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Sarah L. Stafford
William & Mary Law School

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OUTSOURCING ENFORCEMENT: PRINCIPLES TO GUIDE SELF-POLICING REGIMES

Sarah L. Stafford*

When the case for market-based approaches rests on axioms rather than analysis, the conversation becomes at once dull and dangerous.
—John Donahue

INTRODUCTION

In his book Outsourcing Sovereignty, Paul Verkuil warns us to be wary of the possible threats to “democratic principles of accountability and process in what has been a largely unexamined shift from private to public governance.” Verkuil notes that the public and private sectors have different boundaries, and suggests that since outsourcing tests those boundaries, governments should “justify delegations of public power to private hands.”

This goal of this Article is to examine one particular form of outsourcing—the outsourcing of regulatory enforcement to the regulated entities themselves, a practice known as self-policing—to determine whether this type of delegation of public power can be justified as being in the public interest. Part II offers an overview of the particular concerns Verkuil and others have expressed regarding outsourcing in general. Part III provides a definition of self-policing and discusses both the theoretical justifications for the practice as well as the potential pitfalls. Heeding the words quoted above, Part IV presents a case study of the Environmental Protection Agency’s self-policing program, assessing the extent to which it is a defensible form of outsourcing. Part V reviews a number of other federal self-policing programs with a brief assessment of their strengths and weaknesses. Finally, Part VI suggests some general guidelines for self-policing

* Paul R. Verkuil Distinguished Professor of Economics, Public Policy, and Law, College of William and Mary, Williamsburg, VA.

1 John D. Donahue, Market-Based Governance and the Architecture of Accountability, in MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE WASHINGTON 1, 3 (John D. Donahue & Joseph S. Nye eds., 2002).


3 Id. at 1.

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programs to ensure that they are justifiable delegations of public power to private hands.

I. THE CONCERN OVER OUTSOURCING

Privatization can generally be defined as "the practice of delegating public duties to private organizations." The concept of privatization was initially imported from Thatcher's Britain in the early 1980s. The movement flourished in the United States because of its resonance with two political trends taking place at the time: a rejuvenated interest in private enterprise and the push for decreased government spending in response to large budget deficits.

The push for privatization or outsourcing is based on the belief that the market can provide public activities either at a lower cost than the government can provide them, or can provide a more beneficial alternative at the same cost as the publicly provided alternative. If an action can be done more cheaply by the government than by the private sector, or if the government can provide a higher quality good or service than the private sector, there is no public benefit or justification for outsourcing. That is, proof that outsourcing lowers costs or increases benefits without increasing costs should be a necessary condition for endorsing it.

However, even if an activity can be done more efficiently by the private sector, privatization may not ultimately be in the public interest. Perhaps the most loudly voiced concern about outsourcing has to do with the potential loss in accountability that can occur when government functions are transferred to private agents.

The term "accountability" as used in this Article means the ability of the public to demand an explanation or justification from an actor for its actions and to reward or punish that actor on the basis of its performance or its explanation. Obviously, for one's actions to be accountable, they must

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4 JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 3 (1989). This definition applies primarily to the United States. In many other countries, the term is often used to denote the selling of public assets to private parties. Id. at 6.

5 Id. at 4.

6 Id. at 3.

7 Following Verkuil, I use the term "outsourcing" as a synonym for privatization. See VERKUIL, supra note 2, at 4.

8 See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. REV. 543, 574 (2000) (noting that private entities are one step further removed from direct accountability to the electorate, and that they remain relatively insulated from the legislative, executive, and judicial oversight to which agencies must submit); see also VERKUIL, supra note 2, at 7 (noting that given the current level of outsourcing, accountability is lacking).

9 This is the same definition for "accountability" used in VERKUIL, supra note 2, at 7 n.38, and is generally consistent with Donahue's use of the term. See DONAHUE, supra note 4, at 23.
first be transparent. Privatized actions are generally less transparent than public actions, particularly since the Freedom of Information Act does not apply to private contractors.10

A second concern is that inherently governmental functions are currently being outsourced.11 When a government delegates its sovereign powers to private entities, its capacity to govern is diminished. The Constitution enumerates a number of activities that must be performed by particular branches of government.12 In addition, the Federal Activities Inventory Reform Act of 1998 prevents agencies from contracting out inherently governmental activities.13 However, most inherently governmental activities are not clearly defined, and thus there are concerns that some are currently being outsourced.14

A third concern is that privatization may reduce governmental capacity and thus impede the optimal evolution of public policy. As Jody Freeman notes, "[t]he process of [policy] design, implementation, and enforcement is fluid"15 and public policy is constantly evolving. As regulators implement and enforce regulations, they collect information and experiences that can be used to improve the next iteration of that regulation or related regulations. Under outsourcing, information or experience gained during the performance of an activity will accrue to private parties, rather than public employees. While some of this information or experience might be transferred to public agencies as part of the outsourcing contract, it is likely that some—perhaps most—will not be. This loss of information and experience could interfere with the optimal evolution of policy and could also undermine the future performance of government agencies. A similar concern is that

("Accountability means that government action accords with the will of the people it represents . . . ").

10 VERKUIL, supra note 2, at 105.
11 The Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382, defines the term “inherently governmental function” as “a function that is so intimately related to the public interest as to require performance by Federal Government employees,” including “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.”
12 For example, the legislative power is entrusted to Congress in Article I while Article II assigns executive power, the Commander-in-Chief function, the appointment power, the power to conduct foreign affairs, and the granting of pardons to the President. U.S. CONST. Arts. I, II.
14 Although the Office of Management and Budget is currently working on a new policy to provide uniform guideline for determining activities that must be performed by federal employees, see Work Reserved for Performance by Federal Government Employees: Proposed Policy Letter, 75 Fed. Reg. 16,188 (Mar. 31, 2010), the policy will still leave a reasonable amount of discretion to agencies to classify activities. The concern that inherently governmental activities are being outsourced is a primary argument in Verkuil’s book, supra note 2.
15 Freeman, supra note 8, at 572.
outsourcing may have serious implications for maintaining institutional knowledge within the government.  

Finally, there is the concern that outsourcing may lead to increased corruption by exacerbating the "revolving door" through which former government officials obtain positions in private contractors and vice versa.

II. THE CASE FOR SELF-POLICING

A. What Is Self-Policing?

There is no widely accepted formal definition of self-policing, perhaps because the term itself seems to be relatively self-explanatory. In the regulatory context, self-policing is essentially the delegation of enforcement responsibilities to the regulated entities themselves. The delegation can be partial—that is, a regulator can allow facilities to self-policing but continue to have a formal enforcement program as well—or complete.

Consider the following simplistic description of a purely public enforcement regime. In this regime public officials determine whether a regulated entity is in compliance by inspecting or auditing the entity. These inspections are not made on a set schedule, nor is there any announcement prior to the inspection taking place. If the inspection or audit shows that the entity has violated a regulation, depending on the seriousness of the violation, the official may issue an informal notice or warning, initiate a civil administrative action under the agency's own authority, or refer civil or criminal judicial actions to the Department of Justice. Depending on the route taken, sanctions can be imposed through negotiated settlements or decisions by the court. Such

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16 See VERKUIL, supra note 2, at 4 (stating that one of the ways outsourcing undermines government performance is by atrophying government's power to perform these functions in the future); id. at 6 (noting that outsourcing in DHS causes demoralization in the civil service and that maintaining significant functions in-house is crucial to the preservation of the civil service).

