasury, Regulatory Bulletin 18-3a, Enforcement Policy Statement on Civil Money Penalties* (July 30, 1993). In determining a penalty, OTS uses a Civil Money Penalty Assessment Form. The instructions to that form provide that a respondent that voluntarily discloses a violation receives a 25% reduction in the penalty. *See Civil Money Penalty Assessment Form Instructions, Appendix to Regulatory Bulletin 18-3a*, at 6.

---

[2] Available at http://www.bis.doc.gov/ComplianceAndEnforcement/VSDPaper101105.pdf.

One of the more prominent of the federal government's voluntary disclosure programs is the EPA's Voluntary Audit Policy. Under this Policy, regulated entities are encouraged to self-monitor and self-disclose potential violations of the nation's environmental laws. The EPA Policy provides for the reduction or elimination of "gravity-based" civil penalties[3] if a violation is self-reported and if certain other conditions are met.[4]

An entity that meets all nine specified conditions is eligible for a 100% reduction of any gravity-based penalty. An entity that meets eight of the nine conditions (but not the first condition) is eligible for a 75% reduction of any gravity-based penalty. Furthermore, and significantly, EPA will not recommend criminal prosecution of voluntary self-disclosers who meet at least eight of the nine conditions. The nine conditions are:

1. Systematic discovery of the violation through an environmental audit or a compliance management system.

2. Voluntary discovery.

3. Prompt disclosure (within 21 calendar days after discovery).

4. Discovery and disclosure independent of government or third party plaintiff.

5. Correction and remediation of the violation (within 60 days or as expeditiously as possible).

6. The entity agrees to take steps to prevent recurrence.

7. The violation at issue is not a repeat violation.

8. The violation at issue did not result in serious actual harm to the environment or present an imminent and substantial endangerment to public health or the environment.

9. The respondent provides full cooperation to the EPA.

The benefits of EPA's Voluntary Audit Policy have been recognized by commentators. They note that the Policy "creates a bright line rule providing both clarity and predictability for

---

[3] A "gravity-based" civil penalty is that portion of the monetary sanction over and above the portion that represents the entity's economic gain from non-compliance.

[4] The EPA reserves the right to collect any economic benefit that a violator may have gained as a result of the violation.

regulated entities," Lisa Koven, *The Environmental Self-Audit Evidentiary Privilege*, 45 UCLA L. Rev. 1167, 1189 (April 1998), and "provid[es] greater certainty as to the agency's enforcement response to voluntary self-evaluations, voluntary disclosure, and the prompt correction of violations." Ram Sundar and Bea Grossman, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability*, 7 Fordham Envtl. Law J. 351, 383 (Spring 1996). The qualities of clarity, predictability, and certainty are similarly found in the voluntary disclosure policies of the BIS, OFAC, and OTS described above.

Factors Considered in Self-Reported Matters

The seven factors identified in the Commission's proposed policy statement include considerations substantially similar to the factors identified in other federal agency programs. PhRMA and NAM believe great weight should be given to the cooperation exhibited by a self-reporting respondent, the independent investigative steps taken by the respondent, and any remedial measures taken by the respondent to prevent recurrences.

The Commission should, however, consider increasing the weight given to whether a respondent had in place a comprehensive election law compliance program at the time of the violation. In the BIS, OFAC and EPA voluntary disclosure policies, the presence or absence of an effective compliance system is given substantial weight as a separate factor. Currently, this factor is subsumed within the Commission's inquiry as to how the violation arose. Separating out the presence of a comprehensive compliance program as an eighth factor would provide a clearer incentive for entities to expend the necessary resources to develop and implement compliance programs to avoid violations in the first place. It would provide greater assurance that the presence of a meaningful election law compliance program would result in more lenient treatment in the event that a violation occurs, notwithstanding the entity's best compliance efforts.

Many corporations already have established election law and government relations compliance programs, and any voluntary disclosure policy issued by the Commission should recognize the importance of such programs.

Reduced Civil Money Penalty Incentives

In its proposed policy statement, the Commission offers two alternative incentive approaches involving the reduction of civil money penalties for self-disclosing entities. Under the first approach, the Commission would offer a civil penalty reduced by up to 50% to respondents that meet five criteria. The civil penalty reduction would be increased to up to 75% for respondents who meet additional criteria. To qualify for the enhanced reduction, a respondent must (1) have hired an independent expert to conduct a thorough investigation or

audit; (2) provide the Commission with all documentation of the independent expert's investigation or audit;[5] and (3) take appropriate corrective action and make changes to internal procedures to ensure future compliance.

Under the second proposed approach, the Commission would offer a respondent a civil penalty reduction of 50%, with the option of raising or lowering that discount, at the Commission's sole discretion, within the range of 25% to 75%, "depending on the aggravating and mitigating factors" outlined in the proposed policy statement.

As a general matter, PhRMA and NAM believe that the more specific the guidance as to how a potential civil money penalty will be calculated, the greater the incentive to self-disclose will be. PhRMA and NAM therefore believe that the first approach outlined by the Commission is preferable, as it provides greater clarity and predictability in the calculation of civil penalties for entities that self-disclose violations.

Of course, to achieve the maximum effect of a quantifiable incentive, the entire process involved in calculating a sanction must be transparent and predictable. Potential respondents who are able to accurately assess the potential penalties will be able to make informed decisions whether to self-report violations.

