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The Responsible Corporate Officer Doctrine

Characteristics of Defensible Corporate Environmental Compliance Programs

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Responsible Corporate Officer (“RCO”) Doctrine Overview

- Holds corporate officers in positions of authority **personally liable** for corporate violations of public welfare statutes
- Primarily applied in conjunction with welfare public statutes imposing strict liability
- Actively applied in Federal and California State contexts including theories of civil and criminal liability



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Willful Blindness?



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The Crime of Doing Nothing

– I Know Nothing...!

– I See Nothing ...!



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Genesis of the RCO and Seminal Supreme Court Precedent

- Rationale for the RCO emerged from two seminal Supreme Court cases, primarily in the context of the Federal Food, Drug, and Cosmetic Act (“FDCA”) for criminal misdemeanors
- ***United States v. Dotterweich*, 320 U.S. 277 (1943)**: Corporate executives need not possess personal knowledge of a regulatory violation to incur criminal responsibility
- ***United States v. Park*, 421 U.S. 658, 672 (1975)**: “The requirements of foresight and vigilance imposed on responsible corporate agents are . . . demanding, and perhaps onerous, but . . . no more than the public has a right to expect of those who voluntarily assume positions of authority in . . . enterprises whose services and products affect the health and well-being of the public . . .”

Who Is a Responsible Corporate Officer?

- Any person holding a position of responsibility and authority in an organization and who possesses the ability to prevent or correct a violation
- Government can make a *prima facie* case by demonstrating that the corporate officer's position provided him or her sufficient responsibility and authority to prevent the wrongdoing, or that the officer subsequently failed to promptly correct what he or she failed to do in the first instance



Application of the RCO

- RCO Liability has two general elements:
 - 1. Defendant was in a responsible capacity**
 - 2. Defendant had the responsibility and authority to initially prevent, or subsequently correct a violation**
- environmental laws
- securities laws
- consumer fraud
- deceptive lending practices
- antitrust violations
- record-keeping violations
- Sarbanes-Oxley Act liability

Application of the RCO

- The RCO seems to conflict with the well-embedded prohibition against using mandatory presumptions in criminal cases, but is nevertheless supported by Supreme Court precedent
- Officers can avoid civil liability by operation of the Business Judgment Rule, BUT be held criminally liable through the RCO even if he or she did not possess knowledge of an employee's violation of state or Federal welfare laws



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Yes, Criminal Liability



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Federal Environmental Law

- Certain Federal environmental laws incorporate the RCO into statutory definitions of “persons”
- Clean Air Act, 42 U.S.C. § 7413(c)(6): “[T]he term ‘person’ includes . . . any responsible corporate officer.”
- Clean Water Act, 33 U.S.C. § 1319(c)(6): “[T]he term ‘person’ includes . . . any responsible corporate officer.”
- ***United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998):**
“[A] person is a ‘responsible corporate officer’ if the person has authority to exercise control over the corporation’s activity that is causing the discharges. 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.”

Federal Environmental Law

- Prosecutors have also employed the RCO in the context of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*
- Ninth Circuit precedent in ***United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1992)** confirms knowledge of a disposal permit which has not been obtained is not required to attach liability to a corporate officer for improper disposal under the RCRA



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Federal Environmental Law

– Circuit Splits concerning the degree of knowledge and participation the RCO requires:

- Actual Knowledge:
 - 1, 3, 4, and 5
- Jury May Infer:
 - 10 and 11
- Imputed Knowledge:
 - 2, 6, 7, 8, and 9



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California State Environmental Law

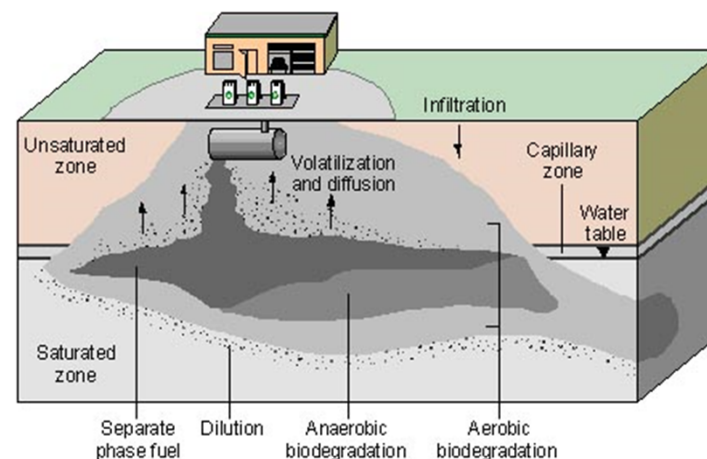
- California environmental regulatory agencies (under CAL EPA) including the State Water Resources Control Board (and corresponding regional boards) use the RCO to impute liability to corporate officers



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California State Environmental Law

- A California appellate court held officers of a company liable for millions of dollars in civil penalties stemming from violation of California's underground storage tank ("UST") laws ***People v. Roscoe*, 169 Cal. App. 4th 829 (2009)**
- The court did not pierce the corporate veil, but instead held the Defendants personally liable under Health and Safety Code section 25299 for \$2,493,250



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California State Environmental Law

- “**Be a manager, go to jail**” - Common reference of the Corporate Criminal Liability Act
 - California Penal Code § 387
- California Labor Code § 6423
- California Labor Code § 6425

Compliance Programs

- Two central criteria of effective compliance programs:
 - 1. Understanding the Regulatory Environment**
 - 2. Understanding the Compliance Chain of Command**

Compliance Programs: Understanding the Regulatory Environment

- Compliance Programs must be industry specific
- Programs must account for Federal and California State law, given that California employs the RCO in parallel fashion
- Actively update to mirror the regulatory environment
- Comprehensive
- Practicable to monitor

Understanding the Regulatory Environment

Use prosecuting agencies' own protocols

– U.S. Attorneys' Manual for Prosecution of Business Organizations

- Reference section 9-28.800 regarding Corporate Compliance Programs

9-28.800 - Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. See USAM 9-28.900. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

- Critical factors are:

- Program adequately designed for maximum effectiveness?
- Whether Corporate management is enforcing the program?
- In general, is this plan a Paper Tiger?

Compliance Programs: Understanding the Compliance Chain of Command

- Corporate officers' removal from the day-to-day operations present challenges in effectively implementing compliance programs
- Carefully review the company's chain of command
- Personally take part in public-safety and public-welfare activities/training and preemptively recognize issues that require personal involvement
- Clear line of reporting to the corporate officers
- Review of corporate governance documents
- Create a culture of openness, where employees are not only encouraged, but are held accountable for correcting and reporting potential violations up the chain of command

Internal Audits and Attorney/Client Privilege

- Internal audits can catch misconduct/violations and prevent future violations
- Violations detected through attorney-audits will be afforded attorney-client privilege
- Internal auditing should be part of and in addition to a compliance program (i.e. surprise inspection vs. comprehensive audit)

Compliance Programs



Questions?

360+

Partners

1800+

Legal professionals
worldwide

3000+

Total Staff

45

Offices across 6
continents

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