"What is astonishing is that the attorney-client privilege, one of the foundational rights on which rests Anglo-American legal culture . . . should now be under siege. The two federal agencies that have been most vigorous in seeking waiver of the attorney-client privilege have been the Department of Justice and — unfortunately, I must say — the Securities and Exchange Commission."

Paul S. Atkins
SEC Commissioner
January 18, 2008

"The message should be clear that prosecutions will go as high up the corporate hierarchy as the evidence permits and we will hold senior managers of corporations accountable, as well as the corporation itself."

Granta Y. Nakayama
EPA Assistant Administrator for
Enforcement and Compliance
June 12, 2006

SPECIAL REPORT:

Federal Erosion of Business Civil Liberties

Washington Legal Foundation
Advocate for freedom and justice©
2009 Massachusetts Avenue, NW
Washington, DC 20036

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***SPECIAL REPORT*:**

Federal Erosion of Business Civil Liberties

This *Report*, along with WLF's ***Timeline: Federal Erosion of Business Civil Liberties***, is a part of our ongoing CRIMINALIZATION OF FREE ENTERPRISE—BUSINESS CIVIL LIBERTIES PROGRAM. For more information on this program or to receive additional copies of this *Report* or the *Timeline*, please contact WLF at (202) 588-0302 or visit us online at www.wlf.org.

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INTRODUCTION
by
The Honorable Dick Thornburgh

The Washington Legal Foundation's SPECIAL REPORT: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES provides the legal community with an excellent summary, analysis, and critique of the key legal, judicial, and regulatory developments in the growing trend to criminalize normal business activities.

Ideal for reference by corporate counsel, white-collar defense attorneys, and the general legal and public policy community, WLF's up-to-date REPORT traces the controversial development of the following legal topics in seven chapters, each followed by a timeline, with an emphasis on environmental criminal enforcement by the Environmental Protection Agency (EPA) and the Department of Justice (DOJ): 1) Mens Rea, Public Welfare Offenses, and the Responsible Corporate Officer Doctrine; 2) EPA Criminal Enforcement Policies; 3) DOJ Criminal Prosecution Policies; 4) Parallel Civil and Criminal Prosecutions; 5) Attorney-Client and Work Product Privileges; 6) Deferred Prosecution and Non-Prosecution Agreements; and 7) U.S. Sentencing Guidelines.

An important theme of the REPORT is that the EPA and DOJ have often resorted to criminal prosecution of minor regulatory offenses when administrative and civil remedies would be more appropriate. In that regard, the REPORT presents several case studies that call into question the case selection criteria used by EPA and DOJ, and which reminds the reader of former Attorney General Robert Jackson's admonition to all U.S. Attorneys that "the prosecutor has more control over life, liberty, and reputation than any other person in America." Of particular interest is Chapter Five on the Attorney-Client Privilege, which discusses the assault by DOJ, the SEC, and other agencies on the venerable privilege, but also notes the successes that are being made to counter its erosion.

I heartily commend the Washington Legal Foundation for producing this useful REPORT, which should be required reading for private and government lawyers alike, as well as for publishing a companion TIMELINE fold-out chart that chronicles and highlights the key events and cases described herein.

The Honorable Dick Thornburgh has served as Governor of Pennsylvania, Attorney General of the United States, and Under-Secretary-General of the United Nations during a public career that has spanned over 30 years. Mr. Thornburgh is currently counsel to the national law firm of Kirkpatrick & Lockhart Preston Gates Ellis LLP in its Washington, D.C. office, and is Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

Chapter One

Mens Rea, Public Welfare Offenses, and the Responsible Corporate Officer Doctrine

Chapter One

MENS REA, PUBLIC WELFARE OFFENSES, AND THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

"You cannot punish corporations. . . . If you dissolve the offending corporation. . . .[y]ou merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons, and to the great inconvenience of society as a whole."

