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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Implementation of the Environmental Protection Agency's
Self-Policing Policy for Disclosures Involving Potential Criminal Violations

FROM: Earl E. Devaney, Director *Earl E Devaney*
Office of Criminal Enforcement, Forensics, and Training

TO: All EPA Employees Working in or in Support of the Criminal Enforcement
Program

Introduction

In December 1995, the Environmental Protection Agency (EPA) published a policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." Since then an increasing number of companies have voluntarily come forward to disclose environmental violations in order to receive the relief available through that Policy.

Drawing on the history and experience of the criminal enforcement program, the purpose of this document is threefold: 1) it is designed to parallel the nine conditions outlined in the Self-Policing Policy, 2) it explains how those conditions apply to potential criminal cases, and 3) it provides guidance for consistent consideration of requests for relief under the Policy.¹

Furthermore, in an effort to ensure the integrity and meaningful application of the Self-Policing Policy between EPA and those entities making disclosures involving potential criminal violations, this guidance further clarifies the conditions that are expected to be met by a disclosing entity before the Agency will make a recommendation against criminal prosecution of the disclosing entity.

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¹ This memorandum is intended only as internal guidance to EPA. It is not intended to, does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor does this guidance in any way limit the lawful enforcement prerogatives, including administrative or civil enforcement actions, of the Department of Justice and the Environmental Protection Agency.

This guidance assumes a working knowledge of both the Self-Policing Policy and the supplemental Agency guidance issued in keeping with that policy, and should be read and considered with these in mind.

Procedures

Under this policy, requests for relief in cases giving rise to potential criminal violations will be considered by the Voluntary Disclosure Board (VDB or Board) in the Office of Criminal Enforcement, Forensics and Training (OCEFT), located at EPA Headquarters. The Board will be chaired by the Deputy Director, (OCEFT), and comprised of the Director, Criminal Investigation Division (CID); Director, Legal Counsel and Resource Management Division (LCRMD); OCEFT's Special Counsel; and a representative from the Environmental Crimes Section, Department of Justice, or their designees. The Board will receive, monitor and consider all requests for treatment under the Policy, and make recommendations to the Director of OCEFT who will serve as the Deciding Official in all cases where disclosure indicates potential criminal violations.

Disclosure and request for relief under the Policy in potential criminal cases may be made to the Board directly, or, if disclosure and request are made through the Special Agent-in-Charge (SAC) or EPA regional enforcement personnel, the disclosure and request shall be forwarded immediately to the Board for initial evaluation and monitoring purposes.

Except in the rare case in which the existence and extent of criminal liability is readily apparent at the time of disclosure, the Board shall instruct the SAC to initiate a criminal investigation. During the course of the investigation, the Board will routinely monitor the progress of the investigation through the SAC, as necessary to ensure that sufficient facts have been established to support (or oppose) a recommendation that relief under the policy be granted. At any time during the course of the investigation, the Board may consider the recommendation of the SAC and/or Regional Criminal Enforcement Counsel as to whether or not the required policy conditions have been met by the disclosing entity.

The Board shall have sole authority to make a recommendation to the Deciding Official.

Upon receiving the Board's recommendation, the Deciding Official will make his final recommendation to the appropriate United States Attorney's Office. The recommendation of the Deciding Official, however, is only that -- a recommendation, and shall not affect the independent exercise of prosecutorial discretion by the Department of Justice.

Application of Criteria

During the course of monitoring and reviewing a case and before final recommendation, the Board will be guided by the conditions (or criteria) set forth in the Self-Policing Policy².

When considered in the context of a potential criminal case, the Self-Policing Policy criteria require clear efforts on the part of the disclosing entity to discover, disclose and correct the shortcomings that gave rise to the violations.

While the policy conditions are applicable to all voluntarily disclosed violations, the relief made available in potential criminal cases differs significantly from the relief made available in civil cases. Therefore, the application of the nine conditions set forth in the Policy will be considered by the Board as follows:

1. Discovery of the Violation through an Environmental Audit or Due Diligence

In a potential criminal case, discovery of the violation may be made through an environmental audit, due diligence, or "voluntary self-evaluation." A disclosure will not be denied consideration solely because it was not the result of an environmental audit or due diligence program. Although the Audit Policy will not be formally invoked in such cases, the same considerations may be applied by the Board in making a recommendation whether or not to seek prosecution. Therefore, any good-faith disclosure made before the official opening of a criminal investigation may be accepted and considered by the Board.

2. Voluntary Discovery

In order to be considered "voluntary" under the Policy, discovery of a violation may not be made through a monitoring or sampling procedure that is required by statute, regulation, permit, judicial or administrative order or consent agreement.

However, if an entity discovers potential criminal conduct through a systematic review of information generated by such monitoring or sampling, and that review would not otherwise be required by law, a disclosure may constitute "voluntary" discovery and be considered by the VDB.

² 60 Fed. Reg. 66706, December 22, 1995 at 66711, C.3. provides: (a) *EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied ... [those conditions being - 1. Systematic discovery; 2. Voluntary discovery; 3. Prompt disclosure; 4. Discovery and disclosure; 5. Correction and remediation; 6. Prevent recurrence; 7. No repeat violations]... so long as the violation does not demonstrate or involve: (i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or (ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.* (b) *Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.*

3. Prompt Disclosure

Disclosure of a (possible) violation should be made within 10 days of discovery. In rare circumstances, the Board may exercise the flexibility to accept later disclosures where "reporting within 10 days is not practical because the violation is complex and compliance cannot be determined within that period" so long as "the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status."³ However, if a delay beyond the 10 days impairs the ability to effectively secure evidence of a crime, the Board will deny the disclosure and request for relief.

