A Message Sent Clearly: The Responsible Corporate Officer Doctrine and Other Theories of Individual Liability

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Agenda

- Criminal Prosecutions of Corporate Employees.
- The Park Doctrine: History and Impact of Conviction, The Message Sent.
- Case Study: The Conviction and Suspension of the Purdue Pharma Executives.
- Future Enforcement of Park.
- DOJ Increases the Pressure.
  - Civil Enforcement Initiatives
  - Suspension/Debarment/Exclusion
- Same Story – Other Industries and Issues
- Foreign Corrupt Practices Act
- Environmental Laws
- Securities Laws
- What to do? How to Protect People While Protecting Their Companies.

Criminal Prosecutions under the FDCA

- **Felony Charge** -- "[I]f any person . . . commits [a violation of a provision of 21 U.S.C. § 331] . . . with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both." 21 U.S.C. § 333(a)(2)(emphasis added).
  - The "prohibited acts" are explained in 21 U.S.C. § 331; there are more than 20 prohibited acts.
- **Misdemeanor Charge** -- "Any person who violates a provision of [§ 331] shall be imprisoned for not more than one year or fined not more than $1,000, or both." 21 U.S.C. § 333(a)(1).
  - The Government is not required to establish knowledge or intent to defraud.
  - The Park doctrine.

The Park Doctrine: History and Recent Enforcement

- The Park doctrine, (also called "responsible corporate officer" doctrine): criminal liability extends to anyone with "**responsibility and authority** either to prevent in the first instance, or promptly to correct, the violation complained of," whether or not the person was aware of or intended to cause the violation. United States v. Park, 421 U.S. 658 (1975).
- "[T]he [FDCA] imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions." Park, 421 U.S. at 676.

United States v. Park, 421 U.S. 658 (1975)

- Acme Markets, Inc.: large national food chain **and** its president (Park) charged with violating the FDCA.
- Government alleged they caused food shipments held in Acme's Baltimore warehouse to be exposed to rodent contamination. Acme, but not Park, pleaded guilty.
- At trial, Park conceded that providing sanitary conditions for food offered for sale to the public was something that he was "responsible for in the entire operation of the company."
- That was one of the many phases of the company that Park assigned to "dependable subordinates."

United States v. Park, 421 U.S. 658 (1975)

- Evidence was admitted showing that Park received a letter from FDA about unsanitary conditions at Acme's Philadelphia warehouse.
- Park conceded that the same people were responsible for sanitation in both Baltimore and Philadelphia, and he was responsible for any result in the company.
- Court instructed jury: Park did not have to have personally participated in the situation, but he must have had "a responsible relationship to the issue."
- Park convicted, but the Court of Appeals reversed.
- Supreme Court reversed the Court of Appeals and upheld the misdemeanor conviction.

United States v. Park, 421 U.S. 658 (1975)

- Court held that the Act imposes upon persons exercising authority and supervisory responsibility:
- A positive duty to seek out and remedy violations, and
- Also a duty to implement measures that will insure that violations will not occur.
- Food distributors are "the strictest censors of their merchandise,"
- The Act punishes "neglect where the law requires care, or inaction where it imposes a duty."

A Case Study

United States v. Purdue Frederick Co.

The New York Times

Narcotic Maker Guilty of Deceit Over Marketing

From left, Howard R. Udell, the top lawyer for Purdue Pharma; Dr. Paul D. Goldenheim, the company's former medical director; and Michael Friedman, Purdue's president.

By BARRY MEIER

ABINGDON, Va., May 10 — The company that makes the painkiller OxyContin and three of its current and former executives pleaded guilty Thursday in federal court here to criminal charges that it had misled doctors and patients when it claimed the drug was less likely to be abused than traditional narcotics.

The Company

- The two companies primarily responsible for manufacturing and marketing OxyContin in the U.S. were Purdue Pharma, L.P. and The Purdue Frederick Company, Inc.

Why an Investigation of Purdue?

- Law enforcement felt that: (a) OxyContin abuse was widespread; (b) resulted in fatalities; and (c) caused secondary crimes. The drug got local, then federal, attention.
- DOJ and local law enforcement prosecuted doctors and street dealers for illegally distributing OxyContin.
- The DOJ began looking at the company that produced and marketed OxyContin.

Subpoena Issued

- December 2002 – administrative subpoena issued to the company for documents.

