CRISIS AVERTED: HOW THE USCG ENVIRONMENTAL CRIMES VOLUNTARY DISCLOSURE POLICY CAN SHIELD AGAINST PROSECUTION

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A vessel owner or operator discovers a (potential) environmental violation; now what? As the saying goes, the cover-up is worse than the crime.

Over 13 years since its inception, the U.S. Coast Guard (USCG) Environmental Crimes Voluntary Disclosure Policy (the Policy) remains a valuable mechanism in avoiding the risk of prosecution of environmental crimes by the U.S. Department of Justice (DOJ). If used properly, the Policy can help avoid a criminal prosecution when a (potential) violation of federal environmental law is discovered by a company, including traditional MARPOL violations (e.g., the improper handling of bilge and ballast water, the failure to use compliant low-sulfur fuel).[1]

HOW DOES THE POLICY WORK?

The Policy is intended to encourage “self-policing” and reward, with the avoidance of criminal prosecution, responsible companies who use effective compliance systems. Under the terms of the Policy, if a vessel owner or operator satisfies the Policy's requirements and reports a (potential) violation of U.S. federal environmental law, the USCG “will not recommend” to the DOJ or other prosecuting authority that criminal charges be brought against the disclosing entity. To qualify under the Policy, the disclosing entity must satisfy each of the following conditions:

- “Voluntary” discovery of the violation through an “environmental audit” or a “compliance management system.”
- Prompt written disclosure of the violation to the USCG, within 21 days of discovery.
- Discovery and disclosure “independent” of government or third-party plaintiff.
- Correction and remediation within 60 calendar days from the date of discovery or “as expeditiously as possible.”
- Prevention of recurrence, for instance, through improvements of the disclosing entity's environmental auditing efforts.

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- No “pattern of violations,” i.e., the specific or related violation must not have occurred within the past three years if involving the same vessel or five years if involving multiple vessels owned or operated by the same entity.[2]
- “Cooperation” with the USCG, i.e., preserving evidence and providing information necessary to determine the applicability of the Policy.[3]

HOW TO UTILIZE THE POLICY?

If a vessel owner or operator detects (through an “environmental audit” or a “compliance management system”) and voluntarily discloses a (potential) environmental law violation, the USCG will evaluate the disclosure to determine whether the Policy's conditions have been satisfied. To ensure the vessel owner or operator is able to invoke the Policy successfully, K&L Gates spearheads the voluntary disclosure efforts immediately following a discovery of a (potential) violation by engaging in a thorough independent shipboard investigation, followed by a comprehensive Voluntary Disclosure Report to the USCG.[4]

K&L Gates has extensive experience in guiding vessel owners and operators through the voluntary disclosure process. Indeed, K&L Gates attorneys submitted one of the first Voluntary Disclosure Reports on behalf of a vessel owner and operator, shortly following implementation of the Policy. We have since successfully handled dozens of such disclosures, leading independent onboard investigations while vessels were underway or in port throughout the United States and abroad, in countries including Panama, Guatemala, Mexico, the United Kingdom, Germany, Belgium, the Netherlands, Malta, Spain, Gibraltar, Turkey, Israel, South Africa, India, and Hong Kong.

WHAT TYPES OF CASES TYPICALLY FALL WITHIN THE POLICY?

The below examples of cases handled by K&L Gates demonstrate the types of issues and (potential) violations that have been discovered, investigated, and reported successfully pursuant to the Policy.

Example A

During an internal audit, a crewmember reported to the vessel's technical superintendent that the vessel's oil content meter (OCM) was “malfunctioning.” Upon investigation, the superintendent discovered that one of the engineers had tampered with the OCM, resulting in the unit's failure to detect the oil content of the processed bilge water.

Example B

The vessel owner received an anonymous email via its SMS confidential reporting system containing several photos of the vessel's oily water separator (OWS). The email revealed a “concern about oil pollution” through the bypassing of the vessel's OWS via a system that presented a “false fresh water sample” to the OCM.

Example C

During an internal audit, the superintendent discovered that the vessel's engineering crewmembers had “bypassed” the OWS using a portable pump and hoses to transfer bilge waste to the vessel's sewage treatment system for direct discharge overboard.

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In each of the above cases, K&L Gates attorneys conducted a thorough independent onboard investigation and submitted a detailed Voluntary Disclosure Report to the USCG delineating the findings of the investigation and the remedial measures taken to prevent recurrence and to ensure future compliance. Most importantly, following the submission of these reports and because the terms of the Policy were satisfied, the USCG did not refer the matters to the DOJ for criminal prosecution against the owner or operator.

For additional information on the Policy and how K&L Gates can assist in protecting a vessel owner or operator from prosecution of (potential) violations of U.S. federal environmental law, please contact us.

FOOTNOTES

[1] The DOJ has been prosecuting vessel owners, operators, and crewmembers for MARPOL and related criminal offenses for more than 25 years, with fines and prison sentences growing each year. In fact, fines in recent years have been as high as US$40,000,000.

[2] Certain violations are excluded from the Policy, for instance, those resulting in “serious actual harm” or presenting an “imminent and substantial endangerment” to human health or the environment.

[3] The Policy does not protect individuals who have committed criminal violations, but it does apply to corporate entities that qualify under its terms.

[4] Each matter requires a careful evaluation of the application of the Policy. K&L Gates routinely assists clients with promptly investigating discovered concerns and determining the proper course of action.

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