17 Id. at 5 n.23 (noting that career officials are less likely to be corrupted because they have a long-term commitment to their agency and they are less likely to take advantage of outsourcing opportunities).

sanctions require remediation of the violation (where applicable), and may include monetary penalties or incarceration in the case of criminal violations.19

Under self-policing, regulated entities conduct “self-audits” to determine whether they are in compliance with regulations.20 The term self-audit merely means that the regulated entity makes the decision to audit, not that it necessarily conducts the audit itself. If the self-audit shows that the entity has violated a regulation, the entity reports that violation to officials who then decide how to proceed. Thus, under self-policing, both the act of auditing and the disclosure of any discovered violations have been “outsourced” to the regulated entity. However, regulatory officials generally maintain responsibility for the imposition of any penalties or fines, as well as the determination of what the regulated entity must do to correct or remediate its violation.21

A key component of self-policing is that the decision to self-police is a voluntary decision. A mandatory requirement that regulated entities must conduct self-audits (or more generally must monitor performance) and report violations to authorities is not self-policing; such a requirement is an additional regulation with which a regulated entity can choose to comply and which authorities will need to enforce.22 For example, the Clean Water Act requires regulated entities to measure the level of pollutants in wastewater discharges and report them to EPA or

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19 This simplistic description is not an attempt to describe any particular enforcement regime, although it is generally consistent with EPA’s enforcement regime. See generally ROBERT ESWORTHY, CONG. RESEARCH SERV., RL 34384, FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? (2010); OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 2098, OSHA INSPECTIONS (2002), available at http://www.osha.gov/Publications/osha2098.pdf.

20 I use the term “self-audit” to denote activities conducted by a regulated entity to determine whether the entity has violated any regulations. Self-audits are roughly equivalent to the concept of “corporate enforcement costs,” employed in Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. LEGAL STUD. 833 (1994) (defining “corporate enforcement costs” as corporate expenditures on detecting and investigating crimes by employees).

21 Some self-policing policies do specify the particular penalties or fines (or lack thereof) that will be imposed on self-disclosed violators. Although some fines may thus be automatic, regulatory officials are ultimately responsible for setting those automatic fines when the policy is established and presumably can choose to modify them.

22 I use the term “self-reporting” to denote the requirement that regulated entities self-report information to an agency, which is consistent with the use of the term by Jon D. Harford, Self-Reporting of Pollution and the Firm’s Behavior Under Imperfectly Enforceable Regulations, 14 J. ENVTL. ECON. & MGMT. 293 (1987), and Arun S. Malik, Self-Reporting and the Design of Policies for Regulating Stochastic Pollution, 24 J. ENVTL. ECON. & MGMT. 241 (1993). However, this distinction between the terms “self-policing” and “self-reporting” is not consistently used, at least within the economic literature on enforcement. See Louis Kaplow & Steven Shavell, Optimal Law Enforcement with Self-Reporting of Behavior, 102 J. POL. ECON. 583, 583 (1994) (“A commonly observed feature of law enforcement is what we shall call self-reporting of behavior: the reporting by parties of their own harm-producing actions to an enforcement authority.”). The two primary distinctions between self-policing and self-reporting, as I use the terms, are (1) that self-policing always pertains to a violation, while self-reporting can occur when a facility is in complete compliance, and (2) self-policing is voluntary while self-reporting can be mandatory.
the state on a regular basis regardless of whether the emissions are within or exceed permitted limits. Failure to adhere to permit limits results in one penalty if the violation is self-reported and a higher penalty if it is not reported or is falsely reported and later discovered by authorities. The difference between the two penalties is thus the punishment associated with violating the reporting requirement.

There is, of course, nothing to stop a regulated entity from voluntarily reporting a violation of any existing regulation. However, in general, profit-maximizing facilities will not voluntarily undertake costly self-audits and turn themselves in for discovered violations unless there is some type of inducement for doing so. The primary inducement used to encourage self-policing is a lower fine or penalty for self-disclosed violations than for violations detected by regulators through traditional channels (i.e., inspections or third party reports). A self-policing policy could also completely waive any fines associated with the self-disclosed violation. A second type of inducement could be reduced external enforcement at the regulated entity—either in the same period as the self-disclosure or in future periods. The implications that both types of inducements can have for the costs and benefits of the self-policing policy are discussed in more detail in the next Part.

Self-policing should not be confused with self-regulation, as self-regulation is a distinctly different activity (although this term also suffers from a lack of a widely accepted formal definition). Perhaps the most well-defined type of self-regulation is “audited self-regulation,” which has been formally defined as “congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency.” Thus, under audited self-regulation, regulated entities collectively develop regulatory standards which are then enforced by both the regulated entities and the agency. In contrast, under self-

23 See 40 C.F.R. § 122 (2010) for a general description of the National Pollutant Discharge Elimination System (NPDES) and 40 C.F.R. § 122.41(l) for the specific reporting requirements.

24 However, a full reduction in penalties might induce entities to stop complying and self-policing to avoid any fine. Of course, any positive payment to those self-policing could induce regulated entities to violate regulations deliberately in order to receive the payment for self-disclosure, and thus should not be part of any self-policing policy where violations are the result of the regulated entities’ actions.


26 While self-regulatory regimes generally include some form of self-policing, the development of standards by regulated entities is the focus of the literature on self-regulation. For the purposes of this paper, I am not considering self-regulatory regimes.
policing, regulated entities enforce standards established by the agency using the traditional rule-making process.

B. The Potential Efficiencies from Self-Policing

Over the past two decades, economists developed a wide range of theoretical models of self-policing regimes in order to study the welfare consequences of such regimes. Not surprisingly, the results of these theoretical inquiries are sensitive to assumptions about the exact form that such regimes might take. Some models predict that self-policing allows regulators to shift enforcement resources from those who do self-policing to other facilities, thereby increasing the level of compliance (which by assumption increases overall welfare) for a given level of enforcement resources. Alternatively, self-policing allows regulators to achieve the same level of compliance for a lower expenditure of enforcement resources. These benefits are analogous to the classic justification for privatizing many traditionally public functions, the ability to provide the same good or service—in this case compliance with government regulations—at a lower or cost or to provide a better good or service at the same cost.

Other models have included the possibility of remediation as an element of self-policing and have found that the requirement to remediate a violation can produce additional welfare gains. To be

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27 This summary of economic theories of self-policing draws extensively from the more detailed presentation of economic models of self-policing in Sarah L. Stafford, Self-Policing in a Targeted Enforcement Regime, 74 S. Econ. J. 934 (2008). Most of these models are framed in the context of environmental regulations, but they can be applied more generally to other regulatory programs.

28 Throughout this Article, I assume implicitly that regulation itself is in the public interest, and thus, an increase in compliance with regulations will increase overall welfare. If regulation is misguided or if regulatory officials have been captured by special interests, regulation may not be beneficial for society in practice, and thus, increasing compliance may not increase overall welfare. In such cases, the problem is the underlying regulation, not the form of the enforcement regime.

29 For example, Kaplow and Shavell present a theoretical model where regulated entities deliberately choose whether or not to comply and are subject to a positive probability of inspection (and thus detection of violations if the entity has chosen not to comply). Kaplow and Shavell, supra note 22, at 585. The introduction of a self-policing regime in which entities that self-policing receive a fine equal to the probability of inspection multiplied by the fine for detected violations induces some entities to self-policing, but does not adversely affect deterrence. Id. at 588. Self-policing thus increases welfare because enforcement effort is reduced as self-policers need not be inspected. Id. Moreover, Kaplow and Shavell show that if individuals are risk-averse rather than risk-neutral, self-policing can lead to welfare improvements through the reduction of risk. Id. at 796.

