DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

GUIDANCE ON COOPERATION IN THE CONTEXT OF AN ENVIRONMENTAL CRIMINAL INVESTIGATION

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I. Introduction

In the context of an environmental criminal enforcement matter, a decision to litigate is seldom an easy one. The target of an environmental crimes enforcement investigation need not forego cooperation in deciding to litigate. There are always opportunities to cooperate with the government, yet ultimately decide it is in the client's best interest to litigate. The decision to litigate should be made on the basis of there being strong defenses or the anticipation that the outcome will be better or otherwise preferable in litigation, rather than in cooperation that ultimately would lead to an agreed-upon disposition. In selecting counsel, the enforcement target should recognize that each lawyer has a style just as each organization has a culture. Counsel's style should match that of the client's, as well as its expectations and culture. Counsel and the client early in the government's investigation should devise and agree upon strategy, and a key component should address cooperation.

Both the Department of Justice and EPA, as well as the Sentencing Commission, have provided guidance on the potential effect of cooperation. Recent plea agreements are also an excellent source of information.

II. Department of Justice Guidance

The earliest of federal guidance on cooperation in the context of environmental criminal enforcement was issued July 1, 1991 by the Environment and Natural Resources Division (ENRD) of the Department of Justice in its "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (Factors). The Factors were developed by ENRD to explain to the regulated community how the Department would exercise its enforcement discretion in deciding whether to bring a criminal prosecution for violation of the

environmental law. These Factors were intended to assure that such prosecutions would not discourage self-auditing, self-policing and voluntary disclosure. The Department expected the Factors to "ensure that such discretion is exercised consistently nationwide."

This guidance sets out three factors, of which cooperation is the second, preceded by voluntary disclosure and followed by preventive measures. There are, as well, three additional factors that may be relevant. The discussion of cooperation exhorts the prosecutor to consider the degree and timeliness, and states that full and prompt cooperation is essential. The prosecutor is also to consider the violator's willingness to make all relevant information available, as well as the extent and quality of its assistance in the investigation. Prosecutors are likely to point to this provision in explaining that they expect to receive a list of all potential witnesses, a copy of any report of an internal investigation, or copies of memoranda of interviews of potential witnesses that may have been conducted by counsel, investigators or others.

Also instructive is a recent memorandum by the Deputy Attorney General, Eric H. Holder, Jr., to the heads of departments and the United States Attorneys on the subject of charging corporations. Mr. Holder sets forth eight factors that prosecutors should consider in conducting an investigation, making charging decisions and negotiating plea agreements, one of which is "willingness to cooperate in the investigation of its [the corporation's] agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges. Section VI of Mr. Holder's Memorandum expands on this general principle with further commentary, pointing out that the Antitrust Division offers amnesty only to the first corporation that agrees to cooperate in the Government's investigation. This is intended to be, and certainly is, a strong incentive. Mr. Holder continues by explaining that a waiver of the attorney-client and work product protections may weigh in assessing the adequacy of cooperation. He points out the benefits to the Government of such waivers and cautions that they are not an absolute requirement, but should be considered as one factor, among others. Mr. Holder notes that this type of waiver ordinarily should encompass the factual internal company investigation and contemporaneous advice concerning the conduct at issue. Thus, only in unusual circumstances should a prosecutor seek waiver with regard to communications and work product for advice concerning the Government's investigation. The Government also will weigh whether the corporation appears to be protecting its culpable employees and agents. Although the memorandum identifies the advancing of attorneys fees as being regarded as a corporation's promise of support to culpable persons, it also notes that some states require that a corporation pay legal fees for individuals prior to a formal determination of guilt. On this issue, the memorandum concludes that "Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate."

