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The U.S. Coast Guard's New Environmental Crimes Voluntary Disclosure Policy: Incentive for Compliance

On November 14, 2007, the United States Coast Guard issued its Environmental Crimes Voluntary Disclosure Policy (the "Policy"). The Policy, patterned on the existing policies of the Department of Justice ("DOJ") and the Environmental Protection Agency, may provide companies a mechanism to potentially avoid prosecution by establishing a dynamic "compliance management system" and fostering a proactive atmosphere of discovery and reporting of noncompliances. Specifically, if the conditions discussed below are met, the Coast Guard can award "Disclosure Credit" and exercise its enforcement discretion and forego reporting the violation to the DOJ for prosecution. While the Policy is a positive development, it is not a panacea - the DOJ can still choose to prosecute environmental crimes cases without a referral from the

Coast Guard. In addition, the Coast Guard may still recommend the prosecution of individual managers or employees.

Compliance Management System

The first step to qualification under the Policy is for a company to establish a compliance management system ("CMS") to encourage employees to prevent, detect and correct violations of noncompliance on a daily basis. Due to the numerous variables which distinguish companies, there is no set format for a CMS, however, the Coast Guard will take several factors into account when assessing a particular company. Generally, the CMS must reflect a company's due diligence in preventing, detecting and correcting violations. In accordance with the Policy, this is demonstrated by a CMS that contains:

- Policies and standards that will assist employees in meet-

ing requirements under environmental laws, regulations, and other enforceable agreements;

- An assignment of overall responsibility within the company for compliance with policies and standards onboard each vessel;
- A system of monitoring and auditing that is designed to correct violations and a procedure for employees to report violations without fear of retaliation;
- A requirement for periodic evaluations of the CMS;
- A training program that effectively conveys the company's standards and procedures to all employees;
- Incentives to managers and employees to act in accordance with the compliance policies, standards and proce-

dures, including enforcement through disciplinary mechanisms; and

- Procedures to promptly correct any violation and to modify the system to prevent future violations.

Awarding Disclosure Credit

Initially, any violation must have been discovered through either an environmental audit or an acceptable CMS as discussed above in order to qualify under the Policy. The Coast Guard will then consider eight separate factors in the exercise of its enforcement discretion and will award Disclosure Credit, the amount of which will determine the Coast Guard's final action in a particular situation. These factors are summarized below:

Voluntary Discovery - The violation must have been discovered voluntarily and not through legally mandated monitoring or sampling requirements under a statute, regulation, judicial or administrative order, or consent agreement.

Prompt Disclosure - Violations must be reported within 21 calendar days. This time limit, however, is inapplicable if a statute or regulation requires that a report be made within a particular time limit. The 21-day limit is triggered when an officer or employee of the company "believes" that a violation may have occurred. This time can be expanded in situations where multiple vessels may have the same issue or when complex circumstances exist on a case-by-case basis.

Discovery and Disclosure Independent of Government of Third Party Plaintiff - The violation must

be discovered and disclosed to the Coast Guard before the commencement of a federal, state or local agency inspection or investigation; notice by a third party; the reporting of the violations to the Coast Guard or other government agency by a "whistleblower," rather than by one authorized to speak on behalf of the company; or imminent discovery of the violation by a regulatory agency.

Correction & Remediation - The violation must be corrected within 60 calendar days from the date of discovery, or as expeditiously as possible. In certain circumstances, the company may be required to enter into a written agreement, administrative consent order, or judicial consent decree where compliance or remedial measures are complex or a lengthy schedule is predicted.

Prevent Recurrence - The company must agree to take steps to prevent recurrence of the violation after it has been disclosed. Preventive steps may include, but are not limited to, improvements to the company's environmental auditing efforts or CMS.

No Pattern of Violation - If the specific violation has occurred in the previous three years involving the same vessel or within the previous five years as part of a pattern involving multiple vessels, the company is barred from receiving Disclosure Credit.

Other Violations Excluded - If the violation resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the environment, then the compa-

ny will be unable to qualify for Disclosure Credit under the Policy.

Cooperation - As with all interactions with governmental agencies, full cooperation is essential to receiving discretionary treatment.

Conclusion

The formal establishment of the Environmental Crimes Voluntary Disclosure Policy is significant in that companies that value compliance, and particularly environmental compliance, and have a stringent compliance program in place, are now at an advantage. Advice of counsel should be sought to verify that the CMS meets the requirements of the Policy, and in advance of a disclosure, to confirm the disclosure meets the requirements of the Policy. This will help ensure that the company and its employees are protected to the maximum extent possible when disclosing potential environmental crimes to the Coast Guard. ■

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