30 In general, these models do not assume that self-audits are less costly than government audits. If that were the case, an additional benefit might be that the overall costs of auditing decrease, although that would depend on the assumptions and parameters of the model, as the total amount of auditing is likely to increase under self-policing.
precise, if a self-policing policy requires entities to remediate their self-reported violations, self-policing can also increase welfare because self-disclosed violations are remediated more quickly than violations discovered by regulators, and more violations will ultimately be remediated.\textsuperscript{31} Additionally, to the extent that regulated entities that choose to violate regulations also engage in activities to conceal their violations, self-policing can increase overall welfare by reducing such activities.\textsuperscript{32}

Of course, self-policing could have negative effects as well. Given the ability to self-policing (and the inducements for doing so), some regulated entities may reduce their initial level of investment in compliance.\textsuperscript{33} Moreover, policies that encourage self-policing can lead to duplication of effort (i.e., self-auditing by regulated entities and inspections by regulatory authorities) and thus be inefficient.\textsuperscript{34} If regulators decrease enforcement efforts at regulated entities that self-police, entities could use self-disclosures as "red herrings," notifying regulators of small violations while concealing more significant violations.\textsuperscript{35} Additionally, if regulators decrease future enforcement as a reward for a self-disclosed violation, entities may also decrease investments in compliance in the future.\textsuperscript{36}

For regulations that apply to organizations (rather than regulations that apply to individuals), there is one additional rationale for allowing self-policing. Organizations subject to regulation must deal with the classic principal-agent problem: It is ultimately the organization's employees who determine the organization's compliance status and the

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\textsuperscript{31} For example, the model of self-policing presented in Robert Innes, \textit{Remediation and Self-Reporting in Optimal Law Enforcement}, 72 J. PUB. ECON. 379 (1999), assumes that regulated entities make a choice as to how much to invest in compliance, with the probability of a violation harm inversely related to the level of investment. If a violation occurs, the regulated entity can choose whether or not to remediate the harm. If regulators set the fine associated with self-policing at an appropriate level (i.e., so that the cost of remediation and the reduced fine is equal to the expected penalty and expected remediation cost), entities will self-police. Overall, the level of remediation will increase because self-policers remediate with certainty whereas non-disclosers only remediate when caught. \\
\textsuperscript{32} See, \textit{e.g.}, Robert Innes, \textit{Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement}, 17 J.L. ECON. & ORG. 239 (2001).
\textsuperscript{33} The possibility for such an effect has been demonstrated in a wide variety of models. See, \textit{e.g.}, Anthony G. Heyes, \textit{Cutting Environmental Penalties to Protect the Environment}, 60 J. PUB. ECON. 251 (1996); Robert Innes, \textit{Self-Policing and Optimal Law Enforcement When Violator Remediation is Valuable}, 107 J. POL. ECON. 1305 (1999); Stafford, supra note 27.
\textsuperscript{34} This potential effect is demonstrated by the model developed by Lana Friesen, \textit{The Social Welfare Implications of Industry Self-Auditing}, 51 J. ENVTL. ECON. & MGMT. 280, 290-92 (2006).
\textsuperscript{35} The use of the term "red herring" for this type of strategic disclosure—i.e., only partially disclosing an entity's violations—was introduced by Alexander Pfaff \& Chris William Sanchirico, \textit{Big Field, Small Potatoes: An Empirical Assessment of EPA's Self-Audit Policy}, 23 J. POL’Y ANALYSIS & MGMT. 415, 426-27 (2004).
\textsuperscript{36} The potential for self-policing to have dynamic effects on compliance is explained in Stafford, supra note 27.
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organization has only imperfect means to induce the employees to act in accordance with the organization’s wishes. Under strict vicarious liability, organizations are liable for all actions of their employees. However, as demonstrated by Jennifer Arlen, strict vicarious liability cannot induce organizations to both set optimal activity level and optimal levels of self-policing. Allowing for self-policing within a strict vicarious liability regime does provide stronger (although potentially still sub-optimal) incentives for corporate policing of employee actions.

All of the models described in this Part are sensitive to the various assumptions they employ and do not tell us what actually happens in the real world when an agency adopts a self-policing policy. Still, the models suggest that, depending on how a self-policing policy is structured, self-policing can produce significant benefits, both by increasing compliance with regulations and reducing the cost of enforcement.

III. CASE STUDY: EPA’S SELF-POLICING REGIME, THE “AUDIT POLICY”

A. Description of the Audit Policy

EPA’s self-policing policy, known informally as the “Audit Policy,” was issued in December 1995. Since the mid 1980s, EPA

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37 While the economic models of self-policing discussed above do not explicitly model this principal-agent relationship, there are a number of models that assume that compliance is, at least in part, exogenous. E.g., Friesen, supra note 34; Alexander S.P. Pfaff & Chris William Sanchirico, Environmental Self-Auditing: Setting the Proper Incentives for Discovery and Correction of Environmental Harm, 16 J.L. ECON. & ORG. 189 (2000); Stafford, supra note 27. Such models can be viewed as representing the classic principal-agent problem between organization and employees vis-à-vis compliance activities in that the organization does not have the ability to ensure full compliance itself.

38 See Arlen, supra note 20, at 836-42, for a discussion of the “perverse incentives” strict vicarious liability provides for self-policing efforts (which Arlen refers to as corporate enforcement costs) because self-policing will, in addition to deterring violations by employees, increase the probability that an organization’s violations are detected, thus increasing the organization’s expected liability. Also, see id. at 847-48 for a discussion of the inability of strict liability to induce optimal levels of both activity and self-policing efforts.

39 See Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687, 694 (1997) (“Duty-based liability is generally better able to induce firms to undertake optimal policing measures such as monitoring, investigating, and reporting.”); id. at 690 (defining a duty-based regime as one similar to that of the EPA which “immunize[s] firms from liability for internally detected environmental violations that firms disclose and correct”).

had been working to encourage regulated entities to adopt effective environmental auditing practices, as the Agency believed that environmental auditing could significantly improve environmental performance. Initially, EPA tried to encourage environmental audits by suggesting that EPA would take auditing efforts into account when assessing violations, “particularly when a regulated entity promptly reports violations or compliance data which otherwise not required to be recorded or reported to EPA.” As the policy evolved, the rewards for self-disclosures became more explicit, and the requirement that disclosures arise from an environmental audit were softened. The final policy that emerged is a self-policing policy rather than a policy on environmental auditing per se, but it is commonly referred to as the Audit Policy because EPA’s initial objective was to encourage environmental auditing. Additionally, the Audit Policy is a policy rather than a formal rule.

Under the Audit Policy, any entity that voluntarily identifies, discloses, and corrects violations of environmental regulations is eligible for a reduction in the punitive penalties associated with those violations. To be eligible for a complete waiver of punitive penalties the self-disclosure must meet nine conditions:

- Systematic discovery: Discovery must either take place during an environmental audit or during a self-evaluation that is part of a due diligence program.

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41 Interim Guidance on Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (Nov. 8, 1985) [hereinafter Interim Guidance]. This guidance defines environmental auditing as follows:

[A] systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: Verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Id. EPA’s belief that environmental auditing would be beneficial was based primarily on anecdotal evidence. See, e.g., U.S. EPA, EPA/CMA ROOT CAUSE ANALYSIS PILOT PROJECT: AN INDUSTRY SURVEY (1999) (presenting results of a study in which many respondents identified the use of self-audits or third party audits as an important method for improving compliance).

42 Interim Guidance, supra note 41, at 46,506.

43 The Policy states:

The Policy is not final agency action and is intended as guidance. This Policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. As with the 1995 Audit Policy, EPA may decide to follow guidance provided in this document or to act at variance with it based on its analysis of the specific facts presented. This Policy may be revised without public notice to reflect changes in EPA’s approach to providing incentives for self-policing by regulated entities, or to clarify and update text.

Audit Policy, supra note 40, at 19,627.

44 Id. at 66,711.

45 Id.
Voluntary discovery: The process through which the violation is discovered cannot be required by federal, state or local authorities and cannot be required by statute, regulation, permit or consent agreement.

Prompt disclosure: Violations must be disclosed within twenty-one days of discovery.

Independent discovery and disclosure: The disclosure cannot be made after an inspection or investigation has been announced or notice of a suit has been given.

Correction and remediation: Any harm from the violation must be remediated and the violation must be corrected within sixty days of the date of discovery unless technological issues are a factor.

No recurrence: The facility must identify why the violation occurred and take steps to ensure that it will not recur.

No repeat violations: The same or a closely related violation cannot have occurred within the past three years at the facility, or within the past five years at other facilities owned by the same parent organization.

Not excluded: No serious harm or imminent endangerment to human health and the environment can have occurred as a result of the violation and the violation cannot have been a violation of an order, consent agreement, or plea agreement.

Cooperation: The facility must cooperate with EPA, including providing all requested documents.

