

The Coast Guard's Environmental Crimes Voluntary Disclosure Policy – What It Does and What It Doesn't Do

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On November 14, 2007, the United States Coast Guard issued its Environmental Crimes Voluntary Disclosure Policy ("Coast Guard Policy"), to be located in Appendix V to the United States Coast Guard Maritime Law Enforcement Manual.¹ In many ways, the Coast Guard Policy mirrors the Incentives for Self-Policing Policy issued by the Environmental Protection Agency ("EPA Policy").² As under the EPA's Policy, regulated entities disclosing environmental violations under the Coast Guard Policy are assured that the Coast Guard "will not recommend" to the Department of Justice ("DOJ") or other prosecuting authority that criminal charges be brought against the disclosing entity, provided that the entity meets all nine of the Coast Guard Policy's conditions (outlined below). Unfortunately, unlike the EPA's Policy, the Coast Guard Policy does *not* include any relief from gravity-based civil penalties for violations of federal environmental law.³ Further,

there are significant limitations under the Policy. Accordingly, regulated entities will have to carefully weigh several factors before deciding whether to disclose violations under the Policy.

Compliance Management Systems

As a threshold matter, eligibility for the Policy requires that any disclosed violation(s) must have been discovered "through either an environmental audit, or a compliance management system that reflects due diligence in preventing, detecting, and correcting violations." *Id.* at V-4.

The Policy uses the term "compliance management system" ("CMS") to refer to "a systematic management plan or systematic efforts to achieve and maintain compliance." *Id.* at V-3. The Policy analogizes a CMS to due diligence, noting that "[n]o substantive difference is intended" by using the term CMS instead of due diligence, "as the Policy clearly indicates that the [CMS] must reflect the regulated entity's due diligence in preventing, detecting, and correcting violations." *Id.* In determining whether "basic due diligence criteria have been met" by a CMS, the Coast Guard will look for a number of components of the CMS, including:

- Policies, standards, and procedures that will identify the requirements of vessel employees and agents under laws, regulations, and other enforceable agreements or sources of authority;
- Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures;
- Assignment of specific responsibility for assuring compliance aboard each individual vessel;
- Mechanisms in place for systematically assuring that compliance policies, standards,

¹ U.S. Coast Guard Maritime Law Enforcement Manual, App. V, Environmental Crimes: Voluntary Disclosure Policy, available at <http://www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf> ("Coast Guard Policy").

² Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice, 56 Fed. Reg. 19,618 (Apr. 11, 2000) ("EPA Policy").

³ Under the EPA Policy, an entity may avoid all gravity-based penalties if it meets all of the criteria of the Policy, and up to 75% of gravity-based penalties if it meets all criteria except that the violation was not discovered through an environmental audit or compliance management system. EPA civil penalties are composed of an economic component which reflects the economic gain derived from non-compliance and a gravity-based component which reflects the punitive portion of the penalty. *Id.* at 19,620.

The Coast Guard does not state why its Policy does not extend to civil penalties, although Coast Guard Hearing Officers are directed to take into account the "circumstances, gravity, culpability, history of similar violations, and demonstrated good faith," in determining an appropriate penalty under Coast Guard's Civil Penalty Procedures. U.S. Coast Guard, Civil Penalty Procedures and Administration, COMDTINST 16200.3A (Oct. 16, 1992) at 4. Representatives of regulated entities dealing with Hearing Officers on civil penalties related to environmental violations originally voluntarily disclosed under the Coast Guard Policy should ensure that Hearing Officers are made aware of the voluntary disclosure as part of mitigation

efforts because the voluntary disclosure is part of the circumstances of the violation; the audit or other compliance system process under which the violation was originally discovered could mitigate the gravity and culpability factors required to be considered; and the voluntary disclosure certainly would appear to demonstrate good faith on the part of the regulated entity.

and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations as well as a mechanism for employees and agents to report environmental violations free from fear of retaliation;

- Effective communication to employees and agents of the company's standards and procedures;
- Incentives for managers and employees to act in accordance with the compliance policies, standards, and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
- Procedures to promptly correct any violations and to make any necessary modifications to the CMS in order to prevent future violations.

