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USCG environmental crime disclosure policy

The rest of the story

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On November 14, 2007, the US Coast Guard released its voluntary disclosure policy as regards environmental crimes. The policy is intended to enhance the protection of human health and the marine environment by encouraging regulated maritime entities to voluntarily discover, disclose, correct, and prevent violations for Federal environmental requirements.

If an entity (such as a ship owner or operator) adopts a qualifying compliance management system to prevent, detect, and correct violations and then promptly and voluntarily reports a violation discovered through such system, the Coast Guard will not normally recommend to the Department of Justice that criminal charges be brought against the disclosing entity. Report of the violation generally must be made within 21 days of discovery. This policy was adapted from the US Sentencing Guidelines and is consistent with similar policies adopted by the Department of Justice and the Environmental Protection Agency (EPA).

Getting started

A qualifying compliance management system is a systematic management plan or systematic efforts to achieve and maintain compliance with applicable requirements. The basic steps that a maritime entity (such as a ship owner or facility operator) must undertake are to: (1) review the company's operations to determine what federal criminal laws apply; (2) audit the company's various programs and procedures to determine what changes and additions must be made to have a qualifying compliance management system; (3) implement and document the required compliance system; and (4) conduct periodic audits to ensure that the compliance system remains effective and that changes in federal requirements are accommodated.

Most ships that trade internationally have instituted safety management systems in conformance with the International Safety Management (ISM) Code. One might think, albeit erroneously, that such a safety management system would constitute a qualifying compliance management system. There are a variety of reasons that the two systems are not equivalent. The major one is that the ISM Code is focused on compliance with international requirements. Unless the ship owner or operator has taken additional voluntary steps, the ISM Code safety

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management system for non-US ships does not address compliance with US law and regulations. Other needed steps (discussed below) are also missing from the international regime.

Elements of a compliance program

There are seven basic elements to a qualifying compliance management system. First, the rules must be set. In other words, the compliance standards and procedures must be established. Secondly, responsibility for the program must be assigned to a high-level person in the company – the responsible individual – someone with authority to assure that the program is actually implemented, rather than being just another manual on the shelf. Thirdly, the company must have some type of screening program to avoid assigning discretionary authority to a person with a propensity for misconduct. For example, the company should have a program so as to avoid hiring a convicted embezzler as its treasurer. Fourthly, the rules that were set in step one must be disseminated to the crewmembers and employees. Those individuals also must be provided training as necessary, as well as the tools needed to comply with the rules. For example, to avoid dumping of oily waste water directly overboard, the ship should be equipped with a well-functioning oily water separator and the engineers should be trained in its use. There should be no disincentives to doing the right thing. For example, the chief engineer should not be penalized (either financially or in his or her evaluations) for spending monies to properly dispose of the ship's wastes. Fifthly, there must be a system to monitor what is actually happening. An auditing program should be established. In addition, there should be a reporting system whereby crewmembers and employees can disclose non-compliances without fear of retribution. Sixthly, there must be some type of enforcement or disciplinary mechanism to address both violations and failure by supervisory employees to detect violations. This does not mean that any and all violations lead to dismissal. Depending on the nature of the violation, a documented admonition may be sufficient. Finally, the company must have a mechanism for responding to violations. The violations must be reported to appropriate government officials (this is the focus of the Coast Guard's voluntary disclosure policy) and the company must cooperate with those officials in their enforcement efforts. The compliance program then may have to be revised so as to reduce the likelihood of future similar violations.

What does the company get out of this? A fair question!

There is the strong probability that the company's commitment to compliance will significantly reduce the occurrence of a violation of applicable law. If the crewmembers and employees see that the company is not only talking the talk, but also walking the walk, they will make the extra effort to conform their conduct to the required standard.

If there is a violation and the company takes action under the Coast Guard's voluntary disclosure policy, the agency has committed to not recommending to the Department of Justice that criminal charges be brought against the company. The Department of Justice has a formal policy that companies with qualifying compliance programs should not be prosecuted unless the violation is part of a pattern that demonstrates a prevalent management policy that conceals or

condones such violations or high-level company officials are personally involved or willfully blind to the violation. Thus, the likelihood of prosecution for the violation is greatly reduced.

If, despite the implementation of a qualifying compliance program, a violation occurs and the Department of Justice prosecutes and the company is convicted, the company is generally entitled to a significant reduction (possibly up to 80%) in the sentence. In these days of multi-million dollar criminal fines, this aspect alone could save large sums of money. If the company is convicted despite the existence of the compliance program, the company will generally be able to avoid the imposition of a court-monitored third-party audit program. Such third-party audit programs are now a usual (and onerous) part of the sentence imposed on companies convicted of violating federal criminal laws.

Finally, for corporations based in the United States or listed on US stock exchanges, implementation of a qualifying compliance program will provide the same benefits to corporation officers and directors as it does to the corporation itself. Under US law, senior corporate officials may, in some circumstances, be personally liable for criminal offenses of the corporation. Additionally, corporate officials may be subject to suit by stockholders for diminishment in the value of the stock due to criminal violations of the corporation that might have been avoided if the company had implemented a compliance program.

It is thus clear that even the best-managed company can benefit from the implementation of a qualifying compliance program. After all, the federal policy of dispensation for companies with qualifying programs applies not only to intentional crimes (such as the midnight dumping of oily waste and falsification of the oil record book) but to negligent violations and even to violations of strict liability crimes (such as the Refuse Act of 1899 and the Migratory Bird Treaty Act).

Having a qualifying compliance program increases the likelihood that one's P & I Club or other insurer will compensate the company for any fines or penalties that may be imposed in the event of a violation. At least one P & I Club has instituted a policy that it will consider covering fines imposed on members "provided the Member has satisfied the [Club] that he has taken reasonable steps to avoid the event giving rise to the fine."

Conclusion

Formal adoption of this voluntary disclosure policy by the US Coast Guard represents a major step forward in removing the threat of criminal prosecution from maritime companies seriously interested in compliance with applicable environmental laws. It is now up to those companies to implement the steps necessary to take advantage of this opportunity.