If the disclosure meets all but the first condition, the punitive penalty is reduced by seventy-five percent, rather than one-hundred percent. Additionally, as long as no actual harm has occurred, EPA will not recommend criminal prosecution of the regulated entity unless EPA determines that the violation is part of a pattern or practice that demonstrates or involves “(i) [a] prevalent management philosophy or practice that conceals or condones environmental violations; or (ii) [h]igh-level corporate officials’ or managers’ conscious involvement in, or willful blindness to, violations of Federal environmental law.” The conditions for a self-disclosed violation to be eligible for penalty reductions are designed to ensure that the policy increases overall compliance and does not undermine the existing enforcement regime.

It is important to note that the regulated entity cannot receive any reduction in penalties that are based on the economic benefit gained from noncompliance, only a reduction in penalties that are punitive in

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46 Id.
47 Id. This applies only to the regulated entity, not to any managers or employees.
For example, if a facility neglects to sample a particular waste stream for several months and discovers this violation through an environmental audit, assuming the violation meets all of the conditions above, the facility would receive a complete reduction in the punitive portion of the penalty, but would continue to owe a penalty equal to the savings it received from not having conducted those samples. This requirement is necessary to ensure that regulated entities have no incentive to deliberately violate and then self-police. In the example above, there would be no benefit to deliberately not sampling and then self-policing if the regulated entity has to pay the cost of sampling after disclosure.

During the development of the Audit Policy, EPA repeatedly sought comments from the regulated community. One commenter on an early version of the policy suggested that EPA should commit to taking audits into account when assessing enforcement actions. In response, EPA stated that agreeing to forgo inspections or reduce enforcement responses is “fraught with legal and policy obstacles.”

However EPA also noted that, because effective audit programs should improve compliance, facilities that audit should have improved environmental performance, which is likely to be considered in setting inspection priorities. Such language is consistent with statements on EPA’s website that when facilities self-police, it can render “formal EPA investigations and enforcement actions unnecessary.” This statement implies that, as well as rewarding self-policers with reduced penalties, EPA’s Audit Policy may provide additional incentives in the form of reduced enforcement.

Throughout the development of the Audit Policy, EPA consistently refused to grant privileges to environmental audits, as that would be “counter to efforts to open up environmental decision making and encourage public participation.” Additionally, EPA was concerned that environmental audit privileges could be misused to “shield bad actors or to frustrate access to crucial factual information.” However, EPA has repeatedly stated that its long-standing practice is to not request copies of regulated entities’ voluntary audit reports.

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48 Id. at 66,712.
52 Id.
53 Audit Policy, supra note 40, at 66,711.
B. Analysis of the Audit Policy

1. General Information of the Use of the Audit Policy

EPA consistently publicizes the Audit Policy as one of its successful, innovative approaches to compliance.\(^{54}\) To get a sense of the role the Audit Policy plays in EPA’s overall enforcement regime, there are over one million entities that are subject to EPA regulation.\(^{55}\) In 2009, federal and state regulators conducted about 20,000 regulatory inspections and evaluations, wrote about 3500 administrative compliance and penalty orders, made about 280 civil judicial referrals, and opened just under 400 criminal cases. During this same time frame, there were approximately 1200 self-disclosures.\(^{56}\) Of course, there could be many more entities that “self-policed,” but found themselves to be in complete compliance and thus had nothing to disclose.\(^{57}\)

Two researchers, Alexander Pfaff and Chris Sanchirico, conducted an analysis of disclosures made under the Audit Policy from 1994 to 1999 and found that the majority of disclosed violations were reporting and recordkeeping violations.\(^{58}\) I found a similar result when I conducted an analysis of disclosures made between 1994 and early 2002.\(^{59}\) Although the initial reaction might be to think that a self-

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\(^{55}\) Data on regulated facilities were compiled by author using EPA’s Envirofacts Database.


\(^{57}\) Disclosing that you are in compliance is not an option under the Audit Policy, and from a theoretical standpoint, it probably should not be. If such disclosures do not change future enforcement behavior, then making them only increases the costs of implementing the policy, as the disclosures have to be recorded. If there were a reward for making such disclosures (such as reduced future enforcement), then EPA would need to institute a process to verify those disclosures (otherwise, entities would falsely disclose compliance in order to receive the reward). There is no reason to expect that the verification process would be less resource-intensive than a traditional enforcement inspection, and thus it is difficult to construct a situation in which such a regime would increase overall compliance relative to a traditional enforcement regime.

\(^{58}\) See Pfaff & Sanchirico, supra note 35.

\(^{59}\) The analysis covered the 236 disclosures that were entered into EPA’s Audit Docket (HQ-OECA-C-94-01). The Audit Docket initially served as a repository for all disclosures made under the Audit Policy. Around 1998, EPA stopped placing all disclosures in the Audit Docket,
policing policy that only results in the disclosure of minor violations cannot be effective, that is not necessarily the case. One of the primary reasons for having an enforcement policy is to deter regulated entities from violating regulations. However, potential violators will only be deterred by the threat of punishment if the decision to violate is based on rational comparison of the cost of compliance compared to the expected cost of violation. If regulated entities violate not because they are “rational violators,” but rather because they are mistaken or confused about how to comply, enforcement will not deter them from violation. If such entities can be brought into compliance by self-policing, enforcement resources can be redirected away from confused violators toward rational violators, increasing the overall level of deterrence without increasing enforcement resources. One may also think that confused violators are much more likely to make small mistakes such as record-keeping or reporting errors. If this is the case, then one should not be surprised at the types of violations that are being reported.

Under the Audit Policy, EPA does give self-disclosers a significant penalty reduction. During the 2001 to 2005 period, over two-thirds of all disclosures resulted in a complete waiver of all penalties. In addition, the likelihood of a regulatory inspection decreases significantly following a self-disclosure. The results of an analysis I conducted on self-disclosures and inspections at facilities subject to EPA’s hazardous waste regulations found that, on average, a self-disclosure in 2001 from a facility regulated under EPA’s hazardous waste program reduces the probability of inspection in 2002 by four-fifths.

2. Effect on Compliance and Enforcement

From the beginning of its development, opponents of the Audit Policy argued that it would have a detrimental effect on the environment because it protected polluters from punishment and decreased the incentives for entities to comply with regulations. To assess the overall

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and by early 2002 EPA was no longer using the Audit Docket at all. Thus, the 236 disclosures in the docket may not be a representative sample.


61 Calculations made by author using information from EPA's database of voluntary disclosures for Fiscal Years 2001 to 2005 obtained under a Freedom of Information Act request.

effect the Audit Policy had on compliance, I conducted an analysis of
the effect of the Audit Policy on compliance with hazardous waste
regulations. The analysis uses data on detected hazardous waste
violations and EPA enforcement actions to determine statistically if
there has been an underlying change in the compliance behavior of
regulated entities. The results provide little evidence to support the
theory that compliance has decreased as a result of the Audit Policy.
According to the results of my study, the federal Audit Policy has had
no measurable effect on compliance behavior while state self-policing
policies and state audit privilege legislation have decreased the
probability of violation. Interestingly, state legislation that provides
complete penalty immunity for self-disclosed violations increases the
probability of a violation. In this study, I also examined inspection
before and after the imposition of the Audit Policy.

I also conducted a second study using a different data set to
examine the consequences of self-policing for facilities that self-
disclosed under the Audit Policy. The primary focus of this analysis
was to examine the effect that a self-disclosure has on future inspections
to determine whether self-policers were being rewarded with a decrease
in future enforcement. As discussed above, I did find that self-policers
are rewarded with a lower probability of enforcement following a
disclosure. One implication of this finding is that the Audit Policy may
induce entities to strategically disclose violations in order to obtain the
advantage of the “enforcement holiday” that follows a disclosure.

Michael Toffel and Jodi Short examine the effect of the Audit
Policy on firm compliance with Clean Air Act regulations, rather than
hazardous waste regulations, and find similar results. Their analysis
concludes that self-disclosers have lower levels of abnormal releases
and higher compliance rates in the five years following their disclosure.
They also find that regulators grant “inspection holidays” to facilities
that self-police.