Government's Allegations Against Purdue

- Purdue trained its sales force that it was more difficult to extract oxycodone from O/C for IV drug users.
- Informed doctors that O/C would create fewer chances for addiction than IR opiods.
- Trained sales force that O/C had fewer "peaks and troughs."
- Told health care providers that patients could stop without withdrawal.
- Told health care providers that O/C would not cause a buzz or euphoria.

Marketing v. The Label

As Marketed

- Addicts Won't Like It
- Less Abuse Potential
- No Euphoria
- Fewer Side Effects
- No Withdrawal At Doses Less Than 60mg Per Day

On Label

- Reduced Dosing Schedule

Final Settlement

- Felony Guilty Plea by The Purdue Frederick Company, Inc.
- Total Penalties for Purdue = $600 million
- Misdemeanor Guilty Pleas: Responsible Corp. Officers
  - CEO Michael Friedman
  - CMO Paul Goldenheim
  - **General Counsel** Howard Udell
- Each defendant received 3 years probation, 400 C/S, and collective penalties of **$34 million** (disgorgement)
- Agreed Statement of Facts as Support for Plea

The Conviction and Suspension of Purdue Executives

- Agreed Statement of Facts:
  - Company pleaded guilty to felony misbranding OxyContin with intent to defraud or mislead
  - Three company executives -- CEO, general counsel, and chief medical officer -- pleaded guilty to misdemeanor misbranding OxyContin as **"responsible corporate officers,"**
  - Both company and executives agreed that the court could accept an “Agreed Statement of Facts” prepared by the parties as the basis for the guilty pleas.

United States v. Purdue Frederick Co.

Not the End of the Story.

Exclusion Proceeding

- November 15, 2007: HHS-OIG notified the three defendants that:
- Based on convictions, HHS considering excluding them from participation in all federal health care programs, including Medicare and Medicaid.
- 42 U.S.C. § 1320a-7(b): permits HHS to exclude individuals convicted of certain crimes from participation in federal health care programs.

Exclusion Proceeding

- HHS cited two subsections of 1320a-7(b) as basis for potential exclusion:
- (1) (b)(1): **permits** HHS to exclude individuals convicted of "a misdemeanor related to fraud ... in connection with the delivery of a health care item or service," and
- (2) (b)(3): **permits** HHS to exclude individuals convicted of "a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

Exclusion Proceeding

- March 31, 2008: O.I.G. issued exclusion notices to executives.
- HHS also (under section § 1320a-7(c)(3)(D)) increased period of exclusion from **3 to 20 years** (later reduced to 12) based on aggravating factors.
- O. I.G. found: increase warranted because the acts:
  - (1) were committed over a period of one year or more;
  - (2) had a significant adverse financial impact on health care program beneficiaries; and
  - (3) had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals.

Exclusion Proceeding

- October 28, 2009: Executives filed complaint seeking declaratory judgment that
- Exclusion order was "contrary to law, arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence, in violation of the Administrative Procedure Act, 5 U.S.C. § 706."

District Court's Holding

- December 13, 2010, District Judge issued decision rejecting executives motion to set aside exclusion decision
- Court held:
  - Rejected defendants' contention that exclusion imiproper because convictions based solely on "status" as corporate officers not their own conduct.
  - Under Park, defendants can not be convicted based solely on position in the corporate hierarchy.
  - Government must demonstrate "the defendant had, by reason of his position in the corporation, responsibility and authority either" to prevent, or promptly to correct, the violation, and failed to do so.
  - Consequences of exclusion are not as dire as defendants contended: defendants free to seek private employment at a company that does not rely on federal or state funds. See Friedman v. Leavitt, No. 08-cv-586, slip op. at 13 (D.D.C. Dec. 5, 2008).

Court of Appeals Holding

- July 27, 2012: DC Circuit:
- Upheld HHS right to exclude based on misdemeanor Responsible Corporate Officer conviction
- Misbranding was a "misdemeanor relating to fraud"
- Held that HHS had failed to sufficiently justify the added length of exclusion
- Remanded for further proceedings
- Government can "refuse to do business with corporate officers, who could have but failed to prevent fraud on their watch."

Impact of Debarment

- Debarment prohibits individuals from "providing services in any capacity" to a company or individual that has an approved or pending drug product application. 21 U.S.C. § 335a.
- Applicants for drug approval must certify in submissions to FDA that they have not used and will not use any services of any debarred individual.
- FDA will not accept for filing any drug product applications from companies who hire or contract with a debarred person – even if that person performs work that is unrelated to the FDA regulatory process.

