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## Voluntary Disclosure Programs

Jacqueline C. Wolff

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# NOTES

## VOLUNTARY DISCLOSURE PROGRAMS

### INTRODUCTION

Voluntary disclosure programs have been used by government agencies with increasing frequency in recent years.<sup>1</sup> Under these programs, corporations voluntarily "confess" illegal conduct to the agency. The agency induces this "confession" by the promise of a quid pro quo, such as leniency.<sup>2</sup> Agencies have experimented with voluntary disclosure programs because, if structured properly, these programs can provide agencies with the information needed to carry out their enforcement functions without the monetary and manpower constraints on agency resources that stem from investigations.<sup>3</sup>

On October 4, 1978, the Antitrust Division of the Department of Justice (DOJ) instituted the most recent voluntary disclosure program for corporate price-fixing violations.<sup>4</sup> This program was prompted by the voluntary disclosure in 1976 of Titanium Metals Corporation that it had fixed the price of

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1. "They [the government agencies] all want us to start confessing." Granelli, *Antitrust Lenience Plan Gets a Good Legal Laugh*, Nat'l L.J., Oct. 16, 1978, at 1, col. 2. The earliest voluntary disclosure program was initiated by the Internal Revenue Service after World Wars I and II to handle wartime tax fraud cases. Rogovin, *To Tell or Not To Tell?: Voluntary Disclosure Fraught with Danger*, Legal Times, June 5, 1978, at 1, col. 3, and 6, col. 1. In 1973, a voluntary program was again employed when the Watergate Special Prosecutor began investigating illegal campaign contributions. He announced that corporations which voluntarily disclosed these contributions would be treated more leniently with regard to the charges brought against them. Securities and Exchange Commission, Report on Questionable and Illegal Corporate Payments and Practices 2 (1976) [hereinafter cited as SEC Report]; Queenan, Brownlee, Kirkpatrick, Lockhart, Johnson & Hutchison, *Tax, Disclosure, Accounting and Other Legal Aspects of Political Contributions and Foreign Bribes*, in *Bribes, Kickbacks and Illegal Payments: SEC & IRS Requirements* 9 (1976) [hereinafter cited as Queenan]. The Securities and Exchange Commission (SEC) has recently instituted a new program in which corporations may voluntarily disclose dubious activities that are not clear-cut violations of the securities laws. Legal Times, Mar. 26, 1979, at 5, col. 1; Wall St. J., Mar. 22, 1979, at 23, col. 1.

2. "Come forward, admit your sins, and you will be treated gently." *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379 & S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 27 (1976) [hereinafter cited as *Bribery Hearings*] (statement of Sen. Proxmire); see Rogovin, *supra* note 1, at 6, col. 1 (confessors would receive a fraction of the punishment nonvolunteers would receive); Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 Harv. L. Rev. 1848, 1851-52 (1976) (the quid pro quo is the avoidance of formal litigation); Address by John H. Shenefield, Assistant Attorney General, Antitrust Division, Dep't of Justice, 17th Annual Corporate Counsel Institute 3-4 (Oct. 4, 1978) [hereinafter cited as Shenefield Address]; Wall St. J., Oct. 5, 1978, at 6, col. 2-3 (quid pro quo is in the form of a tax benefit to the volunteering corporation). *But see* Lewin & Lavine, *Singer Case May Prod Antitrust Disclosures*, Nat'l L. J., Nov. 13, 1978, at 2, col. 3 (counsel for the second corporation to volunteer price-fixing information claims that nothing was expected in return for the corporate confession).

3. SEC Report, *supra* note 1, at 6-7; Lowenfels, *Questionable Corporate Payments and the Federal Securities Laws*, 51 N.Y.U. L. Rev. 1, 22 (1976). The agency then uses this information to discover similar conduct by nonvolunteers. Schorr, *Questionable-Payments Drive Stimulates Competition, Tougher Internal Controls*, Wall St. J., June 23, 1978, at 34, col. 1.

4. Shenefield Address, *supra* note 2, at 1. See generally Wall St. J., Oct. 5, 1978, at 6, col. 2.

titanium mill products along with four other producers.<sup>5</sup> In return for this disclosure, the DOJ granted Titanium leniency by naming it as an unindicted coconspirator in the price-fixing indictment brought against the four other producers.<sup>6</sup>

In its announcement, the DOJ stated that leniency would not be automatic for corporations making a voluntary disclosure.<sup>7</sup> Instead, it outlined a number of leniency prerequisites, including a requirement that the discloser be the first conspirator to volunteer and that the disclosed information be complete.<sup>8</sup> If a volunteer cannot meet these conditions, the DOJ has indicated that the volunteer may nonetheless receive a reduction in the potential fines or imprisonment that can be levied for price fixing.<sup>9</sup>

The DOJ's program was greeted with a "legal laugh" by corporate attorneys.<sup>10</sup> This skepticism was due largely to the unpopularity of another recent voluntary disclosure program—the Securities and Exchange Commission's (SEC) foreign payments program.<sup>11</sup> The SEC program originated quite informally in July of 1975 when SEC Commissioner Loomis testified in congressional hearings<sup>12</sup> that had been called in response to the revelation that many American corporations were making outright bribes and "grease" payments to foreign government officials and employees.<sup>13</sup> These hearings

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5. Wall St. J., Oct. 5, 1978, at 6, col. 2.

6. *Id.* The voluntary disclosure of yet another company further encouraged the DOJ to implement a voluntary disclosure program. In October 1977, Singer Co. confessed to fixing the price of gas meters with Rockwell International Corp. and Textron, Inc. Lewin & Lavine, *supra* note 2, at 2, col. 3. Subsequently, criminal charges were brought by the DOJ against Textron and Rockwell. Wall St. J., Nov. 2, 1978, at 18, col. 3. As with Titanium Metals, the indictment named Singer as an unindicted coconspirator. *Id.* Rockwell pleaded guilty prior to trial while Textron was convicted. Telephone Interview with Roger Dennis, Special Assistant to Assistant Attorney General, Antitrust Division, Dep't of Justice (Mar. 16, 1979).

7. Shenefield Address, *supra* note 2, at 5.

8. *Id.* at 5-6; see notes 104-05 *infra* and accompanying text.

9. This is generally available to any cooperating corporation, regardless of whether it is a volunteer initially. Telephone Interview with Roger Dennis, Special Assistant to Assistant Attorney General, Antitrust Division, Dep't of Justice (Mar. 16, 1979).

10. Granelli, *supra* note 1, at 1, col. 1. As of April 1979, no volunteers have come forward under the program. Assistant Attorney General Shenefield remarked that the program "has not worked well," blaming the unjustified belief of corporate counsel that the DOJ is not being straightforward in its assurances of leniency for volunteers. Legal Times, Apr. 9, 1979, at 1, col. 4.

11. See Granelli, *supra* note 1, at 1, col. 2.

12. *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 35-39 (1975) [hereinafter cited as *House Hearings*] (statement of Comm'r Loomis); see Staff of Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Study of the SEC Voluntary Compliance Program on Corporate Disclosure 2-3* (1976) (Subcomm. Print 1976) [hereinafter cited as Staff Study].

13. *House Hearings*, *supra* note 12, at 1. Payments included those made directly to foreign government officials, those made indirectly to officials by inflating the commissions of sales agents, and those made as political contributions. The Association of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution 2-3 (1977) [hereinafter cited as Bar Association Report]; see Coffee, *Beyond the*

were held to consider the enactment of criminal provisions outlawing these payments because, although foreign payments had to be disclosed in SEC filings if material, they were not specifically illegal at the time.<sup>14</sup> In his testimony, Commissioner Loomis suggested that corporations which had made questionable foreign payments should disclose any material payments to the SEC. The Commissioner hinted that in return the SEC would not bring an enforcement action against a volunteer for its previous nondisclosure.<sup>15</sup>

The SEC's program was plagued by three basic problems. First, in contrast to the DOJ, the SEC did not provide corporations with a clear set of guidelines indicating the conditions to lenient treatment under the program.<sup>16</sup>

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*Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099, 1118-25 (1977). These revelations surfaced from the Watergate Special Prosecutor's investigation of illegal domestic campaign contributions under the Federal Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 10 (repealed and superceded by 2 U.S.C. § 441b (1976)). Upon reviewing the Watergate investigative files for violations of the securities laws, the SEC discovered that corporations had also made questionable foreign payments. SEC Report, *supra* note 1, at 2-3; SEC Securities Exchange Act Release No. 5466, 39 Fed. Reg. 10,237 (1974); see Lowenfels, *supra* note 3, at 1.

14. These and other hearings, e.g., *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm on Foreign Relations*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Foreign Policy Hearings*] eventually led to the passage of the Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, § 103(a), 91 Stat. 1495 (codified in 15 U.S.C.A. § 78dd-1 (Supp. 1978)). The FCPA prohibits any "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for purposes of (A) influencing any act or decision . . . or (B) inducing such foreign official to use his influence . . . in order to assist [the corporation] in obtaining or retaining business." 15 U.S.C.A. § 78dd-1 (Supp. 1978). Certain payments are excluded from the FCPA's proscription. These payments, termed "grease" or "facilitation" payments, are those made to low level government employees to induce them to do what they are already required to do. See *id.* § 78dd-1(b); McCoy & Griffin, *Illegal Payments Abroad: Congress' Response*, Legal Times, Oct. 30, 1978, at 8, col. 4. The FCPA also subjects domestic concerns, not subject to §§ 12 and 15(d) of the Securities Exchange Act, 15 U.S.C. §§ 78j, 78o(d), to the same penalties applicable to reporting companies. 15 U.S.C.A. § 78dd-2 (Supp. 1978). Enforcement, however, is delegated to the DOJ, rather than the SEC. SEC Securities Exchange Act Release No. 15570 (Feb. 15, 1979), reprinted in [Current] Fed. Sec. L. Rep. (CCH) ¶ 81,959, at 81, 394 n.12. See generally McCoy & Griffin, *supra* at 8, col. 1. For an analysis of the statutory remedies available prior to the FCPA's enactment, see McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 Fordham L. Rev. 1071, 1097-1114 (1978).

15. *House Hearings*, *supra* note 12, at 64. The first voluntary discloser was Cities Service Co. on September 23, 1975. Queenan, *supra* note 1, at 12. That corporation's disclosure was held out as a model for those corporations which were potential volunteers. Statement of the Honorable Roderick M. Hills, Chairman, Securities and Exchange Commission, Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm. (Jan. 14, 1976), reprinted in [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,364, at 85,965 [hereinafter cited as Hills Statement]; see *House Hearings*, *supra* note 12, at 182 (excerpts from the Cities Service Co. report to the SEC). The first formal announcement of the voluntary program was given in a 1975 speech by Commissioner Sommer. See Lowenfels, *supra* note 3, at 2 n.2.

