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# NC Chamber Environmental Compliance Conference

EFFECTIVE EHS COMPLIANCE PROGRAMS – HOW TO BUILD THEM AND WHAT THEY CAN DO TO HELP

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January 28, 2016



TROUTMAN SANDERS

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# Topics

- Importance of Compliance Programs
  - Environmental Statutes with Criminal Provisions
  - Factors for Deciding Whether to Prosecute Corporations
  - Responsible Corporate Officer Doctrine
- DOJ's Minimum Requirements for an Effective Compliance Program
- Pervasiveness of Wrongdoing within Organizations and “Complicity of Management”
- Timely and Voluntary Disclosure of Violations
  - Requirement to identify culpable individuals
- Takeaways

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# EHS Statutes with Criminal Provisions

- Clean Water Act – negligent violations
- Clean Air Act – negligent releases of HAPs resulting in imminent endangerment
- RCRA – knowing violations and knowing endangerment
- TSCA – knowing violations
- FIFRA – knowing violations
- Endangered Species Act – knowing violations
- OSHA – willful violation resulting in a death

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# Other Criminal Violations that Can Arise

- Aiding and Abetting – 18 U.S.C. § 2
- Conspiracy – 18 U.S.C. § 371
- False Statement to an Investigator – 18 U.S.C. § 1001
- Obstruction of Justice – 18 U.S.C. § 1501
- Perjury – 18 U.S.C. § 1621

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# Doctrine of Respondeat Superior

- From the U.S. Attorney's Manual:
  - “Under the doctrine of *respondeat superior*, a corporation may be held liable for the illegal acts of its directors, officers, employees and agents” if the actor's actions:
    - Were within the scope of his duties; and
    - Were intended, at least in part, to benefit the corporation.
  - Scope of Duties – is the task at issue of the type that the employee is authorized to perform?
  - Benefit to Corporation
    - Corporation does not have to be primary intended beneficiary
    - Corporation does not actually have to profit

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# Hypothetical

- WWTP operator (Billy Bob Thickhead) decides to falsify monthly effluent sampling results.
  - Knowing violation of CWA by the employee
- EPA Inspector asks WWTP operator to describe how he takes the monthly samples and the operator lies.
  - False statements to investigator
  - Potentially obstruction of justice
- What if the operator has been doing this for 20 years and his superiors never discover it?
  - Is that a negligent violation of CWA by the operator's superiors?

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# DOJ's Factors for Prosecution of Corporations

- Nature and Seriousness of Offense – including risk to public
- *Pervasiveness of wrongdoing in corporation and complicity of management*
- History of previous misconduct
- *Timely and voluntary disclosure of wrongdoing*
- *Existence and effectiveness of pre-existing compliance program*
- Remedial actions taken in response to discovery of violation
- Disproportionate effect of prosecution on innocent parties
- *Adequacy of prosecuting responsible individuals*
- Adequacy of civil enforcement

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# In Practice

- Two Scenarios

- Company discovers the issue on its own and launches an internal investigation.
  - Goal is to develop facts and evidence sufficient to determine if a criminal act occurred.
  - If so, voluntary disclosure to the government is likely.
  - Almost always accompanied by an extensive case for why prosecution of the company is not warranted based on DOJ's factors.
- Government is investigating on its own and the company learns of the investigation at some point.
  - Again, companies almost always launch their own internal investigation.
  - Goal is to do the government's work for them in order to show cooperation and hopefully avoid prosecution of the corporation itself.



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# Responsible Corporate Officer Doctrine

- Strict criminal liability can be imposed on senior executives in a company for the acts of employees if:
  - By reason of corporate position
  - Executive had authority and responsibility
  - To prevent or correct violations but did not
  - Unless – executive was powerless to do so.
- Executive does not have to commit the act directly.
- “Bad” intent and actions are imputed to the executive based on responsibility for controlling a corporate function and failing to do so.

