

G A R V E Y S C H U B E R T B A R E R

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NOAA'S ENFORCEMENT CHALLENGE: ACHIEVING CONSISTENCY, ENHANCING TRANSPARENCY AND PROVIDING FOR BETTER COMMUNICATIONS WITH THE INDUSTRY

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I. INTRODUCTION

- Desirability of enhancing consistency, transparency and communications with the regulated community is unquestionable.
- The root cause of industry disaffection: pervasive sense in the regulated community that the system is arbitrary, unfair and results in the imposition of excessive penalties.
- The Administration's response to the OIG Report: good first steps, but not enough.

II. THE NEED FOR GREATER CONSISTENCY

- The Problem – Arbitrary, idiosyncratic case selection, without adequate, systemic checks and balances.
- Potential Reforms –
 - Set clear enforcement priorities at regional and national levels, related to program needs.
 - Revise the existing penalty schedules to cabin the broad discretion that now exists regarding charging.
 - Develop standards and limitations for cumulating charges.
 - Ensure higher level GC review of charging and settlement decisions.

II. THE NEED FOR GREATER CONSISTENCY (CONT.)

- Provide for involvement of non-enforcement management in both investigation and charging decisions.
- Require explanation of the basis for penalty assessments and allow inquiry into the basis for assessments during discovery.
- Consider re-opening closed cases where major fines have been imposed.

III. THE NEED FOR GREATER TRANSPARENCY

- The Problem – Difficulties in obtaining information both about the agency's overall approach to enforcement and the results of prior, individual cases.
- Potential Reforms –
 - Make proposals for agency enforcement policy and revised penalty schedules available for public comment.
 - Go beyond LEXIS as a compendium of decisions.
 - Expand what is published to include significant procedural rulings and settlement agreements.
 - Allow discovery as of right.

IV. THE NEED FOR BETTER COMMUNICATIONS

- The Problem – Lack of proactive agency engagement with the regulated community in order to reduce the incidence of civil penalty proceedings.
- Potential Reforms –
 - Establish and fill industry liaison positions.
 - Consider conducting non-recourse compliance audits.
 - Hold workshops or forums with industry regarding the development of agency enforcement policy and priorities, revisions to the penalty schedules and modifications of NOAA civil procedures.
 - Develop simpler and more accessible compliance guides.