16. No real guidelines for the program were announced until May 12, 1976, after nearly 90 corporations had volunteered. On that date, in a report to the Senate Committee on Banking, Housing and Urban Development, the SEC outlined the elements of the program, including the

Second, corporations which did come forward<sup>17</sup> did not appear to be rewarded for their efforts.<sup>18</sup> Corporate attorneys opined that corporations which voluntarily disclosed their payments were treated no better than corporations whose payments were discovered by the SEC's own investigative efforts.<sup>19</sup> Third, foreign payments information voluntarily disclosed to the SEC was transferred to a task force established by the DOJ to investigate the payments for possible criminal prosecution.<sup>20</sup> Because foreign payments were not specifically illegal at the time they were made, the task force brought such unexpected and obscure criminal charges as mail and wire fraud<sup>21</sup> against some corporations.

In light of the unreceptive attitude of corporations toward voluntary disclosure programs, this Note will consider two issues. In Part I, it will consider under what circumstances a voluntary disclosure program is appropriate. It will contend that such a program should be utilized by an agency as a substitute for investigations only when the agency can provide the corporation with an adequate incentive to disclose. Because of the corporation's natural reluctance to disclose illegal conduct, an agency's ability to provide an inducement such as leniency is a sine qua non of a successful voluntary disclosure program.

Part II of this Note will consider how an agency should structure a voluntary disclosure program once it has decided that a program would indeed be appropriate. Above all, the structure of a voluntary disclosure program must preserve the incentive provided by leniency. This incentive can be preserved if the agency provides adequate guidelines, if the disclosure agreement reached between the agency and corporation is memorialized, and if the agency promises to limit its disclosure of the volunteered information to other government agencies and to the public. In light of these model provisions, it will be submitted that the DOJ's proposed program is superior to the SEC's program because its guidelines spell out the preconditions to leniency.

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type of information that should be disclosed. SEC Report, *supra* note 1, at 17-31; see notes 99-102 *infra* and accompanying text.

17. A partial list of the voluntary disclosers can be found in Exhibit A of the SEC Report, *supra* note 1.

18. The SEC's treatment of voluntary disclosers was far from uniform. In some cases, enforcement actions were brought with resulting permanent injunctions. *E.g.*, SEC v. General Tire & Rubber Co., [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,542 (D.D.C. 1976); Rogovin, *supra* note 1, at 6, col. 2. In other cases, the SEC went so far as to transfer the information to the "appropriate law enforcement authorities." SEC Report, *supra* note 1, at 8 n.6; see notes 130-35 *infra* and accompanying text.

19. "Volunteers were led to believe that if the SEC was satisfied with the thoroughness of . . . steps taken by a company to terminate the practices disclosed, no enforcement action could be expected." Rogovin, *supra* note 1, at 6, col. 3. "[T]hose who volunteered found that an enforcement program indeed was instituted—against *them*." *Id.* at 6, col. 2. "And those who sat tight, while they may have lost some sleep for awhile, apparently can afford to sleep soundly now." *Id.*

20. Hager, *Who's Next? Pursuit of Corporate Payoffs Gains Momentum at Justice*, SEC, Legal Times, June 19, 1978, at 1, col. 3; Rogovin, *supra* note 1, at 6, col. 3; Brief for Appellee, Dresser Indus., Inc. v. United States, Nos. 78-1942, 78-2212, at 6 (5th Cir., filed Sept. 8, 1978).

21. Hager, *supra* note 20, at 5, col. 2; see notes 134-35 *infra* and accompanying text.

Nonetheless, the DOJ's program is not perfect and can be improved in several areas.

### I. IMPLEMENTING A VOLUNTARY DISCLOSURE PROGRAM

Generally, government agencies acquire information from corporations for two reasons.<sup>22</sup> First, an agency solicits information in furtherance of its duty to ensure full disclosure of information necessary for the protection of the public. Traditionally, agencies obtain full disclosure information by means of mandatory regulations.<sup>23</sup> For example, the Food and Drug Administration (FDA) requires food manufacturers to disclose ingredients on food packages to the public.<sup>24</sup> Similarly, the SEC ensures that corporations disclose adequate and accurate<sup>25</sup> information to the public<sup>26</sup> by, for example, requiring<sup>27</sup> corporations to include financial statements, executive compensation figures, affiliations of directors, and any other "material" information in proxy statements.<sup>28</sup>

22. For a more detailed categorization of agency purposes in requesting that information be disclosed, see Sommer, *Therapeutic Disclosure*, 4 Sec. Reg. L.J. 263, 263-65 (1976).

23. Although some mandatory disclosure regulations are statutory, many are promulgated by agencies. Agency rulemaking is governed by § 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). All the agency need do is publish the proposed regulation for comment and then under its rulemaking authority make the finalized rule mandatory. No expensive evidentiary hearings are necessary. B. Menzines, J. Stein & J. Gruff, 3 Administrative Law § 18.02[1] (1977).

24. 21 C.F.R. §§ 1.20-.35 (1978).

25. The SEC has the ability to ensure the accuracy of the filings by requiring the corporation to correct misleading registration statements and periodic filings by way of administrative proceedings. Securities Exchange Act § 13d(2), 15 U.S.C. § 78m(d)(2) (1976) ("If any material change occurs in the facts set forth in the . . . statement filed with the Commission, an amendment shall be . . . filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."); accord, 17 C.F.R. §§ 230.408, 240.12b-20 (1978); see Klein, *A Response on SEC Consents—Process is Corrupting All*, Legal Times, June 26, 1978, at 20, col. 1. For a summary of administrative remedies available to the SEC, see Comment, *Bribes, Kickbacks, and Political Contributions in Foreign Countries—The Nature and Scope of the Securities and Exchange Commission's Power To Regulate and Control American Corporate Behavior*, 1976 Wis. L. Rev. 1231, 1240-41 [hereinafter cited as *Corporate Behavior*].

26. The SEC has stated that one major objective of the 1934 Act was "to make available to the average investor honest and reliable information sufficiently complete to acquaint him with the current business conditions of the company." 2 SEC Ann. Rep. 2 (1936).

27. The SEC is authorized to "make such rules and regulations as may be necessary and appropriate." Securities Exchange Act § 23, 15 U.S.C. § 78w (1976); accord, Securities Act § 19, 15 U.S.C. § 77(s) (1976). Corporations generally have the opportunity to contest the substance of any proposed rules under the agency's rulemaking procedure. Administrative Procedure Act § 4, 5 U.S.C. § 553(e) (1976); see, e.g., Address by John Evans, Commissioner, Securities Exchange Commission, American Society of Corporate Secretaries Meeting (Nov. 3, 1978), reprinted in Legal Times, Nov. 13, 1978, at 21, col. 1. For example, the SEC recently proposed new rules regarding corporate governance and increased disclosure of management activity to the shareholders. Prior to taking final action on the proposal, the SEC invited comment. Six hundred comments were filed with the SEC, some heavily critical of the proposal. The SEC took these critical comments into account and modified the original proposal. N.Y. Times, Nov. 23, 1978, § D, at 1, col. 3.

28. Securities Exchange Act § 14, 15 U.S.C. § 78n (1976). "No solicitation . . . shall be made

Second, an agency might need information to facilitate its function of deterring illegal conduct. This function is carried out by prosecuting or threatening to prosecute violators.<sup>29</sup> The deterrence achieved through the enforcement of laws is potentially twofold: (1) it deters the violator from engaging in the illegal conduct in the future, and (2) it deters other corporations from engaging in, or from continuing to engage in, illegal conduct. For example, the DOJ acquires information in furtherance of its function to deter price fixing.<sup>30</sup> The DOJ carries out this function by bringing or threatening to bring enforcement actions which subject price fixers to fines, imprisonment, and injunctions.<sup>31</sup> Similarly, the SEC, in order to deter corporations from omitting or misrepresenting the information required in SEC filings,<sup>32</sup> can refer a willful misrepresentation or omission to the DOJ for criminal prosecution.<sup>33</sup> If the omission or misleading statement is not willful, the SEC can

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. . . containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary." 17 C.F.R. § 240.14a-9(a) (1978). For a discussion of what constitutes material information, see notes 77-80 *infra* and accompanying text. Rule 14a-9(b), however, also states: "The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders." 17 C.F.R. § 240.14a-9(b) (1978). See generally, Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311 (1974); McCoy, *Encouraging Public Companies To Disclose Soft Information*, Nat'l L.J., Dec. 11, 1978 at 30, col. 1.

29. Improving "the chances of convicting the guilty and eradicating the illegal conduct . . . also increase[s] the deterrent effect of enforcement actions." Shenefield Address, *supra* note 3, at 4.

30. *Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 9 (1977) (testimony of Assistant Attorney General Shenefield). Price fixing is a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The DOJ may bring either criminal or civil charges for § 1 violations. See note 31 *infra* and accompanying text.

31. A criminal violation of § 1 is a felony for which an individual may be fined up to \$100,000 and imprisoned for up to three years. 15 U.S.C. § 1 (1976). A corporation may be fined up to \$1,000,000. *Id.* Injunctive relief is available to the DOJ pursuant to 15 U.S.C. § 4 (1976).

32. See note 28 *supra* and accompanying text. The SEC's mandates generally does not extend to deterring the substantive conduct disclosed within the statements. *House Hearings, supra* note 12, at 67. "[T]he federal securities laws make it clear in their preambles and in their content that disclosure to deter improper conduct was not the direct or primary purpose of the system; the purpose of the system was to inform investors so they could make intelligent investment decisions." Sommer, *supra* note 22, at 265. This is based on the assumption that the investor can protect himself so long as there is adequate disclosure of all material facts. President Roosevelt noted in 1933 that "the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that new issued securities are sound." Letter from President Roosevelt to the 73d Congress (Mar. 29, 1933), 77 Cong. Rec. 937 (1933). *But cf.* Kripke, *The SEC, The Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. Rev. 1151, 1166 (1970) ("The extent to which the official myth about wise investors making wise decisions persists in the face of substantial evidence to the contrary is striking."). Professor Kripke contends that the myriad disclosure requirements of the SEC have resulted in prospectuses that are often confusing because of excessive detail, thus offering little protection to the investor. *Id.* at 1164-70.