Other Enforcement of Park: Synthes

- United States v. Synthes, Inc.
  - Synthes a subsidiary of Norian Corporation.
  - Company charged with conducting unauthorized tests of its bone cement on about 200 spinal surgery patients. Three patients died on the operating table.
  - Product FDA approved for use in the arm, but not in weight-bearing spine.
  - Synthes charged with training surgeons to use it "off-label" so company could gather data to support its expanded use.
  - Four former Synthes executives pleaded guilty or no contest to related "responsible corporate officer" misdemeanor.
  - First white-collar defendants sent to prison under the Park Doctrine.
  - In court papers, prosecutors argued that the four acted knowingly after a Synthes medical consultant warned that the tests amounted to "human experimentation."

Enforcement of Park, Synthes (cont.)

- Richard Bohner, 56, led away in handcuffs after sentence imposed by District Court Judge Legrome D. Davis (Philadelphia).
- "The government is pleased with the sentence," said lead prosecutor Mary Crawley of the U.S. Attorney's Office for the Eastern District of Pennsylvania. "The court recognized the severity of the harm done in this case, especially with this defendant, who was involved in regulatory affairs."

Other Industries

- Environmental
  - BP
  - United States v. Kurt Mix
- Financial
  - United States v. David Higgs
    - "It is a tale of greed run amok," (U.S. Attorney Preet Bharara). "They papered over more than a half billion dollars in subprime mortgage-related losses to secure for themselves a big payday at the same time that many people were losing their homes and their jobs."
  - United States v. Rajaratnam -- Title III wiretaps
- Construction
- Government Contractors
- Airlines
- Health Care Providers
- Others

Other Laws

- Obstruction
- Conspiracy
- Mail and wire fraud
- False statements
  - "The FBI's here, but it's no big deal. They say they just want to talk to us."
- False Claims Act
- Anti-kickback Act/Bribes/Gratuities
- Procurement Fraud
- FCPA

DOJ's Position: A Message Sent Clearly

- Assistant Attorney General Lanny Breuer speaking about the individuals charged in Siemens AG FCPA investigation **"This indictment reflects our commitment to holding individuals, as well as companies, accountable for violations of the FCPA."**
- "The government has been criticized for not charging individuals," (Sulaksh R. Shah, a director in the FCPA and anticorruption practice with PricewaterhouseCoopers). **"The government is saying: Let this be a warning, companies will pay and individuals will be made accountable."**
- **"Where the facts and law allow, the Justice Department will pursue individuals responsible for illegal conduct just as vigorously as we pursue corporations,"** (Tony West, Assistant Attorney General for the Civil Division of the Department of Justice).

DOJ Policy: Prosecute Individuals

United States v. Abbott Laboratories

- Over $1.5 billion misdemeanor.
- Misbranding.
- Criminal and civil.
- No individuals -- yet
- Qui Tam.
- Deputy Attorney General James Cole said **"We are resolute in stopping this type of activity, and today's settlement sends a strong message to other companies."**
- Corporate Integrity Agreement.

United States v. Glaxo Smith-Kline

- **$3 billion** civil and criminal combined settlement: 3 investigations – 3 drugs
- 1. $757 million for criminal "misbranding" Paxil and Wellbutrin (Off-label marketing); $1.043 billion civil FCA for off label marketing and kickbacks
- 2. Diabetes drug Avandia: $243million for criminal failure to report safety data; $657 million civil settlement for false representations about safety and efficacy
- 3. $300 million civil FCA for false best prices and underpaying of rebates under Medicaid Drug Rebate Program
- 5 year Corporate Integrity Agreement (President and Board must personally certify compliance)
- No individuals charged or debarred – yet

Other Enforcement Tools

Responsible Corporate Officer Doctrines Under the FCPA--Overview

- Other strict liability or "low fault" theories used by DOJ and SEC in FCPA cases
- Agencies "pushing the envelope" all the time
- Across the board application – not limited to pharma industry
  - "Control persons" under Securities and Exchange Act of 1934
  - Travel Act claims
  - Willful blindness claims