Id. § V.3 at V-3, V-4.⁴

The Policy states that the Coast Guard's criteria are flexible enough to accommodate different types and sizes of businesses and other regulated entities. *Id.* at V-3. Accordingly, while all of the above factors will be considered in evaluating whether any company's CMS is adequate, the Policy recognizes that a variety of compliance management programs are feasible, and its assessment will focus on whether basic due diligence criteria have been met in determining whether to grant credit under the Policy.

The Policy's Conditions

In addition to the threshold condition that the violation be discovered through either an environmental audit or a CMS as described above, eight other conditions must be satisfied for the violation to be eligible for relief under the Policy. These conditions mirror to a large extent those of the EPA Policy.

1. *Voluntary discovery.* To qualify under the Coast Guard Policy, the violation must have been discovered voluntarily, *i.e.*, it can not have been discovered through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, judicial or administrative order, or consent agreement. However, provided that the

violation is voluntarily discovered, it is still eligible for Policy credit even if reporting of the violation after it is found is required by law or regulation. *Id.*, § V.5.a. at V-5.

2. *Prompt disclosure.* The regulated entity must disclose the violation within 21 calendar days of discovery, identifying all known particulars of the incident. Discovery is triggered whenever any officer, director, employee, or agent of the company has an objectively reasonable basis for believing that a violation has or may have occurred. The Coast Guard may extend the time period for disclosure with respect to violations involving multiple vessels. It is important to note that if a statute or regulation requires that the violation be reported in fewer than 21 days, disclosure must be made within the time limit established by the applicable statute or regulation. Disclosures should be made to the nearest Coast Guard unit, the National Response Center, and, where applicable, to individuals pre-designated in response plans, or, where multiple ports are involved, to Coast Guard Headquarters (CG-941). *Id.*, § V.5.b. at V-5.
3. *Discovery independent of government or third party.* A violation must be discovered and disclosed before any of the following: commencement of a federal, state, or local agency inspection or investigation; notice by a third party; reporting of the violation by a "whistleblower" employee, rather than by one authorized to speak on behalf of the company; or imminent discovery of the violation by a regulatory agency. The Policy states that the Coast Guard "encourages multi-vessel auditing and does not intend for" this condition to preclude voluntary disclosure of violations involving other vessels based solely on the fact that one of the regulated entity's vessels is the subject of an investigation, inspection, information request or third-party complaint, as long as the other conditions for application of the Coast Guard Policy are met. *Id.*, § V.5.c. at V-6.
4. *Timely correction.* The regulated entity must correct the violation within 60 calendar days from the date of discovery "or as expeditiously as possible." The Coast Guard may still order an entity to correct the violation within a shorter time period whenever "feasible and necessary to protect public health and the environment." In the event that correction will require more than

⁴ While several of these components as written in the Coast Guard Policy specifically refer to vessels, there is no specific statement in the Policy limiting its application only to vessel owners or operators. The Policy states that a regulated entity is "any entity regulated under Federal environmental laws." *Coast Guard Policy, supra* note 1, § V.2 at V-2. Thus, it appears that the Policy also applies to marine facilities subject to Coast Guard regulation.

60 days, the entity must so notify the Coast Guard in writing prior to expiration of the 60-day period in order to satisfy this condition. *Id.*, § V.5.d. at V-6, V-7.

5. *Prevention of recurrence.* The regulated entity must agree to take steps to prevent a recurrence of the violation, including, for example, improvements to the entity's environmental auditing efforts or its CMS. *Id.*, § V.5.e. at V-7.
6. *No repeat violations.* A regulated entity is not eligible for Policy credit for a given violation if the specific violation or a related violation has occurred within the past three years involving the same vessel, or within the past five years as part of a pattern involving multiple vessels owned or operated by the same entity.⁵ For the purposes of this condition, a "violation" is either (a) a violation of federal, state, or local environmental law identified in a judicial order, consent agreement or order, complaint or notice of violation, conviction or plea agreement; or (b) any act or omission for which the entity has previously received leniency from the Coast Guard or a state or local agency. *Id.*, § V.5.f. at V-7.
7. *Some violations excluded.* Regulated entities are not eligible for relief under the Policy for a violation that resulted in serious actual harm, or that may have presented an imminent and substantial endangerment, to human health or the environment. Similarly excluded are violations of specific terms of any judicial or administrative order, consent agreement, or plea agreement. *Id.*, § V.5.g. at V-7, V-8.
8. *Cooperation with Coast Guard.* The regulated entity must cooperate with the Coast Guard and provide it with information needed to determine whether the Policy applies. Moreover, the entity must not hide, destroy, or tamper with possible evidence following discovery of potential environmental violations. At a minimum, disclosing entities must provide: (1) access to all requested documents, (2) access to all employees; (3) assistance in investigating the violation, any noncompliance problems