In circumstances where multi-facility or company-wide audits are being conducted and consolidated reporting is appropriate, the Board may accept supplemental disclosure as long as the initial disclosure was timely under the Policy.⁴

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

This condition requires that disclosure be made not only prior to the opening of a formal criminal investigation, but before the Criminal Investigation Division pursues promising investigative leads from independent sources. This includes, but is not limited to, a citizen or "whistleblower" complaint, commencement of a federal, state or local agency inspection or investigation, or imminent discovery of the violation by a regulatory agency.⁵

If a case has not been officially opened, but the SAC can demonstrate to the Board that the investigating agent was actively pursuing a promising investigative lead, the Board may determine that this condition has not been met. In making its determination, however, the Board will strictly apply CID policy that precludes more than eight hours of investigation prior to officially opening a case.⁶

5. Correction and Remediation

This condition holds the disclosing entity accountable for its commitment to correct the underlying causes for the violation and to remedy any environmental harm caused as a result of the violation and certify this to EPA in writing within 60 days of the disclosure. EPA has recognized that some violations can and should be corrected immediately, while others may take

³ 60 Fed. Reg. At 66708.

⁴ Questions concerning "prompt disclosure" and "supplemental disclosures" are discussed in detail in Audit Policy Interpretive Guidance, January 1997, Office of Regulatory Enforcement, U.S. Environmental Protection Agency, at p. 3.

⁵ See 60 Fed. Reg. at 66711.

⁶ EPA Special Agent Manual, Chapter 1, Section IV.B.3.

longer than 60 days to correct (particularly where capital expenditures are involved, or for technological reasons). If more than 60 days is necessary to correct the violation(s), the disclosing entity must so notify EPA in writing prior to the conclusion of the 60 days.

In determining whether this condition has been met, the Board may coordinate and consult with OECA's Quick Response Team (QRT) and other EPA offices, as appropriate. When compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required, the Board may refer the disclosing entity to the QRT or appropriate EPA enforcement office to enter into an administrative consent order or judicial consent decree in order to meet condition five (5) of the Policy.

Under circumstances in which significant economic benefit appears to have accrued to the disclosing entity as a result of the violation(s), the Board will, after making its determination as to eligibility under the Policy, refer the matter to the QRT or appropriate EPA enforcement office for appropriate administrative or civil action to recover the economic benefit.

6. Prevent Recurrence

To assure the Agency of the disclosing entity's commitment to prevent recurrence of the violation for which it is requesting relief under the Policy, the disclosing entity must affirmatively agree in writing to take steps to prevent such recurrence. This may include making improvements to its environmental auditing or due diligence efforts.

The written assurance must be sufficiently specific for the Board to make a reasoned assessment as to the adequacy of the prevention efforts. Disclosing entities are encouraged to provide a very detailed plan at the outset to assist the Board in the expeditious processing of disclosure requests. Generally, the Board will make its recommendation on the information submitted, but may seek additional information from the disclosing entity when necessary to make a determination as to this condition.

7. No Repeat Violations

The Board will review, as part of its consideration of any request under the Policy, the compliance and enforcement history of the requesting entity. This condition is not limited to previous criminal violations. The Board will be guided by the conditions set forth in the Policy.⁷

⁷ 60 Fed. Reg. at 66712 provides: *7. No Repeat Violations. The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is: (a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or (b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.*

8. Other Violations Excluded

In keeping with the Policy, the Board will not consider requests for relief under the Policy in potential criminal cases in which serious actual harm or imminent and substantial endangerment to human health or the environment has occurred.

When the SAC believes such harm or endangerment appears to be evident in a case presented for treatment under the Policy, the SAC shall provide to the Board a written description and analysis of the case, with concurrence and input by the appropriate EPA program office and the Regional Criminal Enforcement Counsel, explaining why the harm or endangerment should preclude consideration under this condition of the Policy.

9. Cooperation

Cooperation in a criminal investigation shall include, at a minimum, access by CID Special Agents to the specific information contained in the Audit or Due Diligence Program that revealed the violation(s), access to the individuals who conducted the audit or program, access to all employees of the disclosing entity, and access to all requested documents. Such cooperation may be effected directly by the company or through counsel. Full cooperation does not require that the entity waive legitimate legal privileges available to it, but does require that any privilege issues raised during the course of the criminal investigation be made in good-faith. The Board may include in its final recommendation considerations pertaining to bad-faith claims of privilege that impact the progress and result of criminal investigations.

Conclusion

The professional credibility of the criminal program and of EPA's greater enforcement program is at stake in the implementation and execution of the Self-Policing Policy. Therefore, we must do our utmost to fairly present and consider all disclosures and requests for relief brought to us in the criminal arena. Successful implementation of the Policy will serve the interests of all involved. The regulated community receives benefits for its efforts to self-police and provide disclosure; the criminal program advances its mission to detect and deter environmental crime; the Agency augments its goal toward greater compliance; and the American public enjoys the benefits of a safer, cleaner environment.