Brief FCPA Overview – Anti-Bribery Provisions

- Prohibit paying, offering, promising to pay foreign officials **"anything of value"** for the purpose of obtaining or retaining business or otherwise obtaining favorable treatment in commercial matters, 15 U.S.C. §§78dd-1
- Criminal liability – enforced by DOJ
  - Corporate and individual liability
  - Require knowledge or intent to bribe foreign officials
  - Responsible for acts of agents, including third parties
  - Broad view of "foreign official"
  - Limited exception for facilitating payments
  - Jurisdiction if the acts or actors in question have a connection to the U.S. (DOJ views this expansively)

Brief FCPA Overview– Books and Records Provisions

- Related civil violations regulated by the SEC for U.S. issuers
  - "Books and records" infractions or inadequate "internal controls"
  - Books and records violations: mischaracterizing accounting entries about payments or revenues
  - Example: bribe recorded on company's books as a "management fee" or "product registration fee"
  - Strict liability offenses
  - No U.S. jurisdiction required – U.S. issuers strictly liable, even if all the activity and actors operated outside the U.S.

Responsible Corporate Officer Doctrines Under the FCPA – "Control Persons"

- Section 20A of the Securities Exchange Act of 1934, 15 U.S.C. §78t(a), imposes liability on "control persons", i.e., individuals who *directly or indirectly control* another person who commits a securities violation.
- Historically raised in private securities fraud litigation against corporate officers and directors.
- Dodd-Frank Act now clearly establishes SEC's authority to bring "control person" claims directly.
- No single decisional standard from case law.

Responsible Corporate Officer Doctrines Under the FCPA – "Control Persons"

- **Nature's Sunshine Products** (July, 2009): SEC applied "control person" doctrine to an FCPA case.
- "Settled complaint" filed by SEC against Nature's Sunshine Products ("NSP") and its CEO and CFO.
  - Alleged bribes by NSP's Brazilian subsidiary to customs officials and false accounting to conceal the payments.
  - CEO and CFO had no personal knowledge of the payments.
  - Deemed liable as "control persons" for books and records and internal controls violations under FCPA.

Responsible Corporate Officer Doctrines Under the FCPA – "Control Persons"

- Books and records violations don't require corrupt intent.
- Appears SEC imposed a negligence standard ("should have known") for missing red flags.
- Alleged "red flags":
  - Sales dropping significantly in Brazil, then quickly turned around.
  - Very large payments to customs officials.
- Executives and board members more vulnerable to personal liability for the actions of much lower-level employees.

Responsible Corporate Officer Doctrines Under the FCPA – Travel Act

- The Travel Act, 18 U.S.C. §1952, prohibits travelling between states or countries or using an interstate facility *in aid of* any crime.
- No corrupt intent required.
- Increasing use in FCPA cases, but note:
  - Underlying crime does not have to be a federal offense.
  - Travelling or using the mails to violate a state law can also violate the Travel Act.
- Thus, commercial bribery, i.e., bribery between private parties, can be a violation.

Responsible Corporate Officer Doctrines Under the FCPA – Travel Act

- **Control Components, Inc**. ("CCI")(2009)
- CCI pleaded guilty to making corrupt payments in over 30 countries from 2003-2007 and paid criminal fines over $18.2M.
- 7 former executives also pleaded guilty.
- Several executives charged with violating or conspiring to violate both the FCPA and the California's anti-bribery law (Cal. Penal Code section 641.3).
  - The California law prohibits corrupt payments anywhere of more than $1,000 between any two persons, including private commercial parties.

Responsible Corporate Officer Doctrines Under the FCPA – Travel Act

- The FCPA claims were for bribes of foreign government officials.
- The California anti-bribery claims were for bribes of overseas private parties, i.e., commercial bribery.
- The Travel Act was used to convict both U.S. and non-U.S. executives.
  - Example: Flavio Ricotti, former VP for sales (Italian citizen) – admitted conspiring with other CCI employees to bribe official of Saudi Aramco, (state-owned oil company), and employee of a private company in Qatar.

