

US Coast Guard – Formal policy on voluntary disclosure of MARPOL violations

The United States Coast Guard has issued a formal policy on voluntary disclosure that applies to MARPOL violations that may result in criminal prosecution of owners and operators of foreign flag vessels in the United States. The policy is similar to existing policies of other U.S. government agencies and the US Justice Department in describing the factors that will be considered in evaluating a violation for possible criminal investigation or prosecution.

These policies **require** companies to have in place a compliance management system to prevent, detect and correct violations of environmental regulations. If implemented, the Shipping Industry Guidance on Environmental Compliance published by International Chamber of Shipping (ICS) and International Shipping Federation (ISF) would appear to meet all the requirements for a compliance management system as set out in the USCG policy. The shipping industry guidance can be downloaded at: www.marisec.org/environmental-compliance

The USCG voluntary disclosure policy states that if a company promptly and voluntarily discloses a violation discovered within the company's environmental compliance plan including ship audits to the Coast Guard, and the disclosure otherwise meets the requirement of the Coast Guard policy, the Coast Guard will not recommend prosecution of the company. However, it is important to note that such decisions will be case-specific, and ultimate discretion on whether or not to undertake a criminal investigation still rests with the US Coast Guard. The Coast Guard investigates violations and can refer matters to the Justice Department for further investigation, typically through the use of a Grand Jury. The Coast Guard policy now makes it clear that the Coast Guard may recommend leniency in certain cases before the matter goes to the Justice Department.

Other important requirements stated in the policy are:

- The violation must be discovered and identified before the Coast Guard or any other government agency likely would have identified the problem either through its own investigative work or from the information received through a third party;
- The violation must be reported in writing within 21 days of discovery;
- The violation (or a related violation) has not occurred previously within the past three years involving the same vessel and has not occurred within the past five years as part of a pattern involving multiple vessels owned or operated by the same entity.

Under US law, foreign flag shipowners and operators can be and often are prosecuted for entry into US waters with a false oil record book that conceals discharges of oily wastes which have taken place outside of US waters. Discharges in violation of MARPOL in international waters are violations that are subject to the law of the flag state but the United States does not have jurisdiction to prosecute foreign flag operators for the discharge itself because the vessels were outside of US waters at the time of the discharge. According to the Industry Guidance on Environmental Compliance, "non-compliance with MARPOL regulations should be reported to the vessel's flag administration. In the event of the discovery of evidence of intentional discharges of waste, the flag administration must be notified immediately and a request for an investigation should be initiated".

If the vessel trades to the United States, the vessel owner or operator may also consider reporting the discovery and the correction of any false entries in the oil record book to the Coast Guard in addition to the flag state, in order to comply with the voluntary disclosure policy. In deciding whether to report to the Coast Guard, prudence suggests foreign flag owners and operators should seek immediate legal advice from a lawyer familiar with the Coast Guard and Justice Department policy guidelines and MARPOL criminal prosecutions in general.

The official document can be found at: www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf

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