# 3 Insights On DOJ Self-Disclosure Policy From Sterling Plea

By **Dominick Gerace** (March 30, 2023)

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At the American Bar Association's recent White Collar Crime National Institute in Miami, Glenn Leon — who heads the Fraud Section of the U.S. Department of Justice's Criminal Division — spoke about the recent revisions to the Criminal Division's corporate enforcement and voluntary self-disclosure policy.[1]

While he refrained from answering hypothetical questions about the policy, Leon told those in attendance that the Fraud Section would soon be announcing several corporate resolutions that would provide guidance on how the DOJ, and the Fraud Section in particular, would implement and apply the revised policy.

On March 15, the DOJ announced one of those promised corporate resolutions when it disclosed that Sterling Bancorp Inc. had agreed to resolve a criminal investigation into its Advantage Loan Program by pleading guilty to one count of securities fraud.[2]

Here are three key points from a review of the Sterling corporate resolution documents that companies should consider going forward.

**1. If a company self-discloses to a civil regulator, it should strongly consider simultaneous self-disclosure to the DOJ.**

In recent remarks, DOJ officials have placed a heavy emphasis on their desire to see more companies timely self-disclose potential misconduct directly to the DOJ.

In these statements and the various DOJ policies regarding self-disclosure, the DOJ has held out the promise of significant benefits to companies that timely self-disclose misconduct to the department, including with respect to the form of the resolution — i.e., a declination, nonprosecution agreement or deferred prosecution agreement.

In the Sterling plea agreement, the DOJ acknowledged that Sterling self-disclosed the misconduct at issue to its prudential regulator, the Office of the Comptroller of the Currency, but did not self-disclose to the DOJ.

Because Sterling did not self-disclose to both the OCC and the DOJ, it "did not receive voluntary credit pursuant to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy."

Consequently, even though Sterling self-disclosed the misconduct to its regulator, fully cooperated with the DOJ's investigation and conducted extensive remedial measures, it was still required to resolve with the DOJ in a guilty plea.

While the plea agreement does not disclose how the DOJ came to learn of the misconduct at Sterling, DOJ officials have stated that two of the most common methods are (1) criminal referrals by civil regulatory agencies conducting their own investigations and (2) whistleblowers.

Companies should anticipate that if they self-disclose to a civil regulator, the disclosure may lead the regulator to make a criminal referral to the DOJ, leaving the company with no credit under the DOJ's self-disclosure policies.

Thus, if a company reaches the decision to self-disclose potential misconduct to a civil regulator, it should consider self-disclosing to a DOJ component as well to guarantee the greatest benefit and protection for its decision to self-disclose.

Of course, companies must be aware that voluntarily self-disclosure to the DOJ still may not result in a decision to decline a criminal resolution. Under the revised disclosure policy, declination is not presumed in every case of voluntary self-disclosure.

Whether to decline prosecution is left to the discretion of the prosecutors where aggravating circumstances are found to exist alongside the self-disclosure — for example, the involvement by executive management in the misconduct.

To exercise declination discretion in such circumstances, prosecutors are required to conclude that the self-disclosure was timely; the company had an effective compliance program and system of internal controls that enabled the identification of the misconduct and led to the self-disclosure; and the company provided extraordinary cooperation and remediation.

Companies must examine all of these factors to determine how they may ultimately benefit from self-disclosing to the DOJ.

**2. Cooperation credit in the form of a reduced fine amount is of little value where a company avails itself of the DOJ's inability-to-pay policy.**

In the plea agreement, the DOJ recognized that Sterling fully cooperated in the investigation and engaged in "extensive remedial measures," including the termination or resignation of more than 100 officers and employees of the bank; terminating former senior management; and overhauling its compliance, internal audit and Bank Secrecy Act/anti-money laundering function, among many other items.

Based on this cooperation and remediation, the DOJ rewarded Sterling by reducing the base fine under the U.S. sentencing guidelines and then further reducing the base fine pursuant to the Criminal Division's self-disclosure policy.

However, the company received little to no actual benefit for this rewarded reduction because it lacked an ability to pay a criminal penalty in an amount near the proposed fine range.

The Sterling plea agreement calculated the fine range under the sentencing guidelines as nearly $82.9 million at the low end of the guidelines and almost $165.8 million at the high end. Based on the 25% discount Sterling received for its full cooperation and remediation under the voluntary self-disclosure policy, the total criminal penalty the DOJ assessed was $62.2 million.

But as the plea agreement notes, the company suffered from a significant inability to pay a criminal fine, which the Fraud Section verified when it concluded that a "payment of any criminal monetary penalty and restitution in an amount exceeding $27,239,000 is reasonably likely to threaten the continued viability of the Company."

When it came down to brass tacks, it was irrelevant whether the DOJ assessed a criminal penalty of $62 million based on a 25% reduction from the bottom of the guidelines, or assessed a criminal penalty of $165 million based on the top of the guidelines. Sterling was unable to pay anything close to either amount.

Thus, in exchange for its full cooperation and extensive remediation, Sterling was required to plead guilty and was rewarded with a reduced fine amount that it could never pay anyway, which makes it difficult to understand the true scope of the benefit that Sterling received for its cooperation and remediation.[3]

Given the voluntary self-disclosure policy's emphasis on early disclosure, companies may struggle to assess the range of outcomes with respect to a potential fine range before making the decision to self-disclose. However, there will be times when it is clear that a company lacks the ability to pay a criminal penalty of any substance.

