

## **Testimony of Joseph E. Murphy for the Advisory Group on the Organizational Sentencing Guidelines**

The Advisory Group has requested my views on questions relating to organizations' willingness to conduct aggressive compliance activities in light of the risk of the fruits of those activities being used against them in litigation. In my experience, this risk is a significant deterrent to such diligent compliance steps as compliance audits, testing, reviews, and surveys, and can also chill the aggressiveness of internal investigations.

I believe it is essential that there be some form of protection for compliance activities. The key, however, is not shrouding such compliance activities with secrecy. Rather, what matters is that those activities not be used unfairly against companies who engage in them. We should not reinforce the cynic's view that "no good deed goes unpunished." Instead, companies should be able to conduct diligent compliance work without tempering their efforts out of fear that they will be used against them by adversaries.

In the past I have published proposals for a self-evaluative privilege to protect this type of compliance activity. I believe the Sentencing Commission can do much to advance the policy objectives of the Sentencing Guidelines by addressing this issue and helping enforcement agencies to see the value of such protection.

There is, however, a legitimate concern in the enforcement community. If a company commits an offense, the government cannot be expected just to trust the offending company to amend its ways on its own. The government, naturally enough, wants to know what the company found and what it is doing to remedy the wrongdoing. Companies that would otherwise be willing to be candid with the government know that such candor usually comes with a price - loss of all privilege and confidentiality protections. Because of this dilemma, I have proposed a middle ground that I think would remedy this conflict. I believe the Commission is the one honest broker that could work with industry and the enforcement community to fashion a mutually beneficial compromise along the lines of this proposal.

I have attached a brief introduction to this proposal as well as the draft legislation. I am happy to discuss this further with the Advisory Group.

## **PROTECTING VOLUNTARY DISCLOSURES: THE SELF-INFORMANT PROTECTION ACT**

The issue. This proposal addresses an issue that confronts companies seeking to do the right thing by making a voluntary disclosure of wrongdoing to government. It is a circumstance that can affect any company at any time.

When a company with a compliance/ethics program has reason to believe wrongdoing is occurring, it will undertake an internal investigation. In doing so, companies typically take steps to protect the confidentiality of their investigative work. One important reason for this is to protect the identity of whistleblowers and others who have cooperated in the investigation. Protecting whistleblowers is an element of the Sentencing Guidelines standards for compliance programs, and an important step for building employee confidence in any compliance program. Another important reason for protecting confidentiality is to avoid having the company's own good work used against it in litigation. A thorough investigation can become a roadmap for plaintiffs' lawyers who can use the products of the investigation against the company for such things as punitive damages.

As a result of these concerns about confidentiality companies often elect to have their investigations conducted under privilege protection, most frequently attorney-client privilege and/or work product protection. Such protections prevent the use of the work product by others in litigation against the company, and help shield information like the identities of whistleblowers. Preserving these protections is important in order to encourage management to obtain legal advice and to be candid in communicating with counsel.

If a company discovers wrongdoing it then will generally consider whether to disclose the misconduct to the government. Such disclosure is favored by government as a matter of public policy; of course, under the Sentencing Guidelines prompt disclosure of criminal misconduct is a condition for receiving sentencing credit for a company's compliance program. Disclosure to the government also helps serve as a check on the corporate investigative process.

When the disclosure occurs, however, there can be a very serious issue regarding the protections claimed for the investigative work. If the disclosure includes the materials for which privilege is claimed, the law generally is that disclosure to the government waives the protection completely with respect to all other parties. Thus counsel's work papers and advice become subject to discovery and use in evidence against the company; private plaintiffs and other government agencies have the benefit of all of counsel's work to use against the company. A company's legal counsel could be subjected to depositions and examination in court.

This can have a chilling effect on the entire compliance process. It can cause a company to think twice before even opening an investigation. If the investigation is pursued, counsel must be very careful in what is documented, and even what is discussed. Those who are interviewed in an investigation can have no assurance of confidentiality; indeed, if a voluntary disclosure is made this may assure publicity rather than confidentiality.

This is not a one-sided issue, however. From the government's perspective, a

voluntary disclosure may mean that a corporation is reporting a crime, or a very serious civil violation. How can the government just take the word of the company that it has done everything in the investigation correctly, interviewed all the right people, and drawn the same conclusions the government would have drawn? Prosecutors are understandably skeptical and want to know what the company did in its investigation, and whether the government can rely on that work or must institute its own comprehensive investigation.

This dilemma has caused heated debate, and draws polarized responses from government and industry.

The proposal. The attached draft legislation offers a compromise that I believe will appeal to both sides - a limited waiver. Under this proposal a company making a voluntary disclosure would be considered to have waived privilege protection *only for the agency receiving the information*. That agency could use the information for its purposes, but the privilege would still remain with respect to all others. This would give the government what it needs, but still protect the disclosing company's legitimate interests.