Woodrow Wilson
Address to the Annual ABA Meeting (1910)

Mens Rea. Historically, Anglo-American jurisprudence has required the government to prove that a defendant charged with a crime has performed a wrongful act ("actus rea") with a wrongful intent ("mens rea"), that is, "an evil-doing hand" and "an evil-meaning mind." *See Morissette v. United States*, 342 U.S. 246, 251 (1952). The Supreme Court has described this principle as being "as universal and persistent in mature systems of law as belief in freedom of the human will." *Id.* at 250. Generally speaking, prosecutors are required to prove that a defendant had the specific intent or purpose to commit a crime that is inherently evil or wrongful, or *malum in se,* such as robbery or assault. Society has traditionally dealt with these common law or *mala in se* crimes by criminal prosecution and appropriate punishment, including incarceration, to serve the purposes of retribution and deterrence.

However, with the dramatic growth of the administrative and regulatory state in the last several decades, many commercial activities that were otherwise not considered criminal — and indeed, were socially useful because they produced needed goods and services — were made subject to a vast array of complex laws and regulations. By 1900, there were only approximately 165 federal criminal laws on the books. By 1970, the number increased more than ten-fold to approximately 2,000. In 1998, an American Bar Association task force chaired by former Attorney General Edwin Meese III, issued a report, *The Federalization of Criminal Law,* which estimated the number of federal criminal statutes to be 3,300. By 2004, there were more than 4,000 separate criminal offenses scattered throughout 27,000 pages of the U.S. Code. JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR L. & PUB. POL., MEASURING EXPLOSIVE GROWTH OF FED. CRIME LEGISLATION (2004). As one commentator aptly described it, the "federal criminal code" is "simply an 'incomprehensible,' random and incoherent, 'duplicative, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties." Julie R. O'Sullivan,

The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study (SYMPOSIUM 2006: THE CHANGING FACE OF WHITE-COLLAR CRIME), 96 J. CRIM. L. & CRIMINOLOGY 643 (2006) (citations omitted).

In addition to the plethora of federal criminal laws, the number of regulations in the Code of Federal Regulations (CFR), many of them criminally enforceable, far exceeds the statutes, with estimates ranging up to 300,000. *See* John C. Coffee, Jr., *Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 216 (1991). Regulations issued by the Environmental Protection Agency (EPA) alone fill 30 volumes of the CFR, which is 50 percent more than the dense Internal Revenue Service (IRS) regulations. Indeed, the regulations just for three of the more than dozen environmental statutes — the Clean Air Act (CAA), Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) — number 9,000 pages. Violations of any one of these may lead to criminal prosecution. Some members of Congress regard this explosive growth of regulations as an usurpation of its lawmaking role, and have periodically introduced remedial legislation to that affect. *See, e.g.*, Congressional Responsibility Act of 2005 (H.R. 931), introduced by Rep. J.D. Hayworth (R-AZ), which would prohibit a regulation from taking effect unless the text of the regulation is enacted into law by Congress. Unfortunately, those legislative proposals have not been successful.

Environmental regulations are just as complex and confusing, if not more so, as the IRS code and regulations. As one former EPA official acknowledged, "RCRA is a regulatory cuckoo land of definition . . . . I believe we have five people in the agency who understand what `hazardous waste' is." *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991). *See also Inland Steel Co. v. EPA,* 901 F.2d 1419, 1421 (7th Cir. 1990) (describing RCRA as a "statutory Cloud Cuckoo Land"). Environmental regulations are so vast and complex that most corporate officials candidly admit that it is simply impossible to comply with all of them. For example, if certain solvents are poured onto a surface to be cleaned, the rag used to wipe the surface becomes a hazardous waste, which is then subject to strict storage and disposal rules. However, if the solvent is first poured onto the rag, then the rag is *not* a hazardous waste. Businesses and individuals are faced with a "regulatory hydra" and regulatory terms suggestive of "Alice In Wonderland," as one court put it. *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For the most part, sanctions available for violating these so-called *mala prohibita* offenses — conduct that is deemed wrongful only because a law or regulation prohibits or regulates it — range from administrative penalties or sanctions imposed by the appropriate regulatory agency, to civil proceedings in federal court in the form of injunctive relief, restitution, and penalties, and finally to criminal sanctions involving fines, incarceration, debarment from government contracts, and a variety of conditions for probation. Yet, unlike bank robbery, assault and other *mala in se* crimes, violations which cannot be brought before an administrative law judge or a civil court, regulatory offenses are well-suited for non-criminal treatment by using more appropriate administrative and civil remedies. This is especially true for those infractions that are committed in the course of carrying out otherwise socially useful business activities.

