

CLIENT BULLETIN

IS EMPLOYERS' VOLUNTARY SELF-AUDITS A DOUBLE-EDGED SWORD?

Federal Register # 64:54358-54361, Proposed Policy Statement Concerning the OSHA's use of Employers' Voluntary Safety & Health Self-Audits

SUMMARY: On October 6, 1999, the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, issued a proposed policy statement that clarifies the agency's use of employers' voluntary safety & health self-audits. The proposed policy statement establishes the extent, or limits, of authority that OSHA will exercise in the request and review of employers' voluntary self-audits while conducting investigations or audits.

IMPACT: Voluntary internal self-audits are a proactive method for continued improvement to any employer's Environmental, Health and Safety (EH&S) Program. In the past, OSHA has stated that its expectations were that employers would routinely use self-audits to document their monitoring of regulatory programs. Employers conducting these self-audits should act on identified issues and fully document the actions taken. In addition, there should be reviews by management, including senior executive managers. OSHA proposes that a request for internal self-audits will only be to establish the correction activity level of a program, **unless there is a serious compliance issue**. If there is a serious compliance issue, such as an injury or death, OSHA can continue to use employers' voluntary self-audits as a basis to determine employer liability. A major OSHA interest is that employers define methods for continuous self-audits, policies, and procedures. Self-audits must identify hazards, including employee work practices, mechanical hazards, and workplace hazards. Any self-audit process must include a fully documented action and remediation plan, including specific timelines and management follow-up.

THE USE OF ATTORNEY-CLIENT PRIVILEGE: The proposed OSHA policy statement does not fully establish employer rights as to audits which are created under attorney-client privilege. **The use of attorney-client privilege is a critical point for clients to ensure that voluntary self-audits do not establish a greater liability.** There are specific requisites related to establishing proper attorney-client privilege that must be in place to enjoy the full benefit of this practice.

TLG COMMENTS/OPINIONS:

- *Voluntary self-audits should be based on documented policy and procedure. The policy and procedure should define responsibility, identify corrective actions, and verify follow-ups by management.*
- *All self-audits must have an attorney-client privilege provision to ensure the employer's fullest protection under the law. TLG encourages clients to fully discuss this issue with their own respective legal counsel. (NOTE: Many TLG clients are active in the international arena, and in many jurisdictions the attorney-client privilege must be "tailored" properly.)*
- *Ensure that regulatory inspection policies and procedures have provisions for the proper handling of internal audits, if they are requested by the applicable inspecting agency.*

TLG has designed and implemented policies and procedures, with legal review, for clients. For any questions or comments, please contact **THE LION GROUP** *Regulatory Consultants*.

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CLIENT BULLETIN

SENIOR EXECUTIVES AND THEIR EH&S SUBORDINATES -- HOW THE RELATIONSHIP SHOULD WORK.

An editorial by: Thomas O. Jones, Principal, TLG

Many TLG client relationships are formed because of a business suddenly finding itself in a regulatory crisis. These crises are the result of a business being investigated by a regulatory agency. Other regulatory challenges may arise due to expansions, acquisitions, or divestitures.

I cannot tell you how many times I have sat in a conference room across from senior executive managers listening to their challenges. More than once, senior executive managers have been totally caught off guard because they had no idea that there were major compliance issues within their organization. Typically, when TLG begins the process of assisting these clients, there is a discovery that someone within their organization knew there were problems. It is common to find that the "someone" is the environmental, health and safety (EH&S) manager, and there have been occasions when a senior executive manager had information but did not act on it in a timely or appropriate fashion.

"Bottom-Line" Comments/Thoughts:

- Senior executive managers should become educated and involved in periodic review of their company's EH&S program. If you are the senior executive manager, you should consider doing the following:
 - Attend safety and training meetings unannounced,
 - Find out how your safety statistics compare with similar businesses,
 - Request that your EH&S manager make presentations to management groups, outlining both successes and challenges, and
 - Establish a policy to have all facilities audited by an independent party.
- Senior executive managers should allow a working environment in which "bad news" is permitted without "killing the messenger." There is always the possibility that the bad news is "filtered" through management levels so that the final message is decidedly different. Do not let this happen - be fully informed.
- Have established goals for your company's EH&S program. After an independent audit is conducted, establish the present level of compliance relative to internal policies and regulations. Do not implement any programs that exceed compliance until you have reached an acceptable level of compliance.
- Involve your EH&S team early in all business changes such as expansions, acquisitions, and divestitures.
- Make your EH&S manager accountable only after you are sure that there are provisions for proper levels of internal and external resources.
- Get into the detail on occasion to ensure that you have confirmed that the EH&S programs are active and compliant.

THE LION GROUP has simple compliance outlines and checklists to allow a "broad-brush" review of regulatory programs. TLG has Executive Presentations designed to provide senior executive management teams with overviews of regulatory requirements and impacts on their specific industry.