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63 See Sarah Stafford, Does Self-Policing Help the Environment? EPA’s Audit Policy and
Hazardous Waste Compliance, 6 VT. J. ENVTL. L. 14 (2005). The analysis only considers
compliance with hazardous waste regulations because the separate programs that regulate air,
water, toxic materials, and hazardous waste all maintain their own enforcement authority and it is
very difficult to combine data across the various enforcement programs.

64 In addition to the federal Audit Policy, a number of states have passed their own self-
policing policies as well as immunity and privilege legislation for environmental audits. The
state policies are discussed in more detail in Sarah L. Stafford, State Adoption of Environmental

65 See Stafford, supra note 62.

66 Michael W. Toffel & Jodi L. Short, Coming, Clean and Cleaning Up: Is Voluntary Self-
2010), available at http://www.hbs.edu/research/facpubs/workingpapers/papers0708.html#wp08-
098.
A recent study conducted by Santiago Guerrero and Robert Innes also provides some interesting evidence on the effect of self-policing on environmental performance. This study examines the effect of state self-policing policies and environmental audit legislation (rather than EPA’s Audit Policy) on changes in toxic emission levels (rather than violations of environmental regulations). Additionally, while the study considers overall levels of toxic emissions, it only examines enforcement efforts related to the Clean Air Act, not overall enforcement efforts. Similar to the results I found in my study of hazardous waste compliance, their analysis shows that state self-policing policies and audit privilege legislation lead to lower levels of toxic emissions, while legislation that provides complete immunity from state penalties leads to increases in toxic emissions. Innes and Guerrero also find that state self-policing and privilege protections lead to reduced rates of Clean Air Act inspection, while complete immunity spurs increased inspection levels. While these results are not specific to EPA’s self-policing policy, they do suggest that the blanket provision of complete immunity (something that EPA’s Audit Policy does not do) is not beneficial to the environment. The authors speculate that complete immunity reduces entities’ incentive to avoid environmental violations in the first place, thereby increasing overall pollution. Moreover, the results suggest that regulators must increase their monitoring of regulated entities to respond to the reduced incentives.

Taken together, these studies indicate that EPA’s Audit Policy increases compliance and performance, or at a minimum, does not decrease it. Given that overall environmental enforcement resources decreased over the time frame of these analyses, there is thus reasonable evidence that the efficiency of EPA’s enforcement program has increased under the Audit Policy.

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68 While decreases in toxic emissions certainly affect environmental quality, they are not necessarily indicative of higher levels of compliance, as regulated entities can emit toxic materials in full compliance with environmental regulations.

3. Potential "Outsourcing Concerns"

Even though EPA's analyses show that self-policing increases compliance, and thus by assumption overall welfare, there could still be good reason to reject it. Part II presented four potential concerns about outsourcing that have been identified by various scholars of the law and public policy. This subpart examines and evaluates those possible objections to self-policing, drawing on the content of EPA's Audit Policy and the experience with its operation.

a. Accountability

The first issue is accountability, more specifically the potential loss in accountability that can occur when government functions are transferred to private agents. Ideally, if there were full accountability, public actions would be consistent with public interest, although in practice accountability means that the public knows what actions are being taken and can effect changes in those actions if they are not consistent with the preferences of the public. Thus, accountability is closely tied to the idea of transparency—for the public to hold someone accountable, they must first know what that individual has done.

How transparent is the Audit Policy? All disclosures which are granted relief under the Audit Policy are made publicly available after the disclosure has been settled, as well as the terms of the settlement (i.e., any penalty reductions). Initially, disclosures were entered into the Audit Policy docket, although this practice is no longer being used and no new cases have been added into the docket since early 2002. EPA does provide data on the total number of disclosures each year in an annual report, but to obtain data on individual disclosures, one must submit a Freedom of Information Act (FOIA) request. Thus, one might fear that the accountability of EPA's enforcement system is

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70 See supra note 28 (discussing the relationship between compliance and overall welfare).
71 See DONAHUE, supra note 4, at 23-24 ("Accountability means that government action accords with the will of the people it represents. ... Yet, even assuming the best intentions on the part of public decision-makers, making that principle effective in collective choice is an elusive ideal.").
72 Audit Policy, supra note 40, at 19,627 ("EPA will make publicly available the terms and conditions of any compliance agreement reached under this Policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.").
73 Examination of EPA Docket HQ-OECA-C-94-01 by author, conducted in 2004.
74 For the annual aggregate numbers, see the "Numbers at a Glance" Section of the EPA's Office of Enforcement and Compliance Assistance reports on Annual Results, available at http://www.epa.gov/compliance/data/results/annual/index.html (last visited June 19, 2011).
reduced by the Audit Policy. However, enforcement by EPA is not necessarily any more transparent than the Audit Policy. Aggregate information on inspections and violations are provided each year in the same annual report that provides data on the number of disclosures.\textsuperscript{75} Some data on a particular regulated entity's compliance and enforcement status is available from a database available on EPA’s website, but to obtain complete data on an entity’s compliance history or a list of entities that had been inspected or prosecuted for violation of a particular environmental regulation, one would most likely have to file a FOIA request.\textsuperscript{76}

Even if there were additional transparency with respect to the Audit Policy (or for that matter enforcement in general), enforcement is much less accountable than other parts of the public policy process as there is no formal role for public participation in the development or implementation of an enforcement protocol.\textsuperscript{77} Since EPA lacks the resources to inspect all regulated entities or even to pursue cases against all those that are found in violation, there is significant agency discretion to determine how to deploy enforcement resources.\textsuperscript{78} Moreover, in those cases that are pursued, parties may settle or enter into consent decrees, negotiating the terms of their ultimate “compliance” with the regulations with little to no public input into the process. Perhaps as a response to this relative lack of accountability in enforcement, one feature of most environmental statutes is a private right of action for individuals (or groups) to sue regulated entities for violations of the regulations.\textsuperscript{79} This mechanism for direct accountability to the community is not affected by the self-policing policy.\textsuperscript{80}

\begin{footnotesize}
\begin{enumerate}
\item See id.\textsuperscript{75}
\item See Enforcement and Compliance History Online (ECHO), EPA, http://www.epa-echo.gov/echo (last updated May 11, 2011). ECHO provides compliance and enforcement data for approximately 800,000 regulated facilities nationwide. The data set includes inspection, violation, enforcement action, informal enforcement action, and penalty information about facilities for a three-year window.\textsuperscript{76}
\item Unlike the rulemaking process, there is no formal public participation in the development or implementation of an enforcement protocol. Additionally, “courts are reluctant to review the exercise of enforcement discretion.” See Freeman, supra note 8, at 648 n.431.\textsuperscript{77}
\item For example, Heckler v. Chaney held that agency decisions not to bring an enforcement action are generally “committed to agency discretion by law” and are thus not reviewable by a court under the Administrative Procedures Act. 470 U.S. 821, 826 (1985).\textsuperscript{78}
\item See Clean Air Act, 42 U.S.C. § 7604 (2006); Clean Water Act, 33 U.S.C. § 1365(a)(1) (2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (2006). However, the ability to bring private suits is only a partial substitute for what the EPA does because the EPA can refer cases to the Department of Justice for criminal enforcement.\textsuperscript{79}
\item See Timothy T. Jones et al., Environmental Compliance Audits: The Arkansas Experience, 21 U. ARK. LITTLE ROCK L. REV. 191, 240 (1999) (noting that citizen suits are not bound by the enforcement discretion EPA has articulated in its audit policies).\textsuperscript{80}
\end{enumerate}
\end{footnotesize}
OUTSOURCING ENFORCEMENT

Given the high level of agency discretion, the low level of accountability in EPA’s public enforcement regime and the lack of any evidence that the Audit Policy has resulted in a significant decrease in accountability, I do not think that the Audit Policy can be opposed on accountability grounds.

b. Inherently Governmental Functions

A second concern over outsourcing is the outsourcing of inherently governmental functions. At first glance, enforcement of regulations may not appear to be an inherently governmental function. In fact, enforcement of some types of regulations is commonly outsourced. According to a 2007 survey of local governments, approximately 15% of those surveyed contract out tax collection, 8% contract out public works inspections and enforcement, and 4% contract out traffic control and parking enforcement. With respect to the enforcement of environmental regulations, however, it is more difficult to make the case that it is clearly not an inherently governmental function.