33. Securities Act § 24, 15 U.S.C. § 77x (1976); Securities Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (1976). The maximum fine is \$10,000 and the maximum imprisonment is five years.

enjoin the company or persons involved from making such misrepresentations or omissions in the future.<sup>34</sup>

Agencies acquire deterrence information by conducting investigations of corporations. Agencies must resort to investigations because of the natural reluctance of corporations to disclose information of illegal conduct that might subject them to civil or criminal penalties. Thus, the DOJ conducts investigations of corporations suspected of price fixing.<sup>35</sup> Similarly, the SEC, which uses mandatory regulations to obtain full disclosure information, resorts to investigations to ensure that corporations have not omitted or misrepresented any information in their disclosures.<sup>36</sup>

Voluntary disclosure programs provide an alternative information-gathering system to investigations. Because the voluntary nature of these programs avoids corporate resistance, voluntary disclosure programs can provide an agency with better information in less time and at less expense than can investigations.

Corporate resistance can often paralyze an agency's investigation.<sup>37</sup> To procure information from corporations under investigation, agencies need to resort to the time-consuming process of subpoenaing corporate information.<sup>38</sup> Delays result from corporate moves to quash the subpoenas. When Lockheed Aircraft Corporation refused to answer an SEC subpoena issued in September 1975 for foreign payments information, the SEC was forced to seek a court order which was not granted until December 15, 1975.<sup>39</sup> Three months after the issuance of the court order, the corporation had still not submitted all the necessary documents.<sup>40</sup> These problems of acquiring information are compounded when the subject of the investigation is a large multinational corporation. These corporations maintain much of the information which the

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Securities Act § 24, 15 U.S.C. § 77x (1976); Securities Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (1976). The SEC makes the criminal reference pursuant to *id.* § 21(d), 15 U.S.C. § 78u(d) (1976).

34. Securities Act § 20(b), 15 U.S.C. § 77t(b) (1976); Securities Exchange Act § 21(d), 15 U.S.C. § 78u(d) (1976).

35. See 15 U.S.C. § 4 (1976); note 31 *supra* and accompanying text.

36. The SEC has the power to investigate to determine whether the corporation "has violated, is violating, or is about to violate" the filing requirements. Securities Exchange Act § 21(a), 15 U.S.C. § 78u(a) (1976). The SEC's implementation of a voluntary program was due, in part, to the beliefs of at least one of the Commissioners that the traditional mandatory regulations mechanism for eliciting information had failed. *N.Y. Times*, May 10, 1976, at 42, col. 3. This failure has been attributed to the "wrist slap" nature of the penalties assessed for noncompliance. Klein, *supra* note 25, at 20, col. 4, and to the weakening of the corporate community's moral fibre. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S 305 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977) (statement of Sen. Proxmire).

37. See generally *Oversight on the Lockheed Loan Guarantee: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 78 (1976) [hereinafter cited as *Lockheed Hearings*] (statement of SEC Chairman Hills).

38. *House Hearings*, *supra* note 12, at 190 (statement of SEC Enforcement Division Associate Director Timmeny).

39. *Lockheed Hearings*, *supra* note 37, at 78-79; see *SEC v. Lockheed Aircraft Corp.*, 404 F. Supp. 651 (D.D.C. 1975). The corporation alleged that disclosure of the foreign officials involved would be fatal to the corporation's business. *Id.* at 652.

40. *Lockheed Hearings*, *supra* note 37, at 78.



agency might desire at corporate offices and facilities all over the world.<sup>41</sup> In addition, these corporations can hire the finest legal talent to forestall agency access to the documents. Confronted with such an impressive opponent, an agency is forced to muster a veritable army of lawyers and accountants for the investigation. Stanley Sporkin, the Chief of the SEC's Enforcement Division, has estimated that it would entail twenty to twenty-five man-years to investigate all reporting corporations for nondisclosure of foreign payments.<sup>42</sup>

Voluntary disclosure programs can eliminate the investigatory battle between agency and corporation. Because of the voluntary character of the programs, the agency receives the information more quickly and, consequently, with less strain on its manpower resources.<sup>43</sup> In the first ten months of the SEC's program, eighty-nine corporations conducted an internal investigation and disclosed the results to the SEC.<sup>44</sup> It is extremely doubtful that the SEC could have obtained this information as quickly by way of investigations. In addition, aside from reviewing the information submitted, manpower was unnecessary.

Voluntary disclosure programs can also provide the agency with better quality information than that gathered by investigation. A corporation under investigation will provide an agency with no more information than that requested in the subpoena. In contrast, a voluntary disclosure program, if structured correctly, can provide the agency with a broad scope of information about the volunteer.<sup>45</sup> If an adequate incentive exists for program participants, corporations will be more anxious to provide extensive information to the agency. Thorough disclosure can be further assured if, as under the SEC's foreign payments program, the agency requires participants to engage independent directors and outside counsel to conduct an impartial investigation of the corporation's disclosure and report the results to the agency.<sup>46</sup>

A voluntary disclosure by one corporation not only provides the agency with information about that corporation but often supplies informa-

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41. For instance, Gulf Oil Corp. has operations in 60 foreign countries. Address by B. Dorsey, President of Gulf Oil Corp., National Association of Accountants Meeting (Apr. 15, 1970), reprinted in *Foreign Policy Hearings*, *supra* note 14, at 44. Thus, the SEC, lacking personnel in foreign countries, has claimed that it would be much quicker for the companies themselves to acquire the information. *House Hearings*, *supra* note 12, at 58, 68.

42. *Bribery Hearings*, *supra* note 2, at 29. In addition, there is no guarantee that the investigation will uncover wrongdoings. Even if it does and the agency files a complaint, the agency could always lose at trial. In such case, a significant amount of agency resources would have been wasted. It should be noted, however, that 90% of all SEC complaints result in settlement. Jenkins, *Meet the Enforcer*, *Student Law.*, Oct. 1978, at 34, 50.

43. This increased speed of the disclosure of corporate information also benefits the private plaintiff. For example, the information necessary to bring a class action suit against Singer Co., resulting in a \$5.7 million settlement, was gathered in less than a year after the company's voluntary disclosure. *N.Y. Times*, Feb. 17, 1979, at 28, col. 5.

44. SEC Report, *supra* note 1, at 1, 7.

45. See notes 102-04 *infra* and accompanying text.

46. SEC Report, *supra* note 1, at 8. In at least one case, however, this requirement has been circumvented. After disclosing the making of foreign payments, the SEC required International Systems & Controls to conduct an internal investigation by independent directors. Subsequently, it was discovered that these "independent" directors were being paid \$100,000 by the company in legal and professional fees. *Anatomy of a Corporate Scandal*, *Time*, Apr. 9, 1979, at 66.

tion incriminating other corporations.<sup>47</sup> For example, the price-fixing information sought by the DOJ's program inherently involves a conspiracy. Thus, a voluntary disclosure by one price fixer will invariably implicate the volunteer's coconspirators.<sup>48</sup> Even when a conspiracy is not involved, a disclosure by one corporation may incriminate another. Illegal rebating information voluntarily supplied by R.J. Reynolds Industries to the Federal Maritime Commission has enabled that agency to implicate 16 other shippers and hold 200 others under investigation. The Commission conceded that had the company not volunteered, the practices would probably not have been discovered.<sup>49</sup> The potential implication of other corporations by volunteered information furthers the effectiveness of an agency's deterrent function. With the knowledge that a volunteering corporation's disclosure might implicate them, other corporations will be deterred from engaging in, or continuing to engage in, illegal conduct.<sup>50</sup> This increased deterrent effect of the voluntary program can save the agency future investigative and enforcement expenses.

An agency cannot attain these benefits of a voluntary disclosure program, however, unless its threat of enforcement is substantial and it can provide the corporation with a quid pro quo. A corporation might not voluntarily disclose information unless there is a high probability that the agency will discover and successfully prosecute corporate wrongdoing. In announcing its voluntary program, the DOJ recognized this fact and emphasized its excellent "batting average" in winning price-fixing convictions; the DOJ has won fourteen of the fifteen<sup>51</sup> cases brought since price fixing became a felony in 1974.<sup>52</sup> Indeed,

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47. The benefits that can be provided an agency when a corporation is cooperative are evidenced by a recent Department of Energy settlement. In that case, an oil marketing company pleaded guilty to charges of violating Energy Department regulations by engaging in schemes that artificially increased the price of oil. Because many oil companies had formulated similar schemes, the revelations made by the one corporation facilitated the investigation and enforcement against others. *N.Y. Times*, Mar. 8, 1979, § D, at 1, col. 3.

48. The involvement of more than one party is a necessary element in every § 1 charge. Section 1 provides that it is illegal to engage in any "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1976).

49. Schorr, *supra* note 3, at 34, col. 1. Information from voluntary disclosers has been used to build "otherwise-impossible" cases against other violating corporations. *Id.* For examples of the charges asserted against these shipping concerns, see, e.g., Indictment, *United States v. Seatrain Lines, Inc.*, Cr. No. 78-49 (N.D. Ohio, filed July 13, 1978); Transcript of Proceedings, Plea and Sentence, *United States v. U.S. Lines, Inc.*, (D.N.J. May 10, 1978); Information, *United States v. Sea-Land Servs., Inc.*, Cr. No. 78-103 (D.N.J., filed Apr. 11, 1978).

Similarly, when a heavy capital goods corporation, such as an aircraft manufacturer, voluntarily discloses that it had misrepresented the making of foreign payments in the form of outright bribes, it reveals the perceived need for making such payments within that particular industry, thus exposing similar corporations to the watchful eye of the SEC. Coffee, *supra* note 13, at 1118. The SEC, armed with the information voluntarily disclosed to it, is on notice as to the type of payment to look for in that particular industry and is thus one step ahead in its detection of a concealed payment.

50. Shenefield Address, *supra* note 2, at 4.

51. *Id.* at 8. Approximately six months after Shenefield's speech, however, two corporations charged by the DOJ with criminal price fixing of corrugated cardboard boxes were acquitted. *N.Y. Times*, April 28, 1979, at 31, col. 6.

52. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (codified at 15 U.S.C. § 1 (1976)).

even if the probability of discovery is high, a corporation might not disclose information if the penalty for the violation is insubstantial. For instance, the Environmental Protection Agency (EPA) has found that corporations are not deterred from violating the agency's clean air regulations when the penalties assessed for the violation are less than the monetary expenditure necessary for compliance. Thus, in order to provide a more potent deterrent, the EPA has proposed a rule subjecting violators to fines equal to the costs of compliance.<sup>53</sup>

The sine qua non of a voluntary disclosure program is grounded in the agency's ability to reduce the adverse effects of corporate disclosure on the volunteer. Corporations are naturally reluctant to disclose illegal conduct for four reasons: (1) the imposition of criminal penalties; (2) the imposition of civil penalties; (3) private causes of action; and (4) adverse publicity for the corporation. An agency can offer to protect the corporation from one or more of these adverse effects of disclosure as a quid pro quo. Although agencies can provide some relief from the first three, they can do little to prevent the latter without defeating their duty to the public.