Unfortunately, as the next two chapters in this Report demonstrate, EPA and the

Department of Justice (DOJ) have been abusing their discretion by increasingly resorting to criminal penalties instead of utilizing more reasonable administrative and civil remedies for regulatory offenses, particularly in the environmental area. This criminal enforcement trend is due to a number of factors, including an increase in enforcement staff, increased statutory criminal penalties, and increased punishment provided for under the Sentencing Guidelines. In some cases, both civil and criminal charges are brought in parallel prosecutions by the agency and U.S. Attorneys, which can lead to abusive practices as further described in Chapter Five.

Corporate Criminal Liability. Because a corporation is an artificial or fictional entity, it cannot form any intent, criminal or otherwise; rather, it can act only through its officers, employees, and agents. Corporations have long been held to be vicariously liable for torts committed by their employees and agents in the scope of their duties. In 1909, that concept was extended by the Supreme Court when it ruled for the first time that a corporation may be held criminally responsible for the acts of its agents or employees if they were motivated in part to benefit the company and if the law required a showing of "specific intent." *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

Shortly after this decision, the idea of criminally punishing a corporation drew sharp criticism, most notably from future U.S. President Woodrow Wilson, who stated before the Annual ABA Meeting in 1910:

> You cannot punish corporations. . . . If you dissolve the offending corporation . . . [y]ou merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons, and to the great inconvenience of society as a whole.

Over the last decade, even as more corporations are criminally prosecuted, there has been a growing consensus that holding corporations vicariously liable for the criminal acts of their employees is both wrong and unnecessary. As Professor Jeffrey S. Parker succinctly stated, "[c]orporate criminal liability conflicts with the fundamental moral precepts of criminal law, and arose only as a nineteenth century expedient to fill a gap in public law enforcement institutions that has long since closed. Under current conditions, there is no legitimate law enforcement purpose for corporate criminal liability that cannot be equally or better served by the alternative legal processes of civil liability." Jeffrey S. Parker, *Doctrine of Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381 (1996). Despite the availability of administrative and civil remedies as alternatives to criminal sanctions, regulators and prosecutors have continued to criminalize business activity and target the corporation, its officers, and employees.

While the concept of imputing mens rea or criminal intent of employees and agents to the corporation is troubling enough, the boundary has been pushed even farther by holding a corporation criminally liable even when no individual in the corporation possessed any mens rea or intent to commit an offense. In *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987), the court held that under the so-called "collective knowledge" doctrine, the knowledge of individual employees can be combined to reach the critical mass of criminal intent, even if separately, they do not possess the necessary intent to be punished

individually. Indeed, even if the acts of the employee are in direct conflict with corporate policy, the company can still be held criminally liable. The *Bank of New England* court further found that a corporation can also be found criminally liable if it is "willfully blind" or indifferent to the misconduct of its employees.

Individual Criminal Liability. Many regulatory statutes give prosecutors broad discretion to enforce the law administratively, civilly, or criminally. When the government chooses the criminal option, corporate officers or employees can be easily branded as felons and sent to prison for many years because the level of mens rea or intent required to be proven has been greatly watered down by the courts and Congress over the years. The level of criminal intent necessary to prosecute an individual depends to a great extent upon the level of intent specified in the statute being enforced. Unfortunately, there are now over 100 states of mens rea specified in federal criminal statutes that have been given different interpretations by federal judges, causing confusion in this area of the law. William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1065 (1992).