related to the disclosure, and any environmental consequences related to the violations; (4) access to all information related to the violations disclosed, including that portion of the environmental audit report or documentation from the CMS that revealed the violation; and (5) access to the individuals who conducted the audit or review. *Id.*, § V.5.h. at V-8.

To Disclose or Not to Disclose – That is the Question.

The Coast Guard Policy provides an opportunity for maritime companies to report environmental violations to an agency that is familiar with the marine industry and the laws being enforced. This is particularly important to foreign companies that own and operate foreign-flag vessels calling in the United States who regularly deal with the Coast Guard under the Port State Control Program. Further, any opportunity to avoid criminal prosecution and the potential outgrowth of such prosecution, such as suspension and debarment, is a positive development.

However, while the Coast Guard Policy's guarantee against the recommendation of criminal prosecution by the Coast Guard is positive, it has significant limitations. First, the Policy does not apply to a violation that is, in the determination of the Coast Guard, "part of a pattern or practice that demonstrates or involves" either "a prevalent management philosophy or practice that conceals or condones environmental violation," or "high-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law." *Id.*, § V.4. at V-4. The Policy will not offer relief for violations that, in the opinion of the Coast Guard, are so widespread as to reflect a pattern or practice on the part of management to condone or remain willfully blind to environmental violations.

Second, in a significant departure from the EPA's Policy, the Coast Guard Policy requires that the reported violations must have been discovered "through either an environmental audit, or a compliance management system that reflects due diligence in preventing, detecting, and correcting violations." Under the EPA Policy, a disclosing entity does not have to meet this "systematic discovery" requirement in order to be eligible for the EPA's recommendation against prosecution.⁶ It is unclear why the Coast Guard Policy mandates this requirement when the EPA does not. As a practical matter, there are potentially numerous circumstances

⁵ The three-year period begins to run when the government, a third party, or the regulated entity has notice of a specific violation and not when the original violation occurred. *Coast Guard Policy*, *supra* note 1, § V.5.f. at V-7.

⁶ *EPA Policy*, *supra* note 2, at 19,620.

in which a violation was not discovered through an audit or compliance management system. It is hard to fathom why a disclosing entity should not be eligible under the Policy if an environmental violation of which the Coast Guard was previously unaware is voluntarily disclosed, whether or not the violation was discovered through an audit or CMS. In fact, such a limitation does not seem to be in the best interest of the Coast Guard and the public as it could serve to limit reporting.

Third, even when a regulated entity voluntarily discloses and satisfies all nine of the Policy conditions, the Coast Guard "may recommend for prosecution the criminal acts of individual managers or employees." *Id.* In fact, the policy requires an entity making a voluntary disclosure to "cooperate" with the Coast Guard in its further investigation of the violation, including any investigations of such individual managers or employees and has some very specific requirements for such "cooperation." Such cooperation is likely to mean waiver of any attorney-client and work product privilege related to any investigation conducted into the reported violation, including statements made to internal investigators by managers, crewmembers or other employees.⁷

Fourth, while the conditions for cooperation in the Coast Guard Policy mirror the conditions in the EPA Policy, for vessel owners and operators, particularly of foreign-flag vessels, these conditions may pose problems much more difficult to deal with than they would be for EPA-regulated entities. For instance, the requirement to provide access to all employees is typically not as onerous for EPA-regulated entities as it will be for owners and operators of vessels that must provide access to crewmembers or shore personnel who are foreign citizens and who may live in remote areas of the world.