There is general agreement that policy decisions and the making of regulation are inherently governmental. But the regulations themselves are not realized by the act of promulgation; the real consequence of a regulation depends not only on the promulgated language, but also on the implementation and enforcement of that regulation. To the extent that enforcement is central to ultimately determining the import of a regulation, enforcement could be seen as an indirect “inherently governmental activity.”

Although the Audit Policy does reduce penalties for self-disclosed violations, EPA maintains ultimate discretion as to final penalties, what must be done to remediate the violation, and so forth, and thus determines the ultimate import of the regulations, even with respect to

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81 Obviously, the mere fact that something was once performed by government or is usually performed by government does not mean that it is inherently a governmental function.


83 See VERKUIJL, supra note 2, at 45 n.160 (“We regard it as axiomatic that policy decisions must be made by full-time Government officials clearly responsible to the President and Congress.”) (quoting EXEC. OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT ON GOVERNMENT CONTRACTING FOR RESEARCH AND DEVELOPMENT (1962)); see also Freeman, supra note 8, at 563 (explaining that under both the public interest and civic republican theories of administration, agencies provide acts as “a bulwark against narrow private pressure” and thus are able to make decisions in the public interest).

84 Freeman, supra note 8, at 572 (“Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation.”).

85 Id. at 661 (“Only at the enforcement stage do policy choices made by Congress and interpreted by agencies through regulations translate into substantive requirements.”).
firms that choose to "turn themselves in."86 Thus, even though parts of the enforcement process have been outsourced, EPA does continue to determine the ultimate import of the regulations. Moreover, the Audit Policy plays a limited role in EPA's overall enforcement regime. As noted above, for every self-disclosure of a violation, over sixteen federal or state regulatory inspections are conducted.87 As a result, it is hard to make a case for opposing the Audit Policy based on the outsourcing of an inherently governmental function.

c. Reduced Governmental Capacity

The third issue concerns reduced governmental capacity. Any information or experience gained during the conduct of an outsourced function will accrue to private parties. Some information or experience may be transferred from the private party to the agency, but it may be difficult or impossible to write contracts to induce complete transmission of information. The Audit Policy is structured in a way that should mitigate this concern, as the process for reporting a self-policing violation ensures that information is transferred to regulators as a condition for receiving a penalty reduction. Moreover, to the extent that self-disclosures increase the total number of violations of which EPA is aware, EPA's overall level information will increase. Additionally, the act of self-policing should provide additional information to the regulated entity so that the entity can make changes to its operation. Thus, any loss in information to EPA is likely to be small, and there is a reasonable expectation that EPA could actually gain information under self-policing. Finally, regulated entities are likely to gain information that will provide public benefits (through increased environmental performance) to offset any loss in experience to EPA.

d. Corruption

The final concern discussed in Part II was the potential for outsourcing to increase corruption. While that is a valid concern in situations where there is a revolving door between agencies and private entities seeking to obtain agency contracts, the Audit Policy is unlikely to increase the potential for or risks from corruption. Unlike many privatization efforts, the Audit Policy outsources to regulated entities

86 Audit Policy, supra note 40, at 19,627.
87 Calculation based on the 1200 self-disclosures and 20,000 regulatory inspections reported in 2009. See supra note 55.
themselves, not to outside contractors. This is not to say that the regulated entities do not have incentives to try to cheat, just that the Audit Policy does not increase incentives for public employees to substitute their own personal interests for the public interest.

IV. OTHER FEDERAL SELF-POLICING REGIMES

Many federal agencies currently incorporate self-policing into their enforcement programs. While the following subpart does not provide a complete inventory, it does provide a sense of the venues in which self-policing is currently used, and the range of different policies that exist.88

A. The Federal Aviation Administration

The Federal Aviation Administration (FAA) established a voluntary disclosure reporting program (VRDP) in 1990.89 Under this program, FAA will forego legal enforcement action against air carriers, repair stations, and aircraft and aircraft equipment manufacturers who voluntarily disclose violations of FAA requirements for maintenance, flight operations, drug and alcohol prevention programs, and security functions that meet the following conditions:90

- The violation is disclosed immediately once it is detected and before the Agency learns of it by other means;
- The violation was inadvertent;
- The violation does not indicate a lack, or reasonable question, of qualification;
- Immediate action is taken to terminate the conduct that resulted in the violation; and

88 Other authors have also compiled lists of federal self-policing efforts, but to my knowledge, no other author has analyzed these policies with respect to privatization concerns. See John S. Moot, Compliance Programs, Penalty Mitigation and the FERC, 29 ENERGY L.J., 547 (2008), for a selective list of policies, and Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 AM. CRIM. L. REV. 1095 (2006) for a more exhaustive list (although the focus is on corporate enforcement not self-policing and thus includes policies that do not include self-policing or self-disclosure).


90 See AC 00-058B, supra note 89, § 7(b).
• The regulated entity has developed or is developing a comprehensive solution to correct the violation that is satisfactory to the FAA.

Voluntary disclosures that meet these criteria receive only a warning or “Letter of Correction” rather than any other type of enforcement action (including civil penalties or certificate suspension). Disclosed violations that meet the above criteria are also protected from public release. According to a Governmental Accountability Office (GAO) report, over 2000 self-disclosures are filed annually, relative to approximately 15,000 total enforcement actions. To date there has not been any formal evaluation of the VRDP, so there is no empirical evidence of its effect on overall compliance. However, critics of FAA’s enforcement policy believe that the VRDP allows regulated entities to avoid formal enforcement actions, and in April of 2008 the House Committee on Transportation and Infrastructure held a hearing entitled “Critical Lapses in FAA Safety Oversight of Airlines: Abuses of Regulatory ‘Partnership Programs’” to determine the extent to which the VRDP and other enforcement programs were circumventing formal enforcement of FAA regulations. The FAA contends that the VRDP program is necessary to increase agency awareness of operational safety issues and that it has helped to identify a number of important areas to focus on such as pilot and controller communications and runway incursions. Thus, there may be long-term benefits from the VRDP that cannot be easily measured.

In addition to concerns that the VRDP may not be increasing overall compliance, it also appears to raise more outsourcing concerns than EPA’s Audit Policy. With respect to transparency and accountability, under FAA policy, disclosures are explicitly exempted from FOIA queries. Thus, one could argue that transparency and accountability are significantly reduced by this policy. Additionally, if the VRDP does allow regulated entities to circumvent FAA’s formal

92 See AC 00-058B, supra note 89, § 13, at 6.
93 See GAO FAA, supra note 89, at 12-13 (annual self-disclosures); id. at 14-15 (annual enforcement actions).
95 See Critical Lapses, supra note 91.
96 GAO FAA, supra note 89, at 25.
enforcement program, it would make concerns about outsourcing inherently governmental functions more relevant.

B. The Department of Energy, Office of Health, Safety, and Security

The Department of Energy’s (DOE) Office of Health, Safety, and Security has had a self-policing policy since 1993. Contractors who operate DOE nuclear facilities can receive up to 100% penalty mitigation for self-disclosed violations of nuclear safety, worker safety and health, and classified information security regulations depending on the circumstances under which they self-disclose, the nature of the violations, and the extent to which the violation is corrected. Although the DOE policy does not explicitly require disclosures to meet specific conditions, the criteria by which the level of penalty reduction is determined echo many of the conditions of EPA’s Audit Policy. For example, consideration is given to:

- Whether prior opportunities existed to discover the violation;
- The extent to which proper contractor controls should have identified or prevented the violation;
- Whether discovery of the violation resulted from a contractor’s self-monitoring activity;
- The extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation;
- The promptness and completeness of any required report;
- The appropriateness, timeliness and degree of initiative associated with any corrective action; and
- The comprehensiveness of the corrective action.