While most courts have followed the traditional view that waiver for one is waiver for all, the proposed legislation is not a new concept. One federal circuit court, the 8<sup>th</sup> Circuit, adopted this approach in just the circumstances contemplated by this proposal. Of course, if this were adopted as legislation all other courts would have to follow the 8<sup>th</sup> Circuit's approach.

Joe Murphy  
Partner, Compliance Systems Legal Group  
Phone: 856-429-5355  
email: jemurphy@cslg.com  
Address: 30 Tanner Street, Haddonfield, NJ 08033

## SELF-INFORMANT PROTECTION ACT

### Findings and Policy.

The Congress finds the following:

The potentially disastrous impact of organizational misconduct and the need to improve the breadth and quality of legal compliance and business ethics are issues of great concern.

Full legal compliance by organizations requires the development and rigorous implementation of effective compliance and ethics programs, including efforts to detect misconduct. Organizations undertaking such programs are acting in the public interest.

Detection of misconduct and voluntary disclosures by organizations of violations of law serve important public policy goals, including prevention of harm to the public, and should be encouraged.

The risk of losing privilege and other protections relating to confidential information acts as a deterrent to organizations making such disclosures. It is in the public interest to have at least one agency be aware of a violation rather than have the violation remain unreported because of fear of loss of privilege protection.

### Definitions.

**Agency** - The term agency includes the United States Department of Justice, including all United States Attorneys offices, and any agency, administration, commission or other unit of the government of the United States with the authority to institute criminal, civil or administrative proceedings or to take any other action that could result in punitive or remedial action by that agency or any other agency against the organization.

**Good faith** - A voluntary disclosure is made in good faith if it includes candid disclosure to an agency of information relevant to the violation being reported, and the disclosing organization has no reason to know that the agency already has received any such information being disclosed. Good faith is presumed if an organization has in place an effective program to prevent and detect violations of law, as defined in the sentencing guidelines established pursuant to 28 U.S.C. § 991 *et seq.*, Chapter 8 - Sentencing of Organizations, §8A.1 Application Notes 3(k)(1-7), as amended from time to time.

**Organization** - This Act applies to any organization, as defined in 18 U.S.C. §18, and includes all subsidiaries and other units of the organization.

**Voluntary disclosure** - An organization makes a voluntary disclosure when it provides, or offers to provide to any agency, in good faith, and without a legal obligation to do so, information relating to any violation or possible violation, of any law, rule, regulation or order, or relating to the commission of any acts or failure to take any action, that could result in punitive or remedial action by that agency or any other agency against the organization or any of its employees,

directors, or other agents.

No adverse use of voluntary disclosures.

The fact of a voluntary disclosure by any organization to any agency may not be used against that organization or any of its employees, directors or agents for any purpose in any legal or administrative proceeding in any jurisdiction. No such disclosure shall operate as a waiver of any privilege or other legally protected right of confidentiality with respect to that organization or any of its employees, directors, or other agents.

Except as provided in section 5, nothing in this Act shall limit the use that the agency receiving the voluntary disclosure may make of any information included in the voluntary disclosure.

Agency use of information.

An agency may use any information provided as part of a voluntary disclosure to verify the accuracy of other, non-privileged information, and for any other purpose related to the agency's dealings with the organization making the disclosure. The agency may not disclose privileged or protected information to any other person, including any other agency or government, if such disclosure would operate as a waiver with respect to the organization that made the disclosure. The agency may condition acceptance of a voluntary disclosure on a requirement that the organization making the voluntary disclosure make a similar disclosure to another agency or government, but only if such agency or government is fully subject to this Act, or has legally enforceable protections at least as effective as the provisions of this Act. No action by an agency may act as a waiver of privilege or protection with respect to any organization making a voluntary disclosure under the protections of this Act.

Exemption from FOIA. Privileged or protected information disclosed pursuant to this Act shall be exempt from disclosure under the FOIA.

If an organization makes a voluntary disclosure that qualifies for the protections of this Act, no agency may require waiver, or condition the grant of any benefit or favorable treatment on that organization's waiver of any privilege or other protection applicable to the information it disclosed. Assertion of the protections provided by this Act by an organization or individual is fully consistent with a cooperative approach to law enforcement. These protections are to be construed broadly to give full effect to the purpose of this Act.

Federal courts and agencies shall recognize, respect and follow similar protection adopted by any state, territory or possession of the United States, or by any other nation.

**Joseph E. Murphy**  
**Partner**

**Compliance Systems Legal Group**  
**30 Tanner Street**  
**Haddonfield, NJ 08033**  
**(856) 429-5355**  
**JEMurphy@cslg.com**