Fifth, the 21-day requirement for reporting may prove difficult, especially for vessel-related violations, and particularly if the violations occurred on a vessel that does not make regular port calls. The Coast Guard Policy does state that "if the 21-day period has not yet expired and an entity suspects that it will be unable to meet the deadline, the entity should contact the appropriate Coast Guard office, in advance, to develop disclosure terms acceptable to the Coast Guard." *Id.*, § V.5.b. at V-5. It also says that, if there is some doubt as to the existence of a violation, "the recommended course is for the entity to proceed with the disclosure

and allow the regulatory authorities to make a definite determination." *Id.* However, regulated entities should exercise extreme caution before making only a partial or incomplete voluntary disclosure.⁸

Generally, an entity should not make a disclosure until it has conducted a full and thorough investigation and wrapped its arms around the entire problem – which, in many cases, may take longer than 21 days to ascertain. This caution applies especially when the best relief that can be obtained in return for disclosure is a recommendation to DOJ or other prosecuting entities that criminal charges not be brought. This is because even an absolute guarantee by the Coast Guard that they will not recommend criminal charges carries limited weight when the ultimate decision to prosecute rests squarely in the hands of DOJ prosecutors. Additionally, an entity should evaluate, particularly when it cannot conduct a comprehensive internal investigation that meets the 21-day disclosure criteria, whether its interests may be better served by voluntarily disclosing the violation directly to the DOJ. The DOJ has its own policies and guidelines for charging corporations that take into account many of the same factors considered under the Coast Guard policy, such as a regulated entity's timely and voluntary disclosure of wrongdoing, pre-existing compliance program, remedial actions and cooperation.⁹

Conclusion

The new Coast Guard Policy is a positive step forward in addressing the issue of criminal enforcement of environmental laws involving the marine industry. Unlike other industries, the marine industry is required, through the International Safety Management Code, to have an environmental and safety management system in place. In an effort to

⁸ For instance, owners and operators of fleets of vessels frequently find themselves in situations in which a crewmember involved in a violation related to environmental compliance has served on several vessels in that fleet. If, for example, the violation is related to tampering with an OWS or false entries in an Oil Record Book, an internal investigation should attempt to determine what other vessels the crewmember has served on and whether similar violations occurred on those vessels. For a discussion of the issues associated with making a limited or incomplete voluntary disclosure under the EPA Policy, see Thomas J. Kelly, The Criminal Side of EPA's Voluntary Disclosure Program, available in ALI-ABA Course of Study Materials, Criminal Enforcement of Environmental Laws (Sep. 30 – Oct. 1, 2004) at 33.

⁹ U.S. Dept. of Justice, Memorandum, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

⁷ For an extensive discussion of the issues associated with cooperating with the Government in the context of a voluntary disclosure scenario, see Judson Starr, David Dickman and Michael Munson, "Waiving" Goodbye to the Internal Investigation, 3 BENEDICT'S MAR. BULL. 265 (3d Quarter 2005).

encourage even stronger compliance efforts by the marine industry, the Coast Guard is offering a carrot instead of a stick to those who, through their compliance efforts, have found violations and are willing to voluntarily disclose the violations to the Coast Guard and to cooperate with the Coast Guard both to investigate the violations and correct and to prevent their recurrence.

But regulated entities must be aware of the risks and uncertainties in the Policy. This is not a "safe harbor" policy. There is always a risk that DOJ will not accept the Coast Guard recommendation not to prosecute, and the ultimate determination as to whether a violation will be criminally prosecuted is within the sole discretion of the DOJ prosecutors. Further, this recommendation does not encompass managers, crewmembers and employees, who could face criminal prosecution despite a voluntary disclosure. Also, there is no relief from civil penalties that may still be sought by the Coast Guard for any reported violations.

Additionally, the conditions for even obtaining the Coast Guard's recommendation not to prosecute are substantial, and in some instances may militate against a voluntary disclosure. Regulated entities should consider all of the pros and cons and consult with

criminal legal counsel before making a disclosure under the new Coast Guard Policy.

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