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# Hypothetical

- Recall Billy Bob Thickhead
- Chief Compliance Officer
  - Has responsibility to ensure compliance with environmental laws.
  - Has been in the position for 10 of the last 20 years.
  - Repeated refuses to fund EHS compliance auditing program.
- Director of EHS
  - Also been in the position for 10 of the last 20 years.
  - Can produce evidence of asking for funding for an EHS auditing program and consistent rejections by upper management.

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# Requirements for Existing Compliance Programs

- U.S. Sentencing Guidelines of Prosecution of Corporations
- Two High Level Requirements
  - Company must exercise due diligence to prevent and detect criminal conduct
  - Company must promote an internal culture that encourages ethical conduct and compliance with the law
- Details
  - Company must have established standards and procedures for its compliance program
  - Governing authority of the company must be knowledgeable about the program

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# Requirements for Existing Compliance Programs

- Details (cont'd)
  - High level personnel in the company must ensure the program is effective
    - Must have one person who has overall responsibility for the program
  - Specific Individuals (can be more than one)
    - Must have day-to-day responsibility for compliance
    - Must be regular reporting by this individual(s) to High Level Personnel in the company AND must be reporting to governing authority as appropriate
    - Must have:
      - Adequate resources and authority
      - Direct line of communication to governing authority or subgroup thereof
  - Compliance organization cannot include people who corporation knew or should have known have engaged in:
    - Illegal activities
    - Conduct that is inconsistent with compliance

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# Requirements for Existing Compliance Programs

- Details (cont'd)
  - Company must communicate requirements of the program to employees through training.
  - Company Must Take Reasonable Steps To:
    - Use monitoring and auditing programs to detect criminal conduct
    - Perform periodic assessments of the adequacy of its compliance program
    - Have and publicize existence of a system for reporting questionable conduct to management anonymously.
  - Have appropriate incentives and disciplinary measures in place to encourage compliance and discourage turning a blind eye to compliance issues.
  - After criminal conduct is detected – take steps to stop it and prevent it
    - Including modifications to the compliance program to prevent similar occurrences again.
  - Assess operations over time and ensure the program is sufficient to address current non-compliance risks.

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# Pervasiveness of Wrongdoing and Culpability of Management

- Pervasiveness depends on seriousness of the issue – the more serious it is, the fewer people who need to be involved for the problem to be “pervasive” throughout a company.
- Culpability of Management
  - Corporations are directed by their management, and management is responsible for a culture in which criminal conduct is either discouraged or “tacitly encouraged.”
  - Condoning Criminal Conduct – If an individual knows of another’s criminal conduct and fails to take reasonable steps to stop or prevent it.
  - Willful Ignorance – Failing to initiate an investigation as to whether unlawful conduct occurred after having sufficient information for a reasonable person to believe investigation is warranted.
  - Implications for individual criminal liability via responsible corporate officer doctrine.



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# Timely & Voluntary Disclosure of Violations and Cooperation with the Government

- EPA's Self-Disclosure Policy (Civil Enforcement)
  - Looks a lot like DOJ's factors prosecution of corporations.
  - Timeliness – must disclose violations within 21 days of date you knew or should have known of existence of the violation.
  - Corrective action – 60 days to correct the violation.
  - Take steps to prevent recurrence.
  - Repeat violations ineligible.
  - Cooperation with agency investigation.
  - Voluntary – cannot discover the violation through legally required monitoring, sampling or auditing.
  - Independent discovery and disclosure (difference from DOJ) – must disclose before regulators or third parties would have found violation on their own.

