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Client Alert:
Environmental

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May 14, 2012

More Environmental Cases are Going Criminal: How to Protect and Prepare-The Value of Audits and Compliance Programs

Those operating in industries highly regulated by federal, state, and local environmental protection agencies have seen an increase in the number of violations being escalated from administrative notices of violations and fines, or even civil penalties, to criminal prosecutions. Criminal prosecutions can cost companies substantial financial penalties — sometimes millions of dollars in fines alone — plus probation oversight for several years, along with major capital improvements to bring facilities back into compliance. This is in addition to the possibility of being disqualified from bidding on government contracts. With the added potential for loss of liberty, the stakes are even higher for executives and employees. This trend toward criminal prosecution for violations that have traditionally been treated through the administrative process or civilly, especially for companies just trying to do the right thing while keeping their doors open for business is disturbing.

Avoiding a criminal case is as simple as staying in compliance. Of course, as most of the regulated companies and their executives will tell you, staying in compliance is anything but simple. Equipment breaks, parts wear out, and inclement weather can all lead to noncompliance. Keeping the line running to enable a company to stay in business (and keeping employees off of the unemployment line) often leaves little, if any, room for lengthy downtime for repair. For most companies, 100% compliance 100% of the time is much harder than it sounds. The good news is that the government understands this, and in appropriate cases, it will exercise its discretion not to prosecute. But, the government understandably expects companies to anticipate, and have plans in place to avoid, non-compliance. There are several ways lawyers can help their clients in this regard.

The first method is to conduct an environmental audit to determine if the company is complying with the multitude of ever changing regulations. Both the state and the federal government have policies that basically provide for the reduction of penalties if the company voluntarily undertakes to conduct a compliance audit in good faith (e.g., not the result of quickly disclosing because EPA was investigating the company or conducting required monitoring), promptly reports any violations discovered (21 days under the federal policy), and then expeditiously corrects those violations (generally 60 days under federal policy) and prevents the recurrence of future violations. There may also be a recommendation that the case not be pursued criminally. The government also generally refrains from asking for a copy of the audit report. The procedures to follow to take advantage of the State and Federal policies differ slightly, so it is important to follow both procedures if you want to take advantage of both the state and federal incentives. Note that some violations are ineligible, such as repeat violations and violations that result in serious actual harm, present an imminent and substantial endangerment, or violate an order or consent agreement.

What happens if EPA decides to pursue a criminal enforcement action? First, a federal prosecutor will be asked to review the case and decide whether to seek an indictment. The United States Attorneys' Manual delineates the government's Principles of Federal Prosecution of Business Organizations. One factor prosecutors consider when deciding whether to prosecute is whether the company has an effective compliance program — that is, has it anticipated and effectively planned to avoid (and to address) non-compliance from the outset? Notably, of the 74 organizations sentenced in 2011,

only four (5.4%) had an effective compliance program, according to the United States Sentencing Commission. In 2010, none of the organizations sentenced had one. While there are several other factors considered in charging a company with a crime, this data suggests a clear correlation between the decision to prosecute and the absence of an effective compliance program.

Prosecutors recognize that no program could ever prevent all criminal activity. They also recognize that one size does not fit all. Small companies are free to develop a flexible program that meets their unique operational needs. Larger companies, on the other hand, are expected to have more formalized policies and protocols for implementing them, but they too remain free to tailor the program to suit their operations. Regardless of the company's size, however, the program cannot simply exist on paper. The program must be actively implemented daily as a part of doing business, and it must be designed to detect the particular types of misconduct most likely to occur in the company's line of business. In the environmental field, EPA has long offered specialized guidance for each industry it regulates, which can serve as the starting point for developing a program for the company. Once the program is in place, management must be knowledgeable about the program, exercise reasonable oversight, and ensure that employees are trained and incentivized to comply.

Equally as important as the day-to-day implementation of the compliance program is how the company responds to actual or potential violations. Where there are actual violations, a company's timely and voluntary disclosure of the violation, and its subsequent cooperation with prosecutors and law enforcement, are factors in the charging decision. In order to disclose useful information and meaningfully cooperate with the government, companies are well served to conduct internal investigations. In many instances, a full-scale investigation by outside counsel is unnecessary. But, for potentially serious matters, bringing in an experienced legal team will help the company quickly and thoroughly investigate the issue. Not all internal investigations will result in a finding of misconduct, and corporate management should not view such investigations as wasted efforts. They almost always identify areas of concern and offer ways to improve operations. They also help establish evidence of the company's ongoing commitment to a culture of compliance, which is important if a later investigation results in a disclosure to the government.

In some cases, a company may be indicted and ultimately convicted despite having an effective compliance program. All is not lost. Compliance programs still have value on the back end of the case. Since corporations cannot be sent to jail, punishment primarily comes in the form of onerous probation conditions, debarment from working on publicly-funded projects, and a hefty fine. To determine the fine, federal courts start with the recommended fine calculated under the United States Sentencing Guidelines. The severity of the recommended fine is driven by the organization's "culpability score," a points-based system that approximates culpability based upon a number of rigid factors. One mitigating factor that can reduce the culpability score is the existence of an effective compliance program. In the right case, having such a program can reduce the company's culpability score — and its recommended fine — by nearly 50%.

And, if that is not enough incentive for a corporate client to implement a compliance program, the court can order the company to design a court-approved program and submit to regular oversight to ensure that it is properly implemented. So, in the end, foregoing a compliance program today may increase the likelihood of being criminal charged, result in a higher recommended fine, and the company could still be forced to adopt a compliance plan anyway. Implementing one is a smart investment for the client's future.

For additional information on investigations, compliance programs or environmental audits, please contact your Butzel Long attorney or the authors of this Client Alert.

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