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CLIENT BULLETIN

REGULATORY DIFFERENCES IN ENFORCEMENT AND COMPLIANCE BY CONTINENTS / REGIONS

A number of TLG clients have originated from either Europe or Latin America. There is typically a need for an executive understanding as to how regulatory agency administration and authority differs in each region or continent. In all regulatory arenas, there are specific requirements for Environmental, Health and Safety (EH&S) programs. There are significant differences in the actual requirements for program administration and how these regulations are monitored and enforced by the various agencies. The regulatory environment within the United States (US) is extremely complicated in methodologies of program maintenance and monitoring. Typically in the US, the relationship between the agency and the commercial groups are somewhat adversarial in that they result in vigorous interpretive debates. Another factor recognized is that the business atmosphere within the US is often affected by a litigious nature. The following synopsis of recent US regulatory agency activity serves as an example.

United States Environmental Protection Agency (EPA), Office of Enforcement and Compliance Assurance (OECA)

The following information is included in the "EPA's Enforcement and Compliance Program Assurance Highlights: FY 1998 Efforts." During FY 1998, EPA referred 266 criminal cases to the Department of Justice, assessed \$92.8 (US) million in criminal fines, referred 411 civil cases, and assessed \$91.8 (US) million in civil penalties. The agency also reached settlements to recover \$230 (US) million in Superfund Trust Fund expenditures.

The EPA had record enforcement actions for 1999, including \$3.6 (US) billion for environmental cleanup, which is an 80% increase over 1998. There was \$166.7 (US) million in civil penalties, 60% higher than 1998. There were 3,935 civil judicial and administrative actions, which is the highest in the last three years. Criminal defendants were sentenced to a record 208 years of prison time for committing environmental crimes. EPA Administrator, Carol M. Browner, stated: "This year's enforcement statistics again send a strong signal that we will unflinchingly take action against those who illegally pollute the environment of our country."

If one were to review other US agency activities, including those on a regional, state, and local level, there is a similar history as to regulatory enforcement activity.

There sometimes is a definite difference of management style and emphasis when an executive manager from one continent has regulatory oversight responsibility in another continent. These distinct differences must be recognized for the successful administration of a multicultural, global EH&S program.

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CLIENT BULLETIN

UPDATES - REGULATORY ACTIVITIES AND RELATED TOPICS

MEXICO / USA BROADEN REGULATORY EFFORTS

There has recently been an announced expansion of cooperation between Mexico and USA. The expansion is relative to information about the various waste disposal sites and facilities used for hazardous waste recycling.

PRIVATE HOME OFFICES AND OSHA REGULATIONS

Recently, OSHA issued an opinion that "private home offices" would be included in the "regulated" workplace. After public and political pressure, the opinion was withdrawn. However, TLG clients are encouraged to establish "private home office" checklists and written procedures. TLG has developed checklists, training programs, and other documentation.

NORTH AMERICAN COMMUNITY RIGHT-TO-KNOW DATA RELEASED

The third annual report of the North American Community provides the public with information as to releases and transfers of toxic chemicals by industrial facilities. The report was authored under the direction of the U.S. EPA and the environmental ministries of Canada and Mexico. The purpose of the report is to allow the public to compare specific industrial waste disposal, handling, transfer, and releases. This is another example of how much more visible a company's environmental programs can be put under intense global public scrutiny.

GOVERNMENT AGENCIES ARE GIVEN DIRECTIVE TO "BUY GREEN"

TLG clients who have the US Federal Government as a customer should become familiar with the recently signed Executive Order 13101 (EO 13101). EO 13101 is titled, "Greening the Government through Waste Prevention, Recycling and Federal Acquisition." These types of initiatives are growing more common globally, and TLG clients are encouraged to review their various programs such as life cycle analysis or engineering for the environment.

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CLIENT BULLETIN

A "SNAPSHOT" OF TLG TEAMS

Regulatory Affairs Team specializes in assisting clients as they address issues that are regulatory driven. These areas are primarily employee safety, health, and environmental. Services encompass all areas related to program development, policy implementation, and regulatory compliance.

Engineering and Technology Team provides engineering services to TLG clients as they require in - systems design, process improvements, and proactive services related to manufacturing expansion.

Industrial Hygiene and Health Team specializes in assisting clients in all aspects of industrial hygiene and employee health.

Regulatory Research and Systems Team provides global regulatory research for clients on specific regulations and laws. This team also administrates and assists clients in the design and implementation of **THE LION GROUP Footprint System**--*a unique global base system that enhances EH&S compliance, saves time, effort, and money in the disciplines of a Corporate EH&S function.*

Creative Design and Administrative Services Team provides specialized services in presentation materials, regulatory submissions, and administration of regulatory compliance systems.

THE LION GROUP *Regulatory Consultants* - providing services on a global basis.

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DISCLAIMER:

The intent of **THE LION GROUP** *Regulatory Consultants* CLIENT BULLETIN is to provide the reader with information regarding regulatory activities. The topics are presented in a very general sense, and are combined with interpretations and opinions from **THE LION GROUP** *Regulatory Consultants*. The reader is encouraged to contact **THE LION GROUP** *Regulatory Consultants* for further information as it relates to their specific situation. **THE LION GROUP** *Regulatory Consultants* makes no warranty, express or implied, nor does **THE LION GROUP** *Regulatory Consultants* assume any legal liability as to accuracy, completeness, or usefulness of any of the information in **THE LION GROUP** *Regulatory Consultants* CLIENT BULLETIN.