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Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of DOE Nuclear Safety Requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

98 Id. pt. IX(4), (7) (stating that self-policers can receive up to 50% civil penalty mitigation for self-identified and reported violations and up to 50% mitigation for prompt, comprehensive, and effective corrective actions).

99 Id. pt. IX(5)(b), (7).
A GAO report on overall enforcement from the Office of Health, Safety, and Security found:

The actual number of notices of violations and enforcement letters levied against contractors for violating DOE's nuclear safety requirements has been relatively small compared to the number of self-reported conditions of noncompliance that are entered into the Noncompliance Tracking System. Our analysis shows that voluntary entries into the tracking system have averaged around 220 per year since 1999, and the combined number of notices of violations and enforcement letters averaged about 12 per year during this time period. Thus, DOE's self-policing policy appears to play a much larger role in its overall enforcement program than does EPA's Audit Policy. However, there has not been any formal evaluation or analysis of the effectiveness of this policy in increasing overall compliance.

With respect to outsourcing concerns, as is the case with EPA's Audit Policy, DOE's self-policing policy appears to be a complement to its enforcement policy, not a substitute for it. In terms of accountability, self-disclosures are entered into a DOE database along with other agency discovered violations, although some disclosures may not be serious enough to pass DOE's reporting threshold. However, given the nature of the operations at these facilities, it is not clear whether the public can easily obtain information on disclosures. Of course, this applies to DOE enforcement as well, so it is unlikely that the self-policing actions are much less transparent than government enforcement actions.

C. The Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) finalized its self-policing policy in 2000. Like EPA's Audit Policy, OSHA chose to implement a policy rather than a formal rule. Under its policy, voluntarily self-disclosed violations that are corrected prior to any OSHA inspection will not receive a citation, and those violations

101 However, contractors are still required to track these instances of noncompliance and make them available to DOE enforcement upon request. See Office of Enforcement, U.S. Dep't of Energy, Enforcement Process Overview (2009), available at http://www.hss.doe.gov/enforce/docs/Final_EPO_June_2009_v4.pdf.
103 Id. at 46,500-01.
that are self-disclosed but cannot be corrected prior to an inspection are eligible for a penalty reduction of up to 25%. Like EPA, OSHA does not give audit documents privilege, but does state that it will not routinely request audit documents.

One of the key differences between this policy and the Audit Policy is that it does not provide any explicit list of conditions that must be met for immunity or penalty reductions to be granted other than that the violations must have been discovered in the course of a systematic, documented, and objective review of the regulated entity. Additionally, the policy provides complete immunity for disclosed violations that are corrected prior to an inspection. Thus, it appears to be possible for a regulated entity to commit a violation that provides the entity with some economic benefit, and to pay no penalty at all for such a violation if it is disclosed and corrected prior to an OSHA inspection. Because this policy has never been formally analyzed or evaluated, one can only speculate as to its effect on overall compliance. However, the two differences with the Audit Policy cited above are both differences that are likely to have a negative effect on compliance. Theoretical models of self-compliance have noted that providing complete immunity—particularly not requiring entities to pay a penalty equivalent to the economic benefit they received from the violation—can lead to higher violations. Also, as noted in Part III.B.2 of this Article, state environmental self-policing policies that provided complete immunity have been shown to result in lower levels of compliance and environmental performance.

The OSHA policy also raises some outsourcing concerns. With respect to accountability, the policy makes no provision for making acts of self-policing public. Another concern is that OSHA enforcement and penalties are generally acknowledged to be relatively meager—certainly not at the same level as EPA enforcement and penalties. Thus, it is not clear that self-policing is used to complement OSHA enforcement

104 Id. at 46,502-03.
105 Id. pts. III.3-4, V.C.
106 See generally OSHA Final Policy, supra note 102. This requirement that the discovery be the result of a systematic, objective review is very similar to the first condition listed in the EPA’s Audit Policy, supra note 40, at 19,625-26.
107 The GAO conducted a study on OSHA’s voluntary compliance programs that includes the self-policing policy. However, the self-policing policy was not separately identified in the report, nor was there any formal evaluation of the effectiveness of the voluntary compliance. See U.S. Gov’t Accountability Office, GAO-04-375, Workplace Safety and Health: OSHA’s Voluntary Compliance Strategies Show Promising Results, But Should Be Fully Evaluated Before They Are Expanding (2004).
108 See Guerrero & Innes, supra note 67; Stafford, supra note 63.
rather than be a substitute for it, making concerns that an inherently governmental function is being outsourced more pertinent.

D. Federal Electric Regulatory Commission

The Federal Electric Regulatory Commission (FERC) incorporated self-policing into its enforcement program for electricity transmission and wholesale sales markets from the program’s inception in 2005.\footnote{The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, gave FERC new civil penalty authority. To implement this authority, FERC adopted a new enforcement regime, which implied that self-policing would be a mitigating factor in determining penalties. See Enforcement of Statutes, Orders, Rules, and Regulations, 113 FERC 61,068 (2005). In discussing the factors we will take into account in determining the severity of penalties to be imposed for violations, we also recognize the importance of demonstrable compliance and cooperation efforts by utilities, natural gas companies, and other entities subject to the statutes, orders, rules, and regulations administered by the Commission. We encourage regulated entities to have comprehensive compliance programs, to develop a culture of compliance within their organizations, and to self-report and cooperate with the Commission in the event violations occur. Id. In 2008, FERC reiterated its commitment to reducing penalties for self-disclosed violations. See FERC Revised Policy Statement on Enforcement, 123 FERC 61,156 (2008) [hereinafter FERC, Revised Statement].} Under FERC’s self-policing policy, the fact that a facility self-reports can result in up to 100% penalty mitigation.\footnote{As stated by FERC: In most cases, self-reported violations have resulted in the matters being closed without any enforcement action being taken. In the cases where a self-report did result in enforcement action, the penalties reflected mitigation credit for the self-reporting. While we do not articulate here the precise amount of mitigation credit that was earned for self-reporting in our recent enforcement actions, we reiterate that the penalties in these cases would have been greater absent self-reporting. FERC Revised Statement, supra note 110, at 62,019.} Like DOE’s policy, FERC does not explicitly require that the disclosure meet specific conditions, but does say that the level of mitigation depends on:\footnote{Id.}:

- The manner in which the violation was discovered;
- The timeliness with which the violation was disclosed; and
- Steps taken to stop or correct the violation.

FERC provides overall statistics about the number and types of self-disclosures made from 2006 to 2009, as well as the disposition of those self-disclosures in its 2009 Enforcement Report, but there has not been an analysis of the effectiveness of the self-policing program.\footnote{FERC, AD07-13-002, 2009 REPORT ON ENFORCEMENT (2009) enumerates the number and types of self-disclosures made from 2006-2009, as well as the disposition of those self-disclosures, but does not attempt to analyze the effectiveness of the self-policing program. Id. at 8-14.} FERC’s self-policing policy plays a more significant role in overall
outsourcing enforcement than EPA’s policy does. For example, in 2009, there were 122 self-disclosures compared to only ten investigations and thirty-three audits by public officials.\footnote{The year 2009 did represent an increase in self-reports over earlier years, but data on investigations and regulatory audits in earlier years was not provided. See id. at 8 (2009 self-reports); id. at 14 (2009 investigations); id. at 20 (2009 regulatory audit statistics).}

Unlike EPA’s policy, there is no statement in FERC’s self-policing policy that self-disclosures will be made available to the public. On the contrary, FERC’s enforcement report states that much of the enforcement actions the agency takes are “non-public Enforcement activities, such as self-reported violations and investigations that are closed without any public enforcement action or civil penalty assessments.”\footnote{Id. at 1.}

Since both FERC enforcement and the self-policing policy are relatively new phenomena, it is hard to assess whether this instance of outsourcing is beneficial or not. On the one hand, the policy does seem to follow EPA’s and DOE’s policies in many important respects by not providing blanket immunity, but rather conditioning disclosures. However, the conditions are very vaguely expressed and there is no formal mechanism for reporting self-disclosures to the public, raising some outsourcing concerns.