An agency can provide a quid pro quo in the form of a promise not to impose criminal sanctions.<sup>54</sup> For example, the volunteering corporation could be offered the status of "unindicted coconspirator," thereby protecting the corporation and its officers from the imposition of criminal fines and imprisonment.<sup>55</sup> If this offer is considered to be too generous, a reduction in the potential fines or imprisonment could be tendered instead. The offer of criminal leniency, however, will not encourage all corporations to disclose illegal conduct voluntarily. Because of the higher standard of proof, criminal violations are often difficult to establish. For example, the element of intent must be proven in all criminal price-fixing cases.<sup>56</sup> A promise by the SEC not to make a criminal reference to the DOJ for nondisclosure or misrepresentation of information in SEC filings suffers from the same infirmity. Criminal penalties can be imposed only when the omission or misleading statement is willful.<sup>57</sup>

An agency's promise not to bring civil injunctive actions against volunteers would serve as a valuable quid pro quo for more corporations.<sup>58</sup> For example,

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53. N.Y. Times, Mar. 22, 1979, § D, at 1, col. 6. The proposal was derived from a similar plan in Connecticut under which the compliance rate for small violators rose from 50% to 98%. *Id.*

54. The DOJ imposes criminal penalties in furtherance of a punishment as well as a deterrent function. Of course, a program-sponsoring agency's offer of leniency is inconsistent with this punishment function. Implicit in a voluntary disclosure program, however, is that the benefits of increased deterrence outweigh the loss in punishment.

55. See notes 30-31 *supra* and accompanying text.

56. United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978).

57. See note 33 *supra* and accompanying text.

58. The value of a promise not to impose injunctive sanctions is dependent on, of course, the ease with which an injunction may be brought. A lesser standard of liability will increase the likelihood of an action and, at the same time, the value of relief from injunctive actions as a quid pro quo. In this regard, the current split in the circuit courts over the standard of liability in an SEC injunctive action is worthy of note. See, e.g., SEC v. Aaron, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,800 (2d Cir. Mar. 12, 1979) (negligence); SEC v. Arthur Young & Co., [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,766 (9th Cir. Feb. 1, 1979) (same); SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978) (scienter); SEC v. World Radio Mission, 544 F.2d 535 (1st Cir. 1976) (negligence); cf.

the SEC can promise a volunteer that it will not use the corporation's previous nondisclosure as the basis for an order permanently enjoining the corporation from making any future misrepresentations or omissions.<sup>59</sup> Two-fold relief can be provided by this form of leniency. For one, if future nondisclosures or misrepresentations occur, the corporation is not placed in contempt for violating the injunction. Second, agency interference with the operation of the corporation's business is diminished. As part of its injunctive relief, an agency often compels the corporation to engage in or refrain from engaging in certain business practices. As one commentator has observed:

In recent years . . . the Commission has succeeded in securing various farreaching orders of "ancillary relief" to accompany the traditional statutory injunctions against future wrongdoing. Such orders have included the appointment of receivers, the large-scale rescission of completed transactions, the imposition of restrictions on business transactions, the requirement of continuing financial reporting beyond that established by the acts, the appointment of special professionals to oversee company dealings, and the reorganization of the management structures and procedures of business and financial enterprises involved in securities laws violations.<sup>60</sup>

A promise by the SEC not to impose such constraints is an attractive quid pro quo because corporations are anxious to minimize the agency's interference with their business.

An agency can also provide relief from private actions.<sup>61</sup> First, as discussed below, an agency can restrict a private plaintiff's access to the voluntarily disclosed information.<sup>62</sup> Second, an agency can ameliorate the effects of a

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Edward J. Mawood & Co. v. SEC, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,753 (10th Cir. Jan. 24, 1979) (scienter required for SEC order suspending and revoking broker-dealer registration).

59. See Securities Exchange Act § 21(d), 15 U.S.C. § 78u(d) (1976).

60. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 Harv. L. Rev. 1779, 1779 (1976).

61. The importance of private actions is particularly acute in the antitrust area because of the provision for treble damages. See 15 U.S.C. §§ 12, 15 (1976). With respect to the securities laws, the drafters of the 1933 and 1934 Acts created several express causes of action for private plaintiffs. See Securities Act §§ 11 (misleading registration statements), 12 (misleading prospectuses), 15 U.S.C. §§ 77u, 77l (1976); Securities Exchange Act §§ 9 (manipulation of securities prices), 16(b) (insider trading), 18 (purchase or sale of security based on misleading SEC filings), 15 U.S.C. §§ 78i, 78p, 78r (1976). In addition, the courts have created several implied causes of action under the 1934 Act. *E.g.* J.I. Case v. Borak, 377 U.S. 426 (1964) (§ 14(a), 15 U.S.C. § 78n(a) (1976)); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (§ 10(b), 15 U.S.C. § 78j (1976)).

62. See notes 153-56 *infra* and accompanying text. Access to the disclosed material may not always benefit a private plaintiff's action. The plaintiff must still state a cause of action. For example, corporations that made foreign payments have not needed protection from private suits. Shareholders have used two principal methods in suing corporations making foreign payments, neither of which has been successful. First, shareholders have brought private actions under the securities laws. For instance, actions brought under § 18 of the Securities Exchange Act, 15 U.S.C. § 78r (1976), have alleged that failure to disclose foreign payments in periodic filings with the SEC rendered the filings misleading. See, e.g., Cramer v. General Tel. and Elec. Corp., 582 F.2d 259 (3d Cir. 1978); Lewis v. Elam [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,013 (S.D.N.Y. 1977). The elements of this action are difficult to prove. Note, *Section 18 of the Securities Exchange Act of 1934: Putting the Bite Back into the Toothless Tiger*, 47 Fordham L. Rev. 115, 116 (1978). For one, the plaintiff must first establish that he is a purchaser or seller of securities. Lewis v. Elam, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,554; Securities Exchange Act § 18(a), 15 U.S.C. § 78r (1976). In addition, the plaintiff must prove that he

private judgment against the corporation. For example, the DOJ's proposed program provides that a volunteer can obtain a tax deduction for both the compensatory one-third and the punitive two-thirds of the treble damages imposed in a suit brought on the basis of information voluntarily disclosed. Nonvolunteering coconspirators can deduct only the compensatory portion.<sup>63</sup>

An agency, however, cannot eliminate the adverse publicity resulting from whatever public disclosure a corporation must make of its past wrongdoing.<sup>64</sup> The disclosure of some information to the public is necessary to fulfill the agency's goal of protecting the public by providing full disclosure or by deterring illegal conduct. Of course, the adverse publicity does not always have a profound effect on the corporation. For instance, a study of market reaction to the voluntary disclosure of foreign payments by seventy-five companies indicated that knowledge of the payments had no effect on investor decisions.<sup>65</sup> Moreover, the agency can often ameliorate the potentially severe repercussions of adverse publicity. For example, participants in the SEC's voluntary program argued that the recipients of bribes could not be disclosed because the corporation would then be threatened with foreign expropriation of corporate assets. As a result, the SEC provided for "generic" disclosure, under which neither the recipient nor the country where the bribe was made was disclosed.<sup>66</sup> In any event, the publicity stemming from a voluntary cleansing of the soul will probably not be as adverse as that resulting from an involuntary investigation.<sup>67</sup>

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relied on the filings in making the purchase or sale of a security and that the price of the security was affected by the filing. *Id.* Similarly, actions under § 14 of the Securities Exchange Act, 15 U.S.C. § 78n (1976), have alleged that the shareholders were injured as a result of a proxy statement that was misleading because it did not disclose foreign payments. These claims have been dismissed on the ground that the injury caused by the omission was too remote. The damages flow from the breach of a fiduciary duty owed by the corporate directors and officers, rather than from a shareholder vote made on the basis of the misleading proxy statement. *Cramer v. General Tel. and Elec. Corp.*, 582 F.2d at 266-67. Second, shareholders have brought derivative suits against the corporation's directors for breaching their fiduciary duties in making the foreign payments. These actions have been largely unsuccessful because of the business judgment rule, which provides that if the disinterested directors make a good faith business judgement that the suit is not in the corporation's best interests the court should honor this decision and dismiss the action. *See, e.g., Abbey v. Control Data Corp.*, 460 F. Supp. 1242, 1245-46 (D. Minn. 1978); *see N.Y.L.J.*, Mar. 2, 1979, at 1, col. 4. For the rationale behind the business judgment rule, see Note, *Mutual Fund Independent Directors: Putting a Leash on the Watchdogs*, 47 Fordham L. Rev. 568, 576-77 (1979).

63. Shenefield Address, *supra* note 2, at 8-9; *see I.R.C. § 162(g)*; Wall St. J., Oct. 5, 1978, at 6, col. 2.

64. For a discussion of the adverse publicity that can result from SEC investigation and enforcement, see Lacy, *Adverse Publicity and SEC Enforcement Procedure*, 46 Fordham L. Rev. 435 (1978). Observing that corporations suffer this resultant adverse publicity "before any formal determination that they have violated the law," the commentator suggests that the SEC should make sure that it institutes proceedings that give rise to adverse publicity only when necessary to carry out the agency's functions and should minimize the impact of such publicity. *Id.* at 435-36.

65. 5 Sec. Reg. L.J. 376 (1978).

66. SEC Report, *supra* note 1, at 32-33. *But cf. Ignatius, Foreign Bribery Trials May Show U.S. Knew of Some Payments*, Wall St. J., Oct. 5, 1978, at 1, col. 6 (specifics of generally disclosed information leaked to the press).

67. *But cf. Rogovin, supra* note 1, at 1, col. 6 ("Like other opiates, however, the user [of voluntary disclosure plans] learns later of the hidden prices and pains.").

## II. STRUCTURING A VOLUNTARY DISCLOSURE PROGRAM

Once a government agency determines that it can provide corporations with an adequate quid pro quo and that, therefore, a voluntary disclosure program is appropriate, the issue then becomes how the agency will structure the program. It is of the utmost importance that the program be structured to preserve the incentive provided by the quid pro quo. A voluntary disclosure program structured to preserve the incentive to come forward would provide adequate guidelines, memorialize the agreement between the agency and the corporation, and limit the transfer of volunteered information to other government agencies and private plaintiffs.