Responsible Corporate Officer Doctrines Under the FCPA – Travel Act

- **Nexus, Inc**.
  - Facts similar to CCI.
  - Both company and executives pleaded guilty to FCPA and Travel Act violations.
- Important implications of Travel Act cases.
  - Vehicle for U.S. federal government to bring commercial bribery claims outside the U.S.
  - Hook for bringing charges where evidence of the underlying bribery offense is weak or flawed or only shows an intent to bribe.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Concept ‘willfull blindness’ defined in FCPA’s knowledge standard: "when knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless he actually believes the circumstance does not exist." 15 U.S.C. §78dd-1(f)(2)(B) (2004).
- Legislative history confirms intent to encompass a willful blindness standard.
- Sometimes described as ‘conscious avoidance’, ‘deliberate ignorance’ or 'head-in-the-sand‘.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Key issue: for crimes with *mens rea* requirement, can fact finder (particularly a jury) distinguish between willful blindness and mere negligence (“should have known”) or recklessness (showed disregard for knowing).
- **U.S. v. Viktor Kozeny et al**. (the “Bourke case”)
  - Frederic Bourke is the individual defendant of interest.
  - Bourke invested in a privatization scheme in Azerbaijan.
  - Bourke not accused of paying or authorizing a bribe.
  - Alleged to have knowledge of, or willful blindness toward, alleged bribes paid by Victor Kozeny, one of his consortium partners.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Federal jury convicted Bourke of conspiracy to violate the FCPA and lying to FBI agents (U.S. v. Bourke, S2 05 Cr. 518 (S.D.N.Y. 2009)
- 2d Circuit upheld his conviction (U.S. v. Viktor Kozeny et al., Case No. 09-4704-cr(L) (2d Cir. 2011)
- Bourke free on bail while he pursues further appeals

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Bourke's original appeal to the 2d Circuit:
  - 1. Did court err in giving conscious avoidance instruction where: (a) no evidence that Bourke deliberately avoided knowledge of the bribes and (b) government argued that Bourke failed to perform adequate due diligence, increasing the risk that the jury would convict him for negligence or recklessness?
  - 2. Did court err in refusing to instruct jury that *mens rea* for conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") includes the "corruptly" and "willfully" elements required for the underlying offense?

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- 2d Cir. Affirmed: held instructions proper on both conscious avoidance and *mens rea* --cited evidence to support conviction under both standards.
  - Bourke aware of high level of corruption in Azerbaijan generally.
  - Bourke knew of Kozeny's reputation as the "Pirate of Prague" from a Fortune magazine article.
  - Bourke expressed concern to other investors and their attorneys that Kozeny and his employees might be paying bribes.
  - Bourke obtained legal advice about his FCPA risk.
  - Following legal advice, Bourke helped create separate U.S. advisory companies affiliated with Azeri companies to shield Bourke and other American investors from liability from corrupt payments, and he joined only U.S. company boards.
  - Bourke played role in coordinating US medical treatments, combined with tourism and shopping excursions, for Azerbaijani officials.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- **Global-Tech Appliances, Inc. v. SEB S.A.**, 131 S.Ct. 2060 (2011) (civil patent infringement).
- U.S. Supreme Court defined "willful blindness" standard.
- The facts:
  - SEB developed innovative deep fryer in the U.S. and obtained a U.S. patent for it.
  - Global Tech's Hong Kong subsidiary copied exactly a non-U.S. version of the product (which had no patent markings), except for cosmetic features.
  - Knew its customer would sell product in U.S. market and its principal understood U.S. patent regime.
  - Hong Kong sub requested patent search on the product by attorney, without telling him product was a knockoff.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Issue: whether under 35 U.S.C. §271(b), a party "must know that the induced acts [inducing another party to infringe a patent] constitute patent infringement."
- Supreme Court announced “willful blindness” standard for civil and criminal cases.
- Two basic requirements:
  - (1) the defendant must subjectively believe that there is a high probability that a fact exists and
  - (2) the defendant must take deliberate actions to avoid learning of that fact.
- Induced patent infringement found on these facts.

Responsible Corporate Officer Doctrines Under the FCPA – Willful Blindness

- Court distinguished “willful blindness” from recklessness and negligence:
  - “By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, see ALI, Model Penal Code § 2.02(2)(c) (1985), and a negligent defendant is one who should have known of a similar risk but, in fact, did not, see § 2.02(2)(d).”
- Justice Kennedy dissent
  - Where statute requires “knowledge” of wrongdoing for a violation, “willful blindness” is not adequate substitute.
  - Court should not announce such broadly applicable standards without input from the criminal bar.