Under the Commission's regulations governing the imposition of civil money penalties, those penalties shall not exceed $6,500 or the amount of the contribution or expenditure involved for each violation. For knowing and willful violations, the civil penalty shall not exceed $11,000 or 200% of the amount of the contribution or expenditure involved for each violation. *See* 11 C.F.R. § 111.24 (2006). Under this regime, the Commission retains the discretion to choose or group violations upon which the civil penalty will be based and to set the amount of the penalty below the maximum amounts provided.

As a practical matter, in negotiating conciliation agreements with respondents in enforcement actions, the Commission exercises broad discretion in its selection of proposed fines. Because the Commission generally does not explain how exactly it arrives at a proposed fine in the context of conciliation, there is a palpable danger that the value of the proposed 50% or 75% reductions in civil penalties could be offset by adjustments in the overall fine sought by the Commission. In other words, a quantifiable reduction in a fine is a powerful incentive to self-disclose, where the amount of the fine is foreseeable. In contrast, if the amount of the fine to

---

[5] In the view of PhRMA and NAM, the second criterion should not require that a respondent produce to the Commission any privileged material or work product associated with an independent expert review. Such a requirement would only lessen the effectiveness of an independent review by potentially compromising the relationship between the independent expert and the regulated entity.

be sought by the Commission is not foreseeable, because the mechanism for determining the basis of the fine is unclear, then the incentive to self-disclose could be substantially reduced.

The specific penalty reductions outlined in the proposed policy statement would be far more meaningful incentives for self-disclosure if the Commission took steps to increase the transparency of the process by which it currently determines the basis for proposed fines. One proposal we encourage the Commission to explore is the use of a formal penalty assessment form, shared with the respondent, such as that used by the Treasury Department's OTS, and publication by the Commission of a specific policy outlining its methodology for determining fines. In addition, to the extent the Commission already has internal guidelines on determining fines, utilized by the enforcement staff, those guidelines should be made public in conjunction with adopting any voluntary disclosure policy.

Fast-Track Resolution

The Commission's proposed policy statement also provides for Fast Track Resolution of certain enforcement matters when (1) all potential respondents have joined in self-reporting the violations; (2) the violations do not appear to be knowing or willful; and (3) the self-reported submission is substantially complete, addressing all potential issues. Fast Track Resolution would be available at the Commission's discretion, but respondents may request such treatment.

PhRMA and NAM support the proposed modification to the Commission's practices and encourage the Commission to employ Fast Track Resolution whenever feasible.

Parallel Proceedings

The Commission proposes that, in appropriate cases in which self-disclosure and full cooperation have been demonstrated, it will consider entering into conciliation agreements in which respondents are not required to admit violative conduct was knowing and willful. The Commission notes, however, that the civil money penalty may nonetheless be based on the formula for knowing and willful violations. The Commission further notes that it will not negotiate whether to refer or report misconduct, despite the absence of knowing and willful language in a conciliation agreement, to appropriate law enforcement authorities.

To the extent that the Commission's proposed policy statement leaves open the question whether self-reported matters will be referred to law enforcement agencies, the proposed policy retains a significant element of uncertainty for potential self-reporters. We note that under the EPA's Voluntary Audit Policy, one of the explicit incentives for entities self-reporting and remedying violations is that EPA will not recommend criminal prosecution.

Uncertainty, and therefore unpredictability, is also generated by the Commission's proposed policy of reserving the right to impose civil penalties based on the knowing and willful standard, despite self-reporting of the violation.

PhRMA and NAM believe that the Commission's proposed policy statement should reduce this remaining uncertainty and appropriately recognize the decision to self-report by including additional incentives: for entities that self-report violations, absent extraordinary circumstances, (1) no admission of knowing and willful conduct will be sought; (2) civil monetary penalties will not be based on alleged knowing and willful conduct; and (3) no recommendation for criminal prosecution will be made. Under this standard, the Commission would retain discretion to recommend further enforcement measures notwithstanding the entity's decision to self-report, but would only exercise this discretion if warranted by the exceptional facts and circumstances of a particular case. Of course, because the Department of Justice has concurrent jurisdiction over the Federal Election Campaign Act, the Commission's proposed voluntary disclosure policy would not preclude a criminal action by the Department, even where there is no recommendation from the Commission.

Meaning of "Cooperation"

The proposed policy understandably places great weight on "cooperation" by the self-disclosing party. In recent years, the Commission's enforcement staff increasingly has asked those who make *sua sponte* submissions to share with the Commission materials protected by the attorney-client and work product privileges. Such requests raise serious public policy concerns. Indeed, the U.S. Department of Justice recently acknowledged its own concern about prosecutors' practice of requesting waiver of privilege. *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006) ("Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation.").[6] In order to encourage self-policing and auditing by regulated entities, which are key elements of robust election law compliance programs, the Commission should formally declare in its proposed policy that it will neither require nor seek disclosure of privileged materials in connection with *sua sponte* submissions.

As noted above, similar concerns are presented by the proposed 75% reduction in civil penalties for self-disclosing parties who, among other things, have conducted an independent investigation or audit. The Commission should make clear that it will not require self-disclosing parties to waive the attorney-client or work product privileges in order to receive credit for having conducted an independent investigation or audit. Any requirement that the privilege be waived would dramatically reduce the incentive to self-disclose under the proposed new policy, especially where the potential self-disclosing party faces existing or potential parallel civil, regulatory, or criminal investigations.

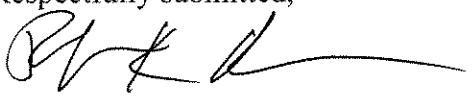
---

[6] Available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

* * *

PhRMA and NAM welcome the opportunity to comment on the Commission's proposed policy statement and appreciate your consideration of these comments.

Respectfully submitted,



Robert K. Kelner
Scott F. Gast