In those situations, companies should evaluate whether the benefit of a fine reduction on paper is compelling enough to weigh in favor of self-disclosure.

Indeed, as the Sterling resolution shows, a company may later avail itself of the DOJ's inability-to-pay guidance even where it does not receive credit for self-disclosure.

**3. Companies should seek to resolve charges that create flexibility with respect to restitution obligations.**

While Sterling received no benefit in the form of the resolution or the reduced criminal penalty amount, the company appears to have received a significant benefit based on the specific charge to which it pled.

The company agreed to plead guilty to securities fraud. The DOJ could have charged the company with securities fraud as a Title 18 offense[4] or a Title 15 offense.[5] By agreeing to plead guilty to a Title 15 securities fraud charge, Sterling received a significant benefit by avoiding the Mandatory Victim Restitution Act, which would have been triggered by a securities fraud charge under Title 18 of the U.S. Code, Section 1348.

The MVRA requires that courts order restitution for victims of certain offenses, including Title 18 fraud offenses.[6]

Specifically, under the MVRA, a court is obligated to impose restitution when sentencing a defendant for a conviction or guilty plea for "an offense against property under [Title 18], ... including any offense committed by fraud or deceit" and "in which an identifiable victim or victims has suffered a ... pecuniary loss."[7]

In the Sterling corporate resolution, the DOJ and Sterling agreed that restitution was calculable and totaled approximately $56 million after crediting the company for its payment to victims in a class action settlement.

Thus, had the company pled guilty to securities fraud under Section 1348, the court would have been obligated to order Sterling to pay $56 million in restitution.

However, because Sterling pled guilty to securities fraud under Title 15 instead, the MVRA's mandatory provisions did not apply, and restitution was governed by the more permissive provisions of the Victim and Witness Protection Act found in Title 18 of the U.S. Code, Section 3663.

This allowed the parties to negotiate an agreed-upon restitution amount as part of the plea agreement, which the court then has the discretion to order pursuant to Section 3663(a)(1).

In practice, having Sterling plead guilty to securities fraud under Title 15 provided the parties with the ability to acknowledge that the full restitution amount was $56 million, but the flexibility to agree that the company only had to pay $27 million of that amount. This approach effectively saved the company $29 million that it likely would have been unable to avoid had it pled guilty under Section 1348.

Accordingly, when a company learns that the DOJ will require a guilty plea or deferred prosecution agreement to resolve its corporate liability, the company should advocate to resolve its liability pursuant to offenses that fall outside of Title 18, whenever possible, to afford itself more flexibility with respect to the imposition of restitution.

If a company is able to offer an alternative substantive criminal charge from outside Title 18,[8] that may provide the company and the DOJ the ability to craft a restitution amount that seeks to make the victims as close to whole as possible, without jeopardizing the company's ability to remain a going concern.

But companies should bear in mind that this strategy will be most successful when they use it to create flexibility as to the structure of restitution, rather than as a means to avoid it all together.

The DOJ recently announced it will be updating its victim assistance guidelines, effective March 31, with Attorney General Merrick Garland going so far as to say that those guidelines would take "an approach that is victim-centered and trauma-informed."[9]

Given this victim-centered environment, it is unlikely that the DOJ would agree to resolve with a company on an offense outside of Title 18 if doing so meant victims would receive minimal restitution.

Accordingly, a company seeking to employ this charge-bargaining approach should be ready to offer its own specific restitution plan and an explanation as to why mandatory restitution would be inappropriate or problematic.

**Conclusion**

The Sterling corporate resolution provides valuable insight into how the DOJ will implement and apply the revised voluntary self-disclosure policy.

While further corporate resolution announcements are expected and likely to shed more light on the DOJ's approach, companies currently weighing issues like self-disclosure and cooperation should look to the Sterling resolution for important guidance.

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[1] https://www.justice.gov/criminal-fraud/file/1562831/download.

[2] https://www.justice.gov/opa/pr/sterling-bancorp-inc-plead-guilty-69m-securities-fraud.

[3] While the company may have received a benefit from its remediation by avoiding a monitor, based on the documents alone, it is difficult to understand which remedial steps ultimately affected DOJ's decision not to impose a monitor.

[4] 18 U.S.C. § 1348.

[5] 15 U.S.C. §§ 78j(b), 78ff(a); 17 C.F.R. § 240.10b-5.

[6] The MVRA contains a carve-out that permits a court to avoid ordering mandatory restitution, but only when the court finds that "the number of identifiable victims is so large as to make restitution impracticable; or determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process[.]" 18 U.S.C. § 3663A(c)(3)(A)-(B). Absent those specific findings, courts are obligated to order full restitution to victims of a covered offense.

[7] 18 U.S.C. § 3663A(c)(1)(A)(ii) and (B).

[8] For instance, DOJ also has the discretion to charge commodities fraud as a violation of 18 U.S.C. § 1348 or a violation of 7 U.S.C. § 60.

[9] https://www.justice.gov/opa/pr/justice-department-updates-guidelines-victim-and-witness-assistance.