Corporate Officer Liability – Environmental Laws Overview of Presentation

- Background on Environmental Laws
- How a Corporate Officer can incur liability
- Who is a Responsible Corporate Officer
- Individual liability under environmental laws
  - Examples
    - CWA and CAA
    - Waste disposal

Environmental Law 101

Environmental laws regulate:

1) *Releases into Environment (waste, water, air)*

2) *Uses of Chemicals and Pesticides*

3) *Physical acts or changes that may impact environment (endangered species, NEPA)*

Environmental Law 101

- Release of wastes and chemicals: permits, treatment, reports
  - Solid waste disposal
    - Resource Conservation and Recovery Act
    - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA aka Superfund)
  - Clean Water Act
  - Clean Air Act
- Use of chemicals and pesticides
  - Toxic Substances Control Act
  - Federal Insecticide, Fungicide, and Rodenticide Act
- Making physical changes that affect the environment
  - National Environmental Policy Act aka NEPA
  - Endangered Species Act
  - Migratory Bird Treaty Act

Acts of Corporate Officers that Trigger Liability: It's not just 'midnight dumping'

- Signing Forms and Certifications
  - Discharge Monitoring Reports
  - Permits
  - Reports of unplanned releases
  - Common violations
    - Falsified sampling logs
    - Rigged measurement equipment
- Consent Order non-compliance
- Negligence
- Knowledge (actual or inferred)

Who is a "Responsible" Officer?

Clean Air Act and Clean Water Act: Criminal penalties for any "person" who

- "knowingly" or "negligently" . . . [violates . . . releases . . . misrepresents…]
- "the term '*person*' [also] *includes any responsible corporate officer*"
  - 42 U.S.C. 7413(c)(6) (CAA)
  - 33 U.S.C. 1319(c)(6) (CWA)
- "Responsible Corporate Officer" not defined in the statutes

Who is a "Responsible" Officer?

- Need not be a "Named" Officer of the Corporation
- US v. Hong (4th Cir. 2001)
  - Discharges from water treatment system violated CWA
  - Hong controlled company finances; refused to purchase proper equipment
  - Guilty under RCO doctrine for *failing to prevent* CWA violation
  - Court rejected defense of "I'm not an officer"

Lowering the Bar: Clean Water Act's Criminal Liability for Simple Negligence (33 USC 1319(c))

- Ortiz (10th Cir. 2005)
  - Operations manager dumped chemicals into bathroom drain
  - No proof he *knew* it discharged to the river ('waters of the US') and not treatment plant
  - Convicted with simple negligence standard
    - "fail[ed] to exercise the degree of care that someone of ordinary prudence would in the same circumstance"
- Hanousek (9th Cir. 1999)
  - Railway's backhoe contractor ruptured oil pipeline
    - 5000 gallon spill to Scagway River
    - Defendant road master was off duty and at home
  - Court rejected defense argument that it should apply a "heightened negligence standard" and convicted of simple negligence
- Hazelwood (Alaska 1997)
  - Jury instruction using civil negligence definition did not violate due process.

Lowering the Bar: Clean Water Act and the Responsible Corporate Officer Doctrine

- Iverson (9th Cir. 1999): employees dumped drum cleaning rinsate on the ground
  - Court: RCO liability exists if "the person has authority to exercise control . . . There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity."
- Roscoe (Cal. Ct. App. 2008): 3000 gallons of gasoline leaked from an underground storage tank
  - Relied on consultant to clean up the spill & respond to agency
  - Officers held jointly and severally liable with corporation
  - Applied RCO doctrine to Cal H&S Code
  - *Civil* penalty of $2.5 million for individual officers

But: Responsible Corporate Officer Liability Rejected for Waste Disposal Laws

- White (E.D. Wash 1991) (RCRA and FIFRA)
  - Illegal disposal of pesticide rinsates on ground
  - Court rejected RCO doctrine and required proof of actual knowledge: applying the doctrine would transform "knowing" to "should have known"
- MacDonald & Watson Waste Oil (1st Cir. 1991) (RCRA)
  - Employees disposed of hazardous waste at an unpermitted site
  - Court: where knowledge is an express element, "a mere showing of official responsibility . . .is not an adequate substitute for direct or circumstantial knowledge"

Aren't Corporate Officers Protected by the Corporate Veil?

- Veil piercing occurs because an individual uses the corporate form to commit fraud or other illegal acts.
- RLG Inc. (Ind. 2001)
  - Violation of environmental consent order
  - Defense:
    - Personal liability under RCO doctrine is possible only if the defendant disregarded the corporate form
    - Cannot pierce veil to reach officer
  - Court: No
    - RCO liability is based on individual responsibility
    - "The responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing."

How Can RCO Liability Be Avoided?