E. Department of Justice, Antitrust Division

Since 1993, The Department of Justice’s Antitrust Division has had a formal Corporate Leniency Program, which accords “leniency” to corporations that report their own illegal antitrust activity at an early stage if the self-disclosure meets certain conditions\footnote{Dep’t of Justice, Antitrust Division, Corporate Leniency Policy (1993), available at http://www.justice.gov/atr/public/guidelines/0091.pdf. The Antitrust Division had an Amnesty Program as early as 1978, but amnesty was not granted automatically and the program had flaws, which led to very few applications and ultimately no cases. See Scott D. Hammond, Detecting and Deterring Cartel Activity Through an Effective Leniency Program, Presentation at the International Workshop on Cartels, Brighton England (Nov. 21-22, 2000), available at http://www.justice.gov/atr/public/speeches/9928.htm.}:

- The self-disclosure occurs before DOJ has begun an investigation;
- DOJ has not received information about the illegal activity being reported from any other source;
- The corporation did not coerce another party to participate in the illegal activity and was not the leader in, or originator of, the activity;
• After discovering the illegal activity, the corporation “took prompt and effective action” to terminate its part in the activity;
• The illegal activity is reported candidly and completely and the corporation provides full cooperation throughout the investigation;
• The disclosure is made by the corporation, not individual executives or officials; and
• Where possible, the corporation makes restitution to injured parties.

If the first three conditions are not met, but the self-disclosure meets the remaining conditions as well as the following conditions, it will also receive leniency if:

• The corporation is the first to come forward and qualify for leniency with respect to the illegal activity being reported;
• DOJ does not yet have evidence against the company that is likely to result in a sustainable conviction; and
• DOJ determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.117

If the self-disclosure meets either set of conditions, DOJ will not charge the corporation criminally for the activity being reported and, since 2004, self-disclosing corporations will only be subject to restitution of damages, not treble damages.118 DOJ also has an individual leniency policy that has analogous conditions for individuals self-disclosing illegal activity where the corporation does not come forward.119 Of course, this policy is quite different from the other self-policing policies discussed in this Article and the theoretical models discussed in Part III because the violations of law involve conspiracies between multiple entities. The fact that only the one entity can receive leniency changes the incentives for entities to participate. However, it is still a self-policing policy and it does provide additional insight into the aspects of various policies that might make outsourcing concerns more or less important.

One characteristic of the policy is that leniency requires restitution to injured parties—thus like EPA’s policy it is only the “punitive” penalties that are forgiven and thus, in theory, self-policers should not

117 DEP’T OF JUSTICE, supra note 116.
receive any economic benefit from their illegal activity.\(^{120}\) While there
have not been any empirical studies of the effect of the policy on cartel
formation or cartel collapse, because of the difficulty in enforcing
antitrust laws, the Corporate Leniency Program plays a very important
role in the overall enforcement program.\(^{121}\) In 2003, the Antitrust
Division received over one disclosure a month and “the majority of the
Division’s major international investigations [were] advanced through
the cooperation of an amnesty applicant.”\(^{122}\) Since the policy allows
DOJ to prosecute other antitrust violators, it clearly acts as a
complement to its enforcement programs rather than as a substitute.

The only outsourcing concern that one might have with respect to
the Corporate Leniency Program is that, unlike the Audit Policy, the
identity of self-policers under the Program is not normally made
publicly available.\(^{123}\)

V. PRINCIPLES TO GUIDE SELF-POLICING POLICIES

As should be clear from the sample of self-policing policies
discussed in the previous Parts, there is a wide variation in both the
design and implementation of such policies. As discussed in Part II,
for a self-policing program to be a justifiable delegation of a public
function to private parties, it must first increase overall efficiency—that
is it must either increase compliance or maintain existing compliance
levels at reduced cost. If a policy can be designed to increase
efficiency, it should then be evaluated with respect to the outsourcing
concerns discussed in this Article.

With regard to the first condition, ideally agencies would use
formal evaluations and analysis to ensure that—at a minimum—
compliance does not decrease under the self-policing program. Additionally, the program should be initially constructed so that it does
not provide perverse incentives for regulated entities to decrease

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\(^{120}\) However, companies may be eligible for partial amnesty from penalties in other cases. See Gary R. Spratling, Making Companies an Offer They Can’t Refuse: The Antitrust Division’s Corporate Leniency Policy—An Update, Presentation at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at http://www.justice.gov/atr/public/speeches/2247.htm.

\(^{121}\) See Joseph E. Harrington, Jr., Optimal Corporate Leniency Programs, 56 J. INDUS. ECON. 215, 215 (2008) (“While it is difficult to assess the role of the leniency program on causing cartels to collapse or deterring cartels from forming, we do know that it has been widely used.”).


compliance efforts and minimize the ability of firms to strategically self-disclose. While the particular details of each policy will obviously vary from program to program, one underlying principle is that there must be some positive chance that regulated entities will be subject to regulatory inspection and prosecution for detected violations. If entities that self-police face no or only a very small (approaching zero) probability of inspection, then in practice there is no enforcement. Not only could this undermine respect for the law, it also could provide regulated entities with the opportunity to strategically self-police in order to reduce future enforcement to zero and then cease to make any effort to comply, thereby increasing the number of undetected violations.124

Additionally, given that several analyses of the Audit Policy suggest that complete penalty immunity worsens overall compliance levels and no studies suggest any beneficial result of complete immunity, I do not think self-policing policies should confer complete immunity. At a minimum, self-policers should always have to pay a fine equal to any economic benefit received by violations—otherwise they are better off violating and self-policing rather than complying. Unfortunately, not all existing Audit Policies make the distinction between punitive fines and those related to the economic benefit of non-compliance.

Self-policing policies should also be designed to minimize outsourcing concerns. With respect to accountability, the concept of self-policing does not require that accountability or transparency be sacrificed. Any decrease in accountability is a result of a policy design or execution choice made by the regulatory agency, and does not appear to be necessary to achieve efficiency. Of course, enforcement is an area in which accountability is limited from the start and most agencies exercise significant discretion in deploying their enforcement resources and determining the punishment for entities found in violation. Thus, I would propose two guidelines to ensure that accountability is not significantly decreased by self-policing: First, all self-disclosures should be made publicly available, preferably in the same way that other enforcement data is provided to the public. Second, any right to bring private action against regulated entities should be protected.

To ensure that self-policing does not become an inherently governmental function, under any self-policing policy public officials should retain ultimate discretion in setting final penalties and determining how violations are to be remediated. Additionally, self-policing should never be the sole means of enforcement—not only because all existing theoretical models of self-policing require a public

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124 This does not preclude an agency from rewarding self-policers with reduced future inspection relative to non-policers, though it might require raising the base inspection rate.
enforcement mechanism to make the policy work, but also because doing so ensures that regulated entities do not determine the ultimate import of regulations. Thus, as a guideline for developing self-policing programs, I would require that they be used to supplement public enforcement regimes, and not as substitutes for traditional enforcement.

Finally, to ensure that there is no significant loss of information to government officials as a result of self-policing, self-policing policies should require, as EPA’s policy does, that entities provide detailed information as to the nature of the discovered violations.

While these guidelines may seem to be simple or obvious principles, they have not been universally adopted in all existing self-policing policies. Of course, adoption of these principles alone will not ensure that all self-policing is ultimately justifiable. Thus I also advocate empirical analyses of all self-policing policies to assess the relative efficiency gains and outsourcing concerns.

In conclusion, as I hope the Article demonstrates, self-policing is neither uniformly beneficial, nor uniformly dangerous. The potential benefits from self-policing are large and, while the concerns over outsourcing are real, there are ways to minimize many of the concerns that might lead some to resist outsourcing. Hopefully there will be no need to trade principles of good government for efficiency if we appropriately design self-policing policies.