III. Environmental Protection Agency Policy

Over the past five years, EPA has issued and then refined and modified its policy on incentives for voluntary self-policing and self-disclosure. In March of 1995, EPA issued the interim policy statement in which it set forth principles for voluntary compliance, with the proviso that entities that self-police and voluntarily disclose and self-correct violations should be assessed lower penalties than those who do not and that they also should not be recommended for criminal prosecution. The interim policy goes on to set forth seven conditions, the last of which is cooperation. This condition envisions that the entity would cooperate as required by EPA and would provide information "reasonably necessary and required by EPA" in its determination of applicability of the policy. The condition further states that cooperation could include providing all requested documents, as well as access to employees and other assistance in furtherance of the investigation.

In December of 1995, EPA issued its final policy statement, in which cooperation is identified as the last of nine conditions that a regulated entity must meet for the Agency not to seek or to reduce gravity-based penalties. Additionally, EPA explained in the preamble that regulated entities that meet all nine conditions generally will not have to fear criminal prosecution. In this iteration, EPA stated: "Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating

the violation, any non-compliance problems related to the disclosure, and any environmental consequences related to the violations." (60 Fed. Reg. 66706 at 66709 and 66712 (Dec.22, 1999))

After four years of implementing this policy, EPA in May of 1999 proposed revisions in which it proposed to add the requirement that cooperation in a criminal investigation include access to all relevant information, including the portion of an audit or documentation from a compliance management system that revealed the violations. EPA set forth its rationale, which is that it had not previously indicated under what circumstances it would request audit reports. EPA represented these proposed changes as being consistent with its practice, saying that it had not requested submission of audit reports unless necessary to apply the policy and where the information is not otherwise available. (64 Fed. Reg. 26745 at 26754 (May 17, 1999))

EPA on April 11, 2000, finalized its revised policy and carried forward the commentary about the expected scope of cooperation. (65 Fed. Reg. 19618 at 19623 (April 11,2000)). The final statement requires that where an EPA Regional official requests an audit report because it otherwise cannot determine whether policy conditions have been met, the Region must notify the Office of Regulatory Enforcement at EPA Headquarters.

The Director of the Office of Criminal Enforcement on October 1, 1997, issued to employees of the Criminal Enforcement Program a memorandum concerning the implementation of EPA's self-policing policy for disclosures involving potential criminal violations. That memorandum defines cooperation as including access by CID special agents to specific information contained in an audit or due diligence program that revealed the violations, as well as access to those who conducted the audit, all employees of the disclosing entity and all requested documents. This memorandum does not require waiver of legitimate legal privileges, but does require any such privilege issues raised be made in good faith.

IV. U.S. Sentencing Commission Guidelines

Not surprisingly, the Sentencing Commission regards cooperation as a mitigating factor in sentencing for which an organization guilty of environmental crimes qualifies for a downward adjustment if the organization fully cooperated in the investigation (reduced by three to six levels). A guilty plea before the Government is put to substantial effort and expense in trial preparation, as well as full cooperation with the prosecutors and all reasonable steps to assess responsibility and prevent recurrence is afforded a reduction by four levels. If the organization pleads guilty and cooperates in all relevant respects, except that it fails to disclose the identity of responsible individuals known to it, the reduction is two levels. The Commentary explains that full cooperation requires that the organization provide all pertinent information "known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense." (Appendix D § 9C1.1)

V. Conclusion

Although the Government certainly seeks to provide strong incentives for cooperation, ultimately a determination will be posed by defense counsel early on in strategy development and evaluated by the client based on its view of its circumstances and its culture, if an organization. Perhaps a client's initial expectations are that cooperation would extend only as far as to the return of a grand jury subpoena, but recognizing that this level of cooperation on this matter avoids waste of resources and immediate foreclosure of good will. Or perhaps the enforcement target is convinced of the absence of criminal culpability and chooses to cooperate even so far as to voluntarily disclose all it knows immediately. If, however, this certainty of innocence results in the client being poised for vigorous litigation, counsel should make clear to the prosecutors early on that this strength of resolve will result in hard-fought litigation absent a non-criminal disposition. Knowing the Government's expectations, what cooperation might afford the client, and how various demands of cooperation have unfolded and been applied in the

disposition of prior cases ultimately will inform the client's decision on cooperation.

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