- RCOD not based solely on "position"
  - Defendant must have a "responsible" relation to situation and
  - by virtue of position -- authority and responsibility to deal with it
  - (still very broad reach).
- *O*nly defense to RCOD is "objective impossibility"; *can* defendant prove he "was powerless to prevent or correct the violation"(not likely).
- Strong, comprehensive and "effective" compliance and ethics programs are company's (and RCO's) best protection.

How Can RCO Liability Be Avoided?

- US Sentencing Guidelines criteria for effective compliance and ethics programs
  - "Exercise due diligence to prevent and detect criminal [improper] conduct."
  - "[P]romote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."
- DOJ required by policy to consider companies' compliance and ethics programs before bringing criminal charges (but note recent criticism by Ben Heineman that government not actually doing this).
  - More and more sophisticated analysis of compliance program elements;
  - Emphasis on thoroughness and independence of internal investigations;
  - Promptness and comprehensive nature of corrective actions; and
  - Self-disclosure of improper conduct.

Potential Exposure for In-House Counsel

- Exposure for role in responding to government investigation.
  - In 2002 FDA invstigation into allegations GlaxoSmithKline promoted off-label use of anti-depressant drug.
  - Lauren Stevens, GSK Vice President and Associate General Counsel, in charge of Company's response to FDA inquiry and allegedly led team of lawyers and paralegals who gathered documents and information.
  - DOJ accused Stevens of lying to FDA in a series of letters in 2003 denying the company had promoted a drug for off-label uses. Stevens denied that company illegally marketed drug, even though it paid doctors to give questionable promotional talks to other doctors, (one spoke at 511 events in 2001-2).

Potential Exposure for In-House Counsel

  - DOJ also alleged Stevens failed to produce slides of potentially illegal off-label marketing and had legal memo prepared (with outside counsel) with pros and cons of producing slides. One argument was they would provide "incriminating evidence."
  - Stevens charged with one count of obstructing an official proceeding; one count of concealing and falsifying documents to influence a federal agency, and five counts of making false statements to the F.D.A. Faced potential sentence of 60 years in prison.
  - May 10, 2011, Judge dismissed all charges after government put on its case. Held case should never have been brought because it was based on government's misreading of ***privileged communications***.
  - Stevens acquitted – but ***8 years*** after the acts charged and only after going through trial.
- Not clear whether loss will deter DOJ from aggressive application of RCOD in future.

•ADDITIONAL THEORIES

Criminal Prosecution of Individuals for Violations of Federal Employment Laws

- Occupational Safety & Health Act: One year imprisonment for 'any employer' who ***willfully*** violates OSHA and causes death (29 U.S.C. Sec. 666 (e)
- An "employer" is defined in § 652(5) as "a person engaged in a business affecting commerce who has employees."
  - For civil purposes, courts generally have held this means only the employing business entity. *Skidmore v. Traveler's Insurance* (5th Cir. 1973)
  - In criminal cases, an individual who is a corporate officer or director, may be deemed an "employer", *U.S. v. Doig* (7th Cir. 1991) , especially where the officer ran the corporation as if it were a sole proprietorship. U.S. v. Cusak (D. N.J. 1992)
- Despite Act's relation to public health and welfare, RCO doctrine has not been explicitly applied in OSHA cases
- Possible future reform? Center for Progressive Reform recently issued a report calling for application of the RCO doctrine in OSHA cases

Criminal Prosecution of Individuals for Violations of Federal Employment Laws

- Other federal employment laws expressly provide for criminal prosecution of "responsible" individuals – does this mean RCO unlikely to be expanded to these laws?
- Fair Labor Standards Act: Establishes minimum wage and overtime requirements and restrictions on the employment of minors. ***Willful*** violation is criminal misdemeanor subject to fine of up to $10,000. A second conviction may result in imprisonment. 29 U.S.C. Sec. 216 (a)
  - "Employer" includes ***any person*** acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C. § 203(d).
  - In 2011, president of Minnesota sheetrock company sentenced to 2 years in prison and fined up to $3.3 million for intentionally underpaying employee overtime and union pension benefits. *U.S. v. Franklin (D. Minn. 2011)*