# Timely & Voluntary Disclosure of Violations and Cooperation with the Government

- Department of Justice (Criminal Enforcement)
  - EPA has civil and criminal enforcement divisions, but DOJ and US Attorneys' Office make the final decision about prosecuting cases.
  - Independent Discovery and Disclosure – not a requirement
    - Common for a criminal investigation to be pending independent of a self-disclosure.
    - Focus is on whether the company performs a complete investigation of the issue and lays its cards on the table for the government.
  - Yates Memo (Sept. 2015)
    - DOJ says corporations get no credit for cooperation unless they identify the individual wrongdoers.
    - Again – corporations can only act through individuals. Punishing the individuals prevents future incidents.
    - DOJ says this is nothing new. If so, then why the memo?

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# Timely & Voluntary Disclosure of Violations and Cooperation with the Government

- The Trouble with the Yates Memo
  - Lawyers typically handle these investigations to preserve the opportunity for the company to assert the attorney-client privilege regarding the results.
    - Raises an important point about who holds the privilege
      - The company, not the employee.
    - But, if it is foreseeable that the interests of the company and an employee might diverge, employees have a right to know that before an interview begins.
  - Upjohn Warnings – Lawyers for the company must inform employees as to:
    - Who the lawyer represents;
    - Who controls the privilege over content of conversation; and
    - Right of the employee to have their own counsel.

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# Timely & Voluntary Disclosure of Violations and Cooperation with the Government

- The Trouble with the Yates Memo (cont'd)
  - Issue – Given the requirement to identify culpable individuals to receive cooperation credit, it seems increasingly likely that the company's interest could diverge from the employee's.
    - Do Upjohn warnings have to come earlier in the process?
  - Imagine how an Upjohn warning affects a conversation and how it can increase the difficulty in getting to the bottom of a situation.
    - A non-lawyer could conduct the interview, but the results are not privileged.
  - Could the policy of pursuing culpable individuals frustrate the larger goal of encouraging corporations to investigate alleged wrongdoing and make a full disclosure to the government?

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# Takeaways

- Effective EHS compliance programs are a way for companies to protect themselves and their employees from “rogue actors.”
  - Auditing provides the mechanism for identifying rogue individuals.
  - Results can help to spot trends and opportunities for improvement.
  - Companies with a robust program can show they were being diligent in the event a bad actor goes undetected.
  - Management is less subject to claims of willful ignorance, condoning bad behavior or failing to prevent it.
  - Employees have an infrastructure and policies to follow in the event they see something troubling.

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# Takeaways

- Focus on prompt disclosure and corrective actions in civil and criminal contexts.
  - In either scenario, companies need to respond quickly to issues that are identified through auditing or are raised by employees.
    - EPA policy only allows 21 days from discovery to disclosure.
  - Issue tracking is essential – once a violation is identified, it MUST be resolved.
    - Otherwise you run the risk of a “knowing violation.”
- Regular re-evaluation of the program is essential.
  - A company’s operations change over time, as does the regulatory climate. Compliance program needs to keep up.



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# Takeaways

- Things can get very tricky if you discover a significant compliance problem.
  - NC's new audit privilege does not apply in a criminal context.
  - Early involvement of in-house or external counsel is critical to establish evidentiary privileges.
  - Need to be careful in terms of how you gather information.
    - Yates memo may push initial work towards documentary evidence, with employee interviews left to the end.
    - Need for Upjohn warnings likely means you will only get one shot at a witness interview.
- Sliding scale for “how much is enough” based on company size.
  - But remember the situation you'll be in.
  - You are going to have to convince a skeptical enforcement official that the company did everything it could reasonably do.

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# Takeaways

- Back to the Hypothetical
  - How could an auditor or in-house compliance person figure out what Mr. Thickhead is up to?
    - Are data too consistent?
    - What do Billy Bob's O&M expenses for the WWTP look like?
  - If someone at the facility catches on to the problem, is there a mechanism to communicate that suspicion up the chain of command quickly and document that it has been addressed?
  - Is management incentivized to take action and not turn a blind eye?
  - Can the company provide other examples of where its program has worked as intended?

# Takeaways



“There is a difference between knowing the path and walking the path.”

- Morpheus

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