While the nomenclature used by federal courts varies widely, mens rea is generally categorized in descending order of culpability as follows:

> (1) **specific intent**, perhaps the highest level of intent, requires conduct that is "knowing, purposeful, and willful" as well as factual knowledge of the law or regulation;
>
> (2) **general intent**, where the conduct is "knowing," that is, the person may not know that the conduct was against the law, but intentionally committed the act in question;
>
> (3) **negligence**, where the person failed to take reasonable steps to prevent the conduct, or was "willfully blind," "consciously avoided," or "reckless" regarding the consequences of their conduct; and
>
> (4) **strict liability**, where criminal liability can be imposed even though the actor had no mens rea or intent to commit the offense, and was not negligent. As this chapter demonstrates, the trend has been to transform even knowing offenses into strict liability offenses.

On the other hand, the American Law Institute's Model Penal Code (MPC) has categorized criminal intent, from most to least culpable, as follows: (1) purpose, (2) knowledge, (3) recklessness, (4) negligence, and (5) strict liability. As the Supreme Court has noted, "`purpose' corresponds loosely with the common-law concept of specific intent, while `knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey*, 444 U.S. 394, 405-06 (1980). While most States have adopted the MPC's classifications of mens rea, Congress has not done so, thus leaving the federal law in this area more confusing than it need be. *See also* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003).

Over the last few decades, the case law has devolved to allow criminal prosecutions and convictions of "public welfare offenses" to stand without a showing of criminal intent or actual knowledge, which is tantamount to imposing strict liability. To make matters worse, targets of criminal prosecution include not only the individuals who actually committed the regulatory offense, but also the

company, under the doctrine of vicarious liability, and company officers, under the so-called responsible corporate officer doctrine, even though they neither were aware of nor condoned the employee's conduct. *See* DANIEL RIESEL, *The Elements of Mens Rea,* ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 6.03 (Law Journal Press 2007).

Moreover, regulatory agencies promulgate rules that not only depart from the intent of Congress, but also impose criminal penalties that dispense with the showing of criminal intent. For example, at the 2002 Federalist Society annual meeting, the General Counsel of the Department of Treasury publicly boasted about his agency's "invention" of a bank regulation designed to prevent a particular form of money laundering by eliminating mens rea and making bank employees strictly liable, contrary to the intent of Congress. This erosion of the mens rea requirement has taken a heavy toll on individuals, employees, and corporations that are being increasingly ensnared by unfair and unwarranted criminal prosecution.

Categories of Criminal Regulatory Offenses. Generally speaking, any violation of regulatory statutes, such as the CWA, CAA, and RCRA, can be prosecuted administratively, civilly, or criminally. For example, under the CWA, the EPA may (1) seek penalties of up to $10,000 per day per violation and "cease and desist" orders in administrative proceedings; (2) file a civil action in federal district ourt and seek civil penalties of up to $25,000 per day per violation as well as injunctive relief; or (3) file criminal charges. In turn, criminal charges can be brought under three different levels or categories of intent: (1) "negligence" or a misdemeanor violation subject up to one-year imprisonment; (2) "knowing violation," a felony subject up to three-years imprisonment; and (3) "knowing endangerment," a violation subject up to 15 years imprisonment. 33 U.S.C. §§ 1319(a)-(g). Unlike the CWA and CAA, RCRA does not have a misdemeanor provision; any knowing violation is a felony.

The question that the courts face when the government elects to file a criminal action is what standard of intent is required to be shown. For "negligence" cases, the government has argued that simple negligence akin to that found in the tort law will suffice instead of having to prove highly reckless conduct or gross disregard of risks, standards which are generally required for proving criminal negligence. Defendants have argued that "knowing" or felony violations require proof of the more rigorous specific intent rather than the more relaxed general intent standard, where prosecutors need only prove that the defendant committed the act in question, namely, that he knowingly discharged a substance or filed a