Criminal Prosecution of Individuals for Violations of Federal Employment Laws

- Federal payroll taxes: **"Responsible"** person who ***willfully*** fails to collect and pay to the IRS payroll taxes:
  - Personally liable under Internal Revenue Code, 26 U.S.C. Sec. 6672 (the "Trust Fund Recovery Penalty" provision) if employer does not pay
  - Subject to felony penalties under Sec. 7202 (individual could be punished by a fine of up to $100,000 and imprisoned for up to five years).
  - "Responsible person" very broadly defined
    - Includes any person who can effectively control the finances of the corporation or determine which bills should or should not be paid and when
    - all persons who fit definition can be held liable civilly or criminally regardless of "relative" level of responsibility (in other words, the government can collect from and/or prosecute the "least" responsible person as well as the "most" responsible person). *Erwin v. U.S. (4th Cir. 2010)*

Criminal Penalties Against Individuals for Violations of Federal Employment Laws

- Immigration: Immigration & Naturalization Act, Sec. 274A (8 U.S.C. 1324a): Unlawful for "person or entity" to knowingly hire, recruit for a fee or employ an unauthorized alien; civil penalties except in case of pattern or practice of violations which are subject to fines up to $3,000 per unauthorized alien and imprisoned for not more than 6 months, or both.
  - Liability not limited to employer or business owner; hiring managers, HR managers, supervisors and even General Counsel who was also Chief Operating Officer have been held liable and prosecuted. See, e.g., *U.S. v. Kramer* (E.D. Pa. 2009)

Responsible Corporate Officer Doctrines Under the Securities Laws – Clawback Remedies

- Sarbanes Oxley Section 304, 15 U.S.C. §7243: strict liability compensation clawback remedy on CEOs and CFOs of U.S. issuers in the event of a financial restatement "resulting from misconduct."
- No private right of action by shareholders against the CEO and CFO under SOX Section 304. E.g., *Cohen v. Viray*, 622 F.3d 188 (2d Cir. 2010); *In re Digimarc Corp. Deriv. Litigation*, 549 F.3d 1223 (9th Cir. 2008); *Perelli Armstrong Tire Corp. Ret. Med. Benefits Trust v. Raines*, 534 F.3d 779 (D.C. Cir. 2008).
- Early on, the SEC only enforced Section 304 against CEOs and/or CFOs who were personally culpable for fraud.

Responsible Corporate Officer Doctrines Under the Securities Laws – Clawback Remedies

- More recently, the SEC has treated as strict liability offense in absence of CEO/CFO misconduct.
  - SEC v. Jenkins, 2010 WL 2347020 (D. Ariz.): Fraud leading to financial restatement. CEO not involved in wrongdoing but signed the financials.
  - SEC v. O'Dell, Case No. 1:10-CV-00909 (D.D.C., June 2, 2010), SEC Litigation Release No. 21543 (June 2, 2010): Similar to Jenkins, but SEC also sought to recoup compensation during the 12-month period after the year of restated financials. O'Dell settled for cash and stock.
  - See also SEC v. McCarthy, Case No. 1:11-CV-667-CAP (N.D. Ga. 2011), SEC Litigation Release No. 21873 (March 4, 2011); SEC v. O'Leary, Case No. 1:11-CV-2901(N.D. Ga. 2011), SEC Litigation Release No. 22074 (August 30, 2011): Similar settlements.

Responsible Corporate Officer Doctrines Under the Securities Laws – Clawback Remedies

- Dodd Frank Section 954, 15 U.S.C. §78j-4, amends Securities Exchange Act of 1934 by inserting Section 10D, dealing with compensation clawbacks following financial restatements
- Still awaiting regulations directing stock exchanges how to administer requirements in listing standards
- On its face Section 954 is more onerous than SOX Section 304
- Lots of open questions

Responsible Corporate Officer Doctrines Under the Securities Laws – Clawback Remedies

	SOX §304	Dodd-Frank §954
Coverage	CEO and CFO only	Any current or former executive officer
Culpability	Restatement "as a result of misconduct"	No misconduct requirement
Look-back for repayment	One year	Three years
Amount of repayment	Any bonus or incentive-based comp and any profit from sale of company's securities	Incentive-based comp, including stock options, which exceeds what would have been paid under the restatement during the 3-year look-back period

Insurance for Corporate Officers

- **2012: Allied Assurance Co and Marsh began offering RCO insurance for pharma, life sciences, and health care corporate officers**
  - **"What You Get**
    - Coverage for defense costs of RCO prosecutions and administrative debarment/exclusion proceedings.
    - Continuation of salary/compensation for excluded/debarred executives.
    - Reimbursement of a corporate officer's compensation that must be returned or forfeited as a result of an adverse judgment or settlement"
- Traditional D&O insurance stops on finding of criminal liability