### A. *Preserving the Incentive by Providing Guidelines*

Corporations' incentive to disclose can be preserved if adequate disclosure guidelines are provided by the agency.<sup>68</sup> By informing the corporations of the type of information desired by the agency as a condition to leniency,<sup>69</sup> guidelines prevent misunderstandings between the corporation and the agency.<sup>70</sup> By preventing misunderstandings, an agency can ensure that the corporate community will not infer that every volunteer that did not receive leniency was cheated. This can preserve the incentive for other corporations to disclose.<sup>71</sup>

Guidelines benefit the agency in still another way. When implementing a voluntary disclosure program, an agency is interested in alleviating investigative expenses.<sup>72</sup> This is best accomplished when the information supplied to the agency is qualitatively adequate to supplant the need for further investigations. Clearly, these costs may not be saved if, in the absence of guidelines, many corporations come forward with little pertinent information. In fact, the agency would be harmed in such a case if it offered leniency to these volunteers.

The importance of providing guidelines is illustrated by the confusion that resulted from the SEC's initial failure to publish guidelines.<sup>73</sup> The first

68. The need for the corporate community to be provided with guidelines was acknowledged by the former SEC Chairman Hills: "I came to the Commission . . . feeling strongly that we had a responsibility to American business to produce guidelines to help American business." *Lockheed Hearings, supra* note 37, at 79.

69. Also, guidelines should naturally include the steps necessary to be taken in order to comply with the program. The incentive to disclose is thereby enhanced by the agency's making it simpler for the corporation to come forward.

70. A misunderstanding arises when a corporation that believes that it gave the agency sufficient information to absolve itself discovers that it is the subject of an enforcement action because the disclosure was not complete. See Lowenfels, *supra* note 3, at 23-24.

71. One company claimed that it "doesn't want to voluntarily comply with something that hasn't been defined." Wall St. J., Mar. 29, 1976, at 29, col. 1.

72. See notes 42-44 *supra* and accompanying text.

73. Many potential volunteers approached Stanley Sporkin, Chief of the SEC's Enforcement Division, requesting that he set guidelines. Not only did he refuse, but later reports indicate that he was pleased with that decision. Jenkins, *Meet the Enforcer*, Student Law., Oct. 1978, at 34, 49. Even some of the commissioners criticized Sporkin's lack of guidelines. *Id.* at 49; see Wall St. J., Mar. 29, 1976, at 26, col. 1. Commissioners Sommer and Hills pressed for guidelines. Commissioners Evans and Pollack were opposed, claiming that if guidelines were formulated corporations would find loopholes to avoid complying. Commissioner Loomis was the "swing man" in favor of guidelines. *Id.* at 26, col. 2.

voluntary discloser came forward in September 1975.<sup>74</sup> Not until a report was made to the Senate in May 1976, and after eighty-nine corporations had already volunteered,<sup>75</sup> did the SEC publish any guidelines on the type of information the agency desired.<sup>76</sup> The only standard these eighty-nine volunteers had was "materiality," the standard traditionally invoked for corporate disclosure by the SEC.<sup>77</sup> Because the standard had never been applied to foreign payments,<sup>78</sup> it was difficult to work with<sup>79</sup> in the absence of some further guidance from the SEC.<sup>80</sup> This was because certain payments were more acceptable in some foreign countries than in others.<sup>81</sup> These payments ranged from small "grease" payments to government clerks,<sup>82</sup> which were not only legal under foreign law<sup>83</sup> but were expected as part of the ordinary course of business,<sup>84</sup> to large bribes to high government officials,<sup>85</sup> which,

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74. See Queenan, *supra* note 1, at 12; note 15 *supra*.

75. See notes 16-17 *supra* and accompanying text.

76. See SEC Report, *supra* note 1. Besides the detailed discussion of the type of information required, the 1976 guidelines also contained a procedure to follow for complying with the program. *Id.* at 8-10.

77. *Id.* at 21; Sommer, *supra* note 24, at 267. Information is material if there is a "substantial likelihood that a reasonable shareholder would consider it important." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). See generally Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311 (1974).

78. Until the Watergate Special Prosecutor discovered illegal domestic payments, the SEC was not even aware of the making of foreign payments, let alone their nondisclosure or misrepresented disclosure. SEC Report, *supra* note 2, at 2-3; *House Hearings, supra* note 12, at 68 (statement of Comm'r Loomis).

79. See *Lockheed Hearings, supra* note 37, at 79-81. But see Stevenson, *The SEC and Foreign Bribery*, 32 Bus. Law. 53, 68 (1976) (given that the materiality standard is inherently vague, securities lawyers should have no more trouble applying it to foreign payments than they do with applying it to other financial matters); cf. Blackstone, *A Roadmap for Disclosure vs. A Blueprint for Fraud*, 26 U.C.L.A. L. Rev. 74, 75 (1978) ("Regulators fear that providing the business community with specific quantifiable disclosure guidelines will invite corporations to circumvent disclosure.").

80. Commissioner Sommer, one of the originators of the voluntary disclosure program, stated: "[B]efore one implements a policy of disclosure for the sake of eliminating undesirable conduct, a number of questions must be answered. First, of course, one must identify what conduct it is desired to eliminate. Is it the practice of paying bribes to foreign officials? Is it the practice of paying petty bribes to secure delivery of mail? . . . Is it paying commissioners without questioning the ultimate destination?" Sommer, *supra* note 22, at 271.

81. See *Foreign Policy Hearings, supra* note 14, at 8 (statement of B. Dorsey, Chairman of Gulf Oil Corp.). The purpose for making foreign payments also varied. Some were made with the hope of acquiring a specific contract while others were made merely to create a favorable business climate. Bar Association Report, *supra* note 13, at 2.

82. These payments, also known as "facilitating payments," are those made to low-level clerks to induce them to do promptly what they are already required to do. McCoy & Griffin, *supra* note 14, at 8, col. 4. These payments were the ones most frequently made. Coffee, *supra* note 13, at 1120-21.

83. Bar Association Report, *supra* note 13, at 3. These "grease" payments are similarly not proscribed by the FCPA. 15 U.S.C.A. § 78dd-1(b) (Supp. 1978); McCoy & Griffin, *supra* note 14, at 8, col. 4.

84. The money is expected to supplement the clerk's low salary. Coffee, *supra* note 13, at 1120-21; Stevenson, *supra* note 79, at 60; see Schorr, *supra* note 3, at 34, col. 1.

85. SEC Report, *supra* note 1, at 25-26; Bar Association Report, *supra* note 13, at 2-3.

because they were generally illegal under foreign law,<sup>86</sup> would often lead to expropriation of corporate assets upon their disclosure.<sup>87</sup>

The SEC's inability to apply its own materiality standard added to this confusion.<sup>88</sup> For one, different divisions of the SEC staff did not apply the standard uniformly. For example, pursuant to the SEC staff offer to hold informal advisory meetings<sup>89</sup> on foreign payments disclosure with corporate representatives,<sup>90</sup> E.I. Du Pont De Nemours & Co. met with two divisions of the SEC enforcement staff. One division recommended that the company should disclose \$155,000 in payments made to foreign government employees and the other recommended they need not.<sup>91</sup> The Commission agreed with the latter. Even the Commission's decision did not seem final; it was later criticized in a congressional staff study that concluded that the information was "material and must be disclosed."<sup>92</sup> Second, the SEC seemed unsure of its own disclosure standard. Of twenty-five cases which were submitted for informal advice regarding disclosure, the SEC declined to take a position on approximately one-third of them.<sup>93</sup>

This confusion over the materiality standard prompted dissatisfaction in the corporate community.<sup>94</sup> Corporate proponents concluded that the SEC's inability to provide even treatment was due, in part, to the lack of guidelines on what should be disclosed.<sup>95</sup> The skepticism was exacerbated when the SEC brought enforcement actions against some of the eighty-nine volunteers.<sup>96</sup> It appeared that the decision to enforce turned on the arbitrary

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86. See, e.g., *Foreign Policy Hearings*, *supra* note 14, at 34 (statement of B. Dorsey, Chairman of Gulf Oil Corp.). The conduct being illegal under foreign law did not pose the same threat as it would have had it been illegal under United States law. *Id.*

87. *House Hearings*, *supra* note 12, at 3; SEC Report, *supra* note 1, at 15. Similar repercussions occurred with foreign political campaign payments, *Foreign Policy Hearings*, *supra* note 14, at 24-26, even though in many instances these payments were legal in the country where made. Coffee, *supra* note 3, at 1123.

88. Former SEC Chairman Garrett stated: "One of the frustrations in this development has been our inability to retain sufficient control over the swift pace of events to enable us to make reasoned judgments regarding precisely what should be disclosed and why." *House Hearings*, *supra* note 12, at 58 (extracts of Chairman Garrett's speech before the American Society of Corporate Secretaries).

89. 17 C.F.R. § 202.2 (1978).

90. *House Hearings*, *supra* note 12, at 181 (statement of Comm'r Loomis); Letter from Elliot L. Richardson, Secretary of Commerce, to Senator Proxmire (June 11, 1976), reprinted in *Bribery Hearings*, *supra* note 2, at 46.

91. Staff Study, *supra* note 12, at 8.

92. *Id.* The difficulty in applying the materiality standard is further evidenced by the congressional staff's conclusion that the SEC erroneously decided that most of the information from 60 of the corporations was not material. *Id.* at 12-13.

93. *Id.* at 19.

94. Lowenfels, *supra* note 3, at 23-24.

95. *Id.* at 25. For instance, although some attorneys at the SEC regarded the facts of two foreign tax evasion cases as essentially the same, the corporation in one case disclosed the information, while the other corporation was advised by the SEC not to disclose. Schorr, *SEC's Fuzziness On What Illicit Dealings Should Be Reported Limits Disclosures*, Wall St. J., Mar. 29, 1976, at 26, col. 3.

96. Rogovin, *supra* note 1, at 6, col. 2; see note 114 *infra* and accompanying text.



application of the materiality standard within the SEC.<sup>97</sup> The SEC suffered as a result of the lack of guidelines. Apart from the disincentive caused by the lack of guidelines, much immaterial information was disclosed to the agency, while the material information remained secret with the corporation.<sup>98</sup>

The 1976 guidelines solved the issue of immaterial information by providing a detailed discussion of materiality.<sup>99</sup> The Report enumerates five major materiality factors peculiar to foreign payments: (1) whether the payments were made outside of the normal channels of financial accountability through foreign "slush funds"; (2) whether the recipient of the payment was a government official or merely a ministerial employee of the foreign government; (3) whether the payment was legal in the country where made; (4) the amount of business derived from the payment; and (5) knowledge or participation by senior management.<sup>100</sup> For example, the SEC guidelines considered "grease" or "facilitation" payments, which are usually legal in the country where made, to be material if management had falsified corporate books and records to conceal the payments.<sup>101</sup> The guidelines did not, however, alleviate the corporate community's dissatisfaction with the voluntary disclosure program, primarily because the guidelines did not indicate what trade-offs would be given for the information supplied by the corporation. The only reference in the guidelines to trade-offs was a footnote that stated that it would be within the SEC's discretion to bring an enforcement action against a volunteer.<sup>102</sup> The absence of trade-off discussion resulted in corporate skepticism as to the agency's desire to provide a quid pro quo at all, thereby reducing the corporate incentive to "join" the program.

