

**ENVIRONMENTAL, HEALTH & SAFETY AUDITING
PROPOSED CMA POLICY**

OBJECTIVE The purpose of this tab is to seek approval of CMA's proposed policy regarding federal legislation on environmental, health and safety auditing.

BACKGROUND Environmental, health and safety (EHS) audits are key to EHS management systems. Audits provide a measure of a company's conformance with specific criteria -- compliance audits evaluate conformance with statutes and regulations; systems audits evaluate conformance with processes or standards such as Responsible Care®, ISO 14000, etc. Unfortunately, the same feature that makes an audit effective -- clear identification of nonconformance -- makes it a potential liability if disclosed to governmental agencies or other potential plaintiffs. Not only may an audit (especially a compliance audit) provide details on possible violations, it may also be used to support a claim that the company knew of them, and hence should be held criminally liable.

Companies that audit occasionally identify noncompliance. In some cases, this noncompliance must be disclosed by law; in other cases, companies may choose to disclose it voluntarily. Experience has shown that such disclosures commonly result in fines just as large as if the government had detected the noncompliance. Companies making disclosures also sometimes find themselves suffering collateral consequences, such as being debarred from government contracts or having difficulty obtaining permits.

Virtually all stakeholders agree that EHS audits improve compliance, and that companies which audit should be placed in no worse position than companies which do not audit. Most parties also agree that incentives should be created to encourage systems that detect, correct and disclose violations.

In the last 18 months, over 30 states have considered legislation to address these two goals. Ten states have enacted legislation that creates an evidentiary privilege for documents and opinions that are generated in the course of an environmental audit. These privileges contain certain limitations and exceptions, the most common of which are for fraud or violations that are not corrected within a reasonable time. Most of these statutes also prevent plaintiffs from compelling the testimony of auditors, to avoid circumventing the privilege.

Four states have also enacted laws that provide immunity from or mitigation of administrative or civil (and potentially criminal) sanctions for violations that are detected in the course of an audit and promptly disclosed voluntarily. None of these laws, however, immunizes violations where disclosure is required by law, even if the company was not required to look for the violation in the first place.

Bills have been introduced in both houses of Congress to create a federal audit privilege (with testimonial immunity) and to provide immunity for voluntary disclosures (H.R. 1047, introduced by Congressman Hefley, and S. 582, introduced by Senator Hatfield). A multi-industry group called the Compliance Management & Policy Group (CMPG), which includes CMA, has also developed a draft bill that attempts to improve on these bills.

In May 1994, EPA announced a major reevaluation of its policies regarding auditing and disclosure. EPA announced a new "interim policy" this March that departs significantly from prior practice by eliminating the gravity component of civil penalties for self-detected and voluntarily disclosed violations. Violations that must be disclosed may receive 75% mitigation of the gravity component. The new policy opposes privilege altogether, however, threatening privilege law states with intrusive scrutiny of their enforcement programs.

CMA ACTIVITY TO DATE Working through CMPG, CMA has spent the last three years working actively to persuade EPA to create incentives for auditing and disclosure. CMA has also provided technical assistance to companies working on state audit legislation. CMA has not previously sought federal legislation on the subject, preferring to let momentum build in the states and allow EPA to conclude its reevaluation. The EHSOC supports this proposed policy.

RESPONSIBLE CARE® IMPLICATIONS The legislation supported by this proposed policy would increase and improve EHS auditing and disclosure, which in turn would generally promote the Responsible Care® goals of continuous improvement in EHS performance and community awareness. In particular, such legislation would also expedite and improve implementation of the Responsible Care® verification process.

STATE, FEDERAL AND INTERNATIONAL IMPLICATIONS As noted above, states have already been active on this issue. Federal legislation would encourage that activity. This proposed policy recognizes the need to preserve consistency with evolving international standards for environmental auditing such as ISO 14000.

RECOMMENDATION CMA should actively support the enactment of federal legislation to create (i) an evidentiary privilege and testimonial immunity for audit materials and opinions; and (ii) immunity from or mitigation of administrative, civil and criminal sanctions otherwise applicable to noncompliance that is detected, corrected and disclosed in connection with the operation of EH&S management systems.

RECOMMENDED ACTION Approve the recommendation.

CMA
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