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97. The possibility that the agency was using some unpublished standard, requiring more detailed disclosure than the materiality standard, served as an additional disincentive to disclose. *Corporate Behavior*, *supra* note 24, at 1255. Evidence of another standard being used can be found in a dialogue between Commissioner Hills and Senator Proxmire during the Lockheed Loan Guarantee Hearings. When questioned as to whether certain foreign payments would be considered material by the Commission, Hills was unable to give a "simple" answer. He claimed that given the widespread failure of corporations to disclose this information in the past, the SEC may require more detailed disclosure when dealing with foreign payments. *Lockheed Hearings*, *supra* note 37, at 80.

98. Schorr, *SEC's Fuzziness On What Illicit Dealings Should Be Reported Limits Disclosures*, Wall St. J., Mar. 29, 1976, at 26, col. 1. An SEC attorney admitted that most of the information received could be classified as "immaterial." *Id.* Judging from the SEC's summary of the voluntarily disclosed documents of the 89 corporations, very little information, material or immaterial, was disclosed. SEC Report, *supra* note 1, Exhibit A.

99. SEC Report, *supra* note 1, at 17-32. The guidelines indicated that the extensive discussion of materiality was due in large part to the SEC's recognition of the large variety of payments. *Id.* at 1. That these guidelines increased the incentive to disclose is evidenced by the more than 300 corporations that voluntarily disclosed after the report's release. McCoy & Griffin, *supra* note 14, at 8, col. 1. Once the report was published, the SEC could rebut a corporation's defense that payments were immaterial by pointing to the report's discussion of materiality. See *SEC v. Jos. Schlitz Brewing Co.*, 452 F. Supp. 824, 830 (E.D. Wis. 1978) (rejecting Schlitz's argument that payments representing only three percent of net sales were not material, citing the 1976 report's discussion of a small amount being material when it reflects on the integrity of management).

100. SEC Report, *supra* note 1, at 17-32.

101. *Id.* at 27.

102. *Id.* at 8 n.7.

The disappointing results of the SEC's program indicate that in structuring a voluntary disclosure program an agency must clearly define the interrelationship between the information disclosed and the trade-off. Adequate guidelines would cover at least six areas: (1) what information should be disclosed; (2) in what detail the information should be described; (3) whether an internal investigation must be conducted before disclosure; (4) whether the results of the investigation must be embodied in a special report; (5) what trade-offs will be given if the volunteer complies with the above conditions; and (6) what steps the volunteer must take to comply with the program. Thus, for example, the SEC's program could have provided that volunteers who disclosed all material payments in sufficient detail and submitted a report prepared by independent counsel to the SEC would be entitled to an SEC promise that no civil or criminal actions would be initiated.<sup>103</sup>

The DOJ's program recognized the importance of guidelines.<sup>104</sup> It outlined seven conditions to be met before a volunteer could be provided leniency as an "unindicted co-conspirator": (1) only the first volunteer in a price-fixing conspiracy will be considered for such lenient treatment; (2) the violations disclosed must be those which the DOJ would not have discovered itself; (3) the disclosure must be made by the corporation, not by officers in their personal capacities; (4) corrective action must have been taken by the corporation immediately after discovery of the violation; (5) the information must be complete; (6) the volunteer must not have been the initiating party in the conspiracy; and (7) the corporation may be required to provide restitution to injured parties.<sup>105</sup>

To date, the DOJ's proposed program has not shown positive results. No corporations have come forward under the program. Apart from the cynicism attributable to the SEC's program, at least one possible reason for the poor showing may be noted. The DOJ's guidelines, though exemplary of the detail and adequate notice which must be provided for a successful voluntary disclosure program, should not have included the second factor—that leniency is dependent on whether the DOJ would have discovered the violation itself. Such a factor is inappropriate when the corporate conduct, like price fixing, is committed outside of public view. In such a case, there is no way of verifying that the agency was on the verge of discovery. As a result, the agency may use this provision as a catch-all to avoid granting leniency to voluntary disclosers. If the factor can be used in this manner, the corporate community's incentive to disclose would be obviated by the uncertainty created by this provision. Thus, it is suggested that this factor be modified to provide that the agency can deny immunity to the volunteer only if the DOJ can show clearly that it has already expended a large amount of its resources in investigation.

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103. If the agency determines that all material payments were not disclosed in sufficient detail, the agency could withhold its trade-off and probably institute an enforcement action. The volunteer could defend by arguing that the disclosure satisfied the conditions for leniency and that, by bringing the enforcement action, the SEC had breached its agreement with the corporation.

104. "The bottom-line questions [*sic*] raised by this still-novel situation is this: Will the Antitrust Division consider leniency toward a confessing corporation or its officers, and in what circumstances?" Shenefield Address, *supra* note 2, at 3 (emphasis added).

105. *Id.* at 5-7.

On the other hand, a factor conditioning leniency on the agency's proximity to discovery can be included in a voluntary disclosure program's guidelines when the conduct is committed in public view. Under those circumstances, a substantial likelihood exists that the conduct will be reported to the agency by public witnesses. In such a case, the agency can easily verify, at little expense and effort, whether it was close to receiving the information through these witnesses anyway. Such a factor has recently been included in a voluntary program instituted by the Federal Aviation Association (FAA) for the disclosure of near air collisions.<sup>106</sup> The inclusion of the factor seems appropriate here because near air collisions are clearly within the view of potential informants such as air passengers, flight attendants, and crew. As the FAA has reasoned: "We are not eliminating the immunity . . . . We are only closing the loophole that makes it possible for a violator to escape punishment even if the offense is committed in full public view."<sup>107</sup>

### B. *Memorializing the Agreement*

A model voluntary disclosure program should also provide that the bargain struck by the agency and the corporation will be embodied in an agreement. Such a provision is needed to preserve the incentive of corporations to disclose voluntarily.

Much of the criticism surrounding the SEC's foreign payments program resulted from that agency's failure to record the quid pro quo received by the corporation in return for disclosure.<sup>108</sup> Although written agreements were reached between the SEC and most corporations that voluntarily disclosed,<sup>109</sup> the terms of those agreements listed only the promises made by the volunteer. These obligations generally included a promise not to make any false or incomplete public disclosures in the future,<sup>110</sup> a promise to conduct an

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106. N.Y. Times, Mar. 17, 1979, at 7, col. 1. The purpose of the FAA's voluntary disclosure program is "to identify hazards and take remedial steps before they [lead] to crashes." *Id.* Pilots and controllers file confidential reports with the agency confessing near air collisions. In return, the agency promises immunity from punishment so long as the violation was not intentional. The FAA has recently announced, however, that it will abolish the automatic immunity provision. Opponents of such a move fear that it will cause "reporting to dry up and thereby decrease air safety." *Id.*

107. *Id.*

108. See, e.g., Hager, *supra* note 20, at 1, col. 3; Rogovin, *supra* note 1, at 1, col. 2.

109. Each of these volunteers signed a standard SEC consent decree. Jenkins, *Meet the Enforcer*, Student Law., Oct. 1978, at 34, 49. This consent decree is used to settle 90% of all SEC enforcement actions. *Id.* at 50.

110. Even when it is clear that the company has ceased making foreign payments, the SEC may obtain an injunction prohibiting the filing of future misleading statements regarding the payments. The SEC merely has to prove that the company's past actions point to a reasonable expectation that misleading statements will be filed again. SEC v. Kalvex, Inc., 425 F. Supp. 310 (S.D.N.Y. 1975). See also SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959). In some cases, instead of enjoining the making of future false statements, the decree enjoins the making of future foreign payments. E.g., SEC v. International Tel. & Tel. Corp., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,586, at 94,504 (D.D.C. 1978). The SEC was criticized for this type of injunction because, prior to the FCPA, these payments were not illegal. Thus, the injunction was considered an intrusion into corporate conduct and thus an overstepping of the SEC's statutory authority. Sommer, *supra* note 22, at 269-70.

internal investigation,<sup>111</sup> and a promise to submit a report of the results of the investigation to the SEC.<sup>112</sup> The agreements did not mention what the corporation was to receive in exchange for its disclosure.<sup>113</sup>

When enforcement actions were brought against some of the voluntary disclosers,<sup>114</sup> these corporations were hard pressed to convince a court that they had indeed received a quid pro quo. Because they had no written evidence of the promise, corporations would argue that the promise could be inferred from the terms of the agreement;<sup>115</sup> their promise to conduct an internal investigation and submit the results in a report clearly obviated the need for an SEC investigation and evidenced the agency's intention not to enforce.<sup>116</sup> Corporations also relied on a footnote in the 1976 SEC report submitted to the Senate stating that "[a]lthough participation in the voluntary program does not insulate a company from Commission enforcement action, it does diminish the possibility that the Commission will, in its discretion, institute an action."<sup>117</sup>

The SEC, however, was able to dispute the existence of a promise, pointing to an express provision in the standard consent decree used to record the agreement that "no promise [was] made by the Commission"<sup>118</sup> to induce the corporation to enter into the agreement. Moreover, the SEC could always find support for the enforcement action in a footnote to its report<sup>119</sup> which stated that "[t]hese disclosures still are subject to . . . inquiry and action by the Division of Enforcement, if necessary."<sup>120</sup>

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111. The internal investigation usually had to be supervised by independent directors. *See, e.g., SEC v. General Tire & Rubber Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,542 (D.D.C. 1976).

112. *Id.*; *see Corporate Behavior, supra* note 24, at 1246.

113. Indeed, the standard form used for the agreement stated that the SEC made no promises to induce the disclosure. *See* note 118 *infra* and accompanying text.

114. *See, e.g., SEC v. General Tire & Rubber Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,542 (D.D.C. 1976); *SEC v. International Tel. & Tel. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,586, at 94,501 (D.D.C. 1978); *SEC v. Dresser Indus., Inc.*, 453 F. Supp. 573, 575 (D.D.C. 1978). *See also Kaplan v. Bennett* 465 F. Supp. 555, 557-58 (S.D.N.Y. 1979).

115. In *SEC v. IU Int'l. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,594 (D.D.C. 1978), the court found that since the written agreement did not have a merger clause, circumstances surrounding its creation can be looked into to decide whether any promises were in fact made. *Id.* at 94,529.

116. Rogovin, *supra* note 1, at 6, col. 3.

117. SEC Report, *supra* note 1, at 8 n.7.

118. *See* notes 128-29 *infra* and accompanying text. An example of this standard clause in the agreement can be found in *SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420, at 99,141 (D.D.C. 1976); *see McCoy, To Consent or Not To Consent: Is That Really the Question?*, Nat'l L. J., Nov. 13, 1978, at 29, col. 2. This clause provided an obstacle to corporations that claimed a promise had been given even when the SEC was willing to admit a promise had been made. *See, e.g., SEC v. IU Int'l. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,594 (D.D.C. 1978); note 128 *infra* and accompanying text.

119. Corporations apparently discounted this footnote because another footnote to the report indicated that a volunteer's chances of obtaining leniency were good. SEC Report, *supra* note 1, at 8 n.7. As one commentator stated: "Enlisting in a voluntary disclosure program is not unlike buying a car on credit or joining an encyclopedia-of-the-month club: one must look very carefully at the fine print before signing up." Rogovin, *supra* note 1, at 6, col. 2.

120. SEC Report, *supra* note 1, at 12 n.10.

As a result of this failure to memorialize, corporations could not convince the courts that they had been promised leniency.<sup>121</sup> This prompted dissatisfaction in the corporate community with the program. The corporate community complained that while those who volunteered received fines, convictions, and adverse publicity, those who did not volunteer "lost some sleep for awhile, [but could] afford to sleep soundly now."<sup>122</sup>

As the SEC program demonstrates, the memorialization of the final agreement reached between the corporation and the agency is needed to preserve the incentive provided by the trade-offs. Despite the experience under the SEC program, the DOJ has not indicated that its trade-off promises will be memorialized under its price-fixing program. As a result, the DOJ may lose the benefits that can be gained from memorialization. Memorializing the agreement prevents misunderstanding by the volunteer as to what trade-off was received.<sup>123</sup> Moreover, a memorialized agreement serves to reinforce the incentive mechanism created by trade-offs; it reassures the corporate community of the advantages of disclosing the possibly incriminating information.

The SEC standard<sup>124</sup> consent and undertaking form<sup>125</sup> could be used to memorialize voluntary disclosure agreements. In consent and undertaking agreements, which are presently used to submit enforcement action settlements to the court,<sup>126</sup> the company neither admits nor denies the charges brought against it.<sup>127</sup> Two changes, however, would have to be made to the

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121. See notes 114-18 *supra* and accompanying text.

122. Rogovin, *supra* note 1, at 6, col. 2; see Hager, *supra* note 20, at 1, col. 4.

123. See also *Bribery Hearings*, *supra* note 2, at 19 (statement of Chairman Hills, Comm'r's Pollack, Evans, and Loomis). An analogous situation involving the "final" settlement of an enforcement action is illustrative of the misunderstandings and unnecessary litigation that results from the failure to memorialize the trade-off. In *SEC v. IU Int'l Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,594 (D.D.C. 1978), the company argued that the promise in a settlement decree not to investigate any allegations in the complaint permitted the SEC to investigate only "totally new" matters. The SEC claimed that the promise did not apply if new evidence was brought to the agency's attention. The court managed to bypass the entire issue by holding that no matter what the actual promise was, the SEC could reopen its investigation on other grounds. *Id.* at 95,429.

124. With minor exceptions, consent decrees are identical. Lowenfels, *supra* note 3, at 3. For a discussion as to why the consent decrees tend to be identical, see T. Lindstrom & K. Tighe, *Trade Regulation by Negotiation: Federal Trade Commission Consent Decrees 18-19* (1974).

125. For examples of consent and undertaking agreements, see, e.g., *SEC v. Jos. Schlitz Brewing Co.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,485 (E.D. Wis. July 7, 1978); *SEC v. Lockheed Aircraft Corp.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,509 (D.D.C. 1976); *SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. L. Rep. (CCH) ¶ 95,420 (D.D.C. 1976).

126. Klein, *supra* note 25, at 20, col. 1. As this commentator notes, "the consent is 'sold' to the client as a method to get the SEC off the client's back and out of its pocketbook, as a way to return the attention of management from the daily activities of inquisitive, accusatorial bureaucrats to the fundamentals of their business." *Id.* at 21, col. 1.

127. *Corporate Behavior*, *supra* note 24, at 1246; see SEC Report, *supra* note 1, Exhibit B (summaries of consent injunctions). In addition, in most consent decrees, the company promises to set up an internal investigation by independent directors and submit a report to the SEC containing the results of the investigation. See, e.g., *SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420, at 99,141 (D.D.C. 1976). In some cases, the corporation is also required to correct and amend any past statement filed with the SEC which

form. For one, instead of neither admitting nor denying the charges, the volunteer should confess to the violations. Second, paragraph V of the standard consent form would have to be altered. That paragraph states that the corporation "enters into this Consent and Undertaking voluntarily and no promise or threat of any kind whatsoever has been made by the Commission or any member, officer, agent or representative thereof to induce [the corporation] to enter into this Consent and Undertaking."<sup>128</sup> In its place, a set of parallel paragraphs should be inserted, one listing the violations admitted by the corporation and the other listing specifically the trade-offs and conditions to these trade-offs. These conditions would consist of the ancillary relief<sup>129</sup> usually provided in the standard SEC consent and undertakings: a promise by the corporation to conduct an internal investigation and to report the result to the SEC, and a promise not to engage in similar violation of the securities laws.

### C. *Limiting Transfer of Disclosed Information to Other Agencies and Private Plaintiffs*

The incentive an agency can provide corporations through leniency can be vitiated if the information voluntarily disclosed to the agency is made available to another agency conducting a parallel investigation of the same corporation.<sup>130</sup> This is best illustrated by the SEC's foreign payments program. Under that program, the SEC turned over to the DOJ its files containing voluntarily disclosed information from most of the corporate participants.<sup>131</sup> Because many of the volunteers had been left with the impression that the SEC would maintain the confidentiality of the informa-

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omitted or misrepresented foreign payments information. *See SEC v. International Tel. & Tel. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,586, at 94,504-05 (D.D.C. 1978). In return, the corporation is spared the burden of litigation. *See Klein, supra* note 25, at 21, col. 1. One commentator has argued that the SEC has overused consent decrees thereby resulting in an inefficient deployment of resources. He contends that the SEC should litigate cases in which it has sure evidence of an ongoing violation and ignore cases in which the payments have ceased or evidence of the payments is scant. *See id.* at 20, col. 1.

128. *See, e.g., SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420, at 99,141 (D.D.C. 1976).

129. One commentator has suggested that any ancillary relief that requires corporate supervision by special counsel should also explicitly define the counsel's duties. McCoy, *supra* note 28, at 29, col. 1.

130. "Should [corporations] now believe that communications they regarded as confidential are subject to public disclosure, the chilling effect . . . would contribute to increasing reluctance on the part of corporations to come forward voluntarily . . ." Letter from SEC Chairman Hills to Rep. Moss (May 21, 1976), reprinted in Staff Study, *supra* note 13, at 24. An additional danger is that the agency receiving the volunteered information may be able to "piggy-back" onto its restricted powers the powers of the agency conducting the parallel investigation and thus obtain information which otherwise would be inaccessible. Burke, *Lawyers Warn of Pitfalls in Voluntary Disclosure*, Nat'l L.J., Dec. 18, 1978, at 7, col. 1.

131. The files of all the approximately 400 voluntary disclosers were transferred to the DOJ. Of that number, 40 were "culled" for closer inspection by the DOJ. Nat'l L.J., Nov. 6, 1978, at 3, col. 1, at 17, col. 4; *see, e.g., SEC v. Dresser Indus., Inc.*, 453 F. Supp. 573, 575-76 (D.D.C. 1978). Not only was the information transferred from the SEC to the DOJ, but two SEC attorneys were loaned to the DOJ's Special Task Force investigating the payments. Hager, *supra* note 20, at 1, col. 3.

tion,<sup>132</sup> these transfers to the DOJ evoked much criticism within the corporate community.<sup>133</sup> Dissatisfaction with the SEC's program was intensified when the DOJ used this information to bring criminal charges against some volunteers under mail and wire fraud statutes which "neither Congress nor the potential defendants contemplated as being applicable to these cases."<sup>134</sup> As a result, many corporations were dissuaded from participating in the program, concluding that it would be better to remain silent and risk the possibility of discovery by either agency than to disclose voluntarily and risk the near certain discovery and punishment by the transferee agency.<sup>135</sup>

Thus, in order to preserve corporate incentive to disclose, corporations need some guarantee that voluntarily disclosed information will not be transferred to other agencies.<sup>136</sup> Corporations have attempted to rely on the attorney-

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132. See Brief for Appellee, *Dresser Industries, Inc. v. United States*, Nos. 78-1942, 78-2212 (5th Cir., filed Sept. 8, 1978). Upon Dresser's assertion that the district court should be reversed and that the DOJ should be enjoined from further investigation because the SEC had made a promise of confidentiality to Dresser, the DOJ responded: Dresser's "experienced counsel knew (or should have known) that the SEC jurisdiction is limited to civil enforcement proceedings and that the agency cannot institute (or agree to refrain from instituting) criminal proceedings, since all federal prosecutorial responsibility is vested in the Department of Justice and the grand jury. In short, Dresser had no reasonable basis for reliance upon the promises which it claims were made by the SEC regarding immunity from criminal prosecution." *Id.* at 28-29 (footnote omitted).

133. Hidden in a footnote to the SEC guidelines, however, is a disclaimer of any promise not to transfer: "In addition to requiring appropriate disclosure under the federal securities laws, the Commission refers matters that appear to represent violations of domestic law to the appropriate law enforcement authorities." SEC Report, *supra* note 1, at 8 n.6.

134. Hager, *supra* note 20, at 5, col. 2. Some critics of the DOJ's use of these statutes have claimed that because Congress enacted a statute specifically covering the illegality of these payments, namely, the FCPA, it did not intend mail and wire fraud to cover foreign payments. Best, *Corrupt Practices Enforcement: Emerging Patterns Appear*, *Legal Times*, June 19, 1978, at 4, col. 3.

135. The Maritime Commission's Chief of Enforcement admitted that the agency would probably not have uncovered questionable payments information on its own had the company not voluntarily disclosed. Schorr, *supra* note 3, at 34, col. 1.

136. Courts have been reluctant to remedy the transfer by one agency of information received through settlement negotiations, even when the settling party alleges that a promise was made to the contrary. In *United States v. Fields*, 592 F.2d 638 (2d Cir. 1978), the defendant moved to dismiss the indictment on the ground that the SEC staff, in a settlement of a prior civil suit concerning the same securities fraud, wrongfully concealed that it had made a criminal reference to the DOJ. The concealment was wrongful in that the staff had been told during settlement negotiations that the defendant was disclosing the incriminating information in the hopes of avoiding a criminal prosecution and then had chosen to remain silent. This silence was perceived as assent. *Id.* at 94,276. The court held that even though such misconduct undermines the credibility of the SEC, dismissal was too harsh a remedy. The defendant would have the opportunity at trial to request that the wrongfully transferred information be suppressed. *Id.* at 94,279. The court also noted that dismissal of an indictment is intended to deter widespread official misconduct. It reasoned that this purpose would not be served in this case because only two staff attorneys were involved in this conduct. *Id.*

United Brands requested a less drastic remedy for the transfer of information acquired through SEC settlement negotiations. The company's request was simply to stay the SEC civil proceedings pending the outcome of the DOJ's criminal prosecution. The corporate executives argued that they would be prejudiced by the DOJ's use of information acquired outside the normal criminal investigation channels. The court denied the stay, holding that the executives would be

client privilege to prevent such transfers. They argue that the information disclosed is privileged because it was prepared by the corporation's counsel.<sup>137</sup> Under traditional notions of the attorney-client privilege, submission of the report to the SEC would operate as a waiver of the privilege.<sup>138</sup> Corporations contend, however, that the waiver is limited to the SEC's access to the information and that it does not extend to other agencies.

Courts have reached conflicting decisions on the limited waiver argument. In *United States v. Upjohn*,<sup>139</sup> the company, as part of its voluntary disclosure of foreign payments information to the SEC, conducted an internal investigation and submitted a report of the results to the SEC. The report was accompanied by a promise by Upjohn to furnish the SEC with any underlying documentation.<sup>140</sup> When the Internal Revenue Service (IRS) issued a summons requesting the company to hand over these underlying documents, the company refused because it was aware that the IRS was transferring the documents to the DOJ.<sup>141</sup> The company argued that these documents were compiled under the supervision of the company's attorney and were therefore protected by the attorney-client privilege.<sup>142</sup> The court concluded that no privilege existed in the case because the underlying documents contained interviews with minor corporate employees who were not part of the corporation's "control group."<sup>143</sup> Furthermore, the court noted that, even if the privilege existed, the corporation waived it when it offered to submit the documents to the SEC.<sup>144</sup>

In contrast, the court in *Diversified Industries, Inc. v. Meredith*,<sup>145</sup> accepted the limited waiver argument. There, a corporation, as opposed to a government agency, sought to obtain a report prepared by a law firm and submitted to the SEC pursuant to a subpoena. Diversified invoked the attorney-client privilege to prevent the corporate plaintiff from obtaining the report. The court held that the firm was entitled to the privilege because it contained confidential communications between the law firm and Diversified's

sufficiently protected by their ability to invoke the privilege against self-incrimination in either proceeding. *SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,263, at 98,347 (D.D.C. 1975).

137. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir. 1977), *aff'd in part and rev'd in part on rehearing en banc*, 572 F.2d 606 (8th Cir. 1978); *United States v. Upjohn Co.*, 78-1 U.S. Tax Cas. ¶ 9277, at 83,600 (W.D. Mich. 1978).

138. The communication must not be disseminated "beyond those persons who, because of the corporate structure, need to know its contents." 2 Weinstein's Evidence ¶ 503(b)(04) (1975)

139. 78-1 U.S. Tax Cas. ¶ 9277 (W.D. Mich. 1978).

140. *Id.* at 83,599.

141. *Id.* at 83,605.

142. *Id.* at 83,602.

143. The "control group test" is satisfied when the individuals with whom the attorney communicates are endowed with sufficient authority so as to make them the personification of the corporation. *Id.* at 83,661.

144. *Id.* at 83,603; *accord*, *SEC v. Dresser Indus., Inc.*, 453 F. Supp. 573 (D.D.C. 1978). The *Dresser* court enforced an SEC subpoena for documents from Dresser, holding that the privilege, if one in fact existed, was waived as to documents not yet given to the SEC but underlying a previously submitted voluntary disclosure report. Disclosure of part constituted a waiver for all. *Id.* at 576.

145. 572 F.2d 606 (8th Cir. 1978) (en banc).



employees. The court further held that Diversified had only waived the privilege in part "by voluntarily surrendering [the report] . . . in a separate and nonpublic SEC investigation."<sup>146</sup> The court reasoned that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."<sup>147</sup>

The *Diversified* decision represents a better approach. The *Upjohn* decision's wooden application of the traditional waiver rules of the attorney-client privilege fails to take into account the SEC's dilemma in investigating multinational corporations. Agency resources are simply inadequate to investigate all possible violations of the securities laws. New approaches like voluntary disclosure programs must be cultivated in order to achieve adequate deterrence. Preservation of the attorney-client privilege for information disclosed to an agency will encourage corporations "to seek out wrongdoing in their own house"<sup>148</sup> and voluntarily disclose it.

Nevertheless, because of the unsettled nature of the law in this area, corporations will be reluctant to rely on the attorney-client privilege. As a result, agencies must provide further assurances to corporations that other agencies will not have access to voluntarily disclosed information. Of course, the program-implementing agency is powerless to preclude parallel investigation and enforcement proceedings by other agencies.<sup>149</sup> "It is well established that more than one governmental agency may investigate the same conduct simultaneously and bring simultaneous civil and criminal actions based on such conduct so long as their respective remedies are not mutually exclusive and there is an otherwise rational basis for their individual proceedings."<sup>150</sup> The agency can, however, provide this protection by an interagency agreement in which other agencies are asked to defer to the program-conducting agency's need to prohibit the transfer of the information, thereby preserving incentive for its voluntary disclosure program. This interagency agreement should be attached to the memorialized written agreement between the agency and the corporation.

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146. *Id.* at 611.

147. *Id.*

148. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 606 (8th Cir. 1977) (Heaney, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part on rehearing en banc*, 572 F.2d 606 (8th Cir. 1978).

149. Some attorneys have argued that although these investigations cannot be prohibited, it would be in the best interests of the public to leave the corporation alone as to past violations and "wipe the slate clean." Hager, *supra* note 20, at 5, col. 1.

150. *SEC v. Jos. Schlitz Brewing Co.*, 452 F. Supp. 824 (E.D. Wis. 1978). In this case, Schlitz argued unsuccessfully for a stay of the SEC enforcement proceedings pending the outcome of a parallel criminal proceeding for violations of the Federal Alcohol Administrative Act, 27 U.S.C. §§ 201-205 (1976). The court decided that neither the corporation nor the Bureau of Alcohol, Tobacco and Firearms, which had referred the criminal action, would be prejudiced by the parallel proceedings, noting that the SEC's burden of proof in a civil action is much less than that of the Bureau's in a criminal action. Thus, the court reasoned that, even if the company were to lose in the prior SEC civil proceeding, it would not automatically lose in the criminal case. 452 F. Supp. at 833.

This interagency agreement would provide the volunteer with relief from enforcement by another agency. If one or more of the agencies should break its promise, the corporation can have the other agency's parallel investigation stopped. In *United States v. Rodman*,<sup>151</sup> the DOJ had brought a securities fraud indictment against the defendant based on information disclosed by the defendant to the SEC and later transferred to the DOJ. The defendant moved to dismiss the indictment, claiming that the prosecution was unfair because the SEC had induced the incriminating disclosure by promising that it would strongly advise the DOJ against prosecution. The court dismissed the indictment because of the SEC's breach of its promise.<sup>152</sup>

A corporation's voluntary disclosure can also result in private actions. As a result, corporations need a guarantee that information voluntarily disclosed will not be made available to potential private plaintiffs under the Freedom of Information Act (FOIA).<sup>153</sup> While for the most part all information on file with a government agency is subject to an FOIA request, voluntarily disclosed information can be exempted from disclosure as confidential information of a commercial or financial nature disclosed to an agency.<sup>154</sup> "Confidential" information under section 552b(4) has been defined as information which, if disclosed, would impair the agency's future ability to obtain this information.<sup>155</sup> Voluntarily disclosed information falls within the definition of confidential information because, if disclosed to prospective plaintiffs, corporations will be dissuaded from voluntarily providing information to the agency in the future.<sup>156</sup>

Corporations, however, are not fully protected by the confidential information exemption. This section merely permits, but does not require, an agency to refuse disclosure of voluntarily disclosed information to the public.<sup>157</sup> As a result, an agency should promise the corporation that its voluntarily disclosed information will be deemed confidential and that the agency will not exercise its right to disclose the information to the public.<sup>158</sup> This guarantee also must

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151. 519 F.2d 1058 (1st Cir. 1975).

152. *Id.* at 1059.

153. 5 U.S.C. § 552 (1976). Corporations are generally far more willing to reveal sensitive information when it is exempted from FOIA disclosure. *Coffee*, *supra* note 13, at 1265 n.584. Of course, an SEC guarantee not to transfer the voluntarily disclosed information does not preclude a private plaintiff from obtaining information concerning foreign payments through the discovery process.

154. 5 U.S.C. § 552(b)(4) (1976). This exemption exists because "a citizen must be able to confide in his Government." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2418, 2427. "[W]here the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." *Id.*

155. *Charles River Park "A", Inc. v. Department of HUD*, 519 F.2d 935, 940 (D.C. Cir. 1975).

156. When discussing Lockheed's reluctance to submit documents regarding foreign payments to the SEC, Commissioner Loomis stated: "[I]f we are unable to safeguard sensitive information . . . then our ability to obtain that information and consequently our effectiveness as a law enforced [*sic*] agency would be compromised." *House Hearings*, *supra* note 12, at 181.

157. *Chrysler Corp. v. Brown*, 99 S. Ct. 1705, 1713 (1979) ("[T]he FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.").

158. In addition, it should be noted that 17 C.F.R. § 203.2 (1978) states that information

be clearly memorialized in the agreement and should be noted in the official guidelines published at the program's inception.

#### CONCLUSION

As the sphere of corporate influence expands, the duties of government agencies become increasingly more difficult to perform. Voluntary disclosure programs represent an important development in agency enforcement practices. If structured properly, they can provide significant benefits to the agency and, from the corporation's viewpoint, can alleviate the ordeal that traditionally accompanies agency investigations.

Voluntary disclosure programs, however, present major problems for the agency. The corporate community traditionally distrusts agency promises of leniency. Thus, in order to earn the trust of corporations, an agency must offer a quid pro quo and must structure its program to ensure that the incentive to disclose is not vitiated. Only then can the benefits of a voluntary program be realized.

*Jacqueline C. Wolff*

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obtained by the SEC during the course of an investigation "unless made a matter of public record, shall be deemed non-public." This provision could be extended to cover information during the course of a voluntary disclosure program. The criteria for determining when information is a matter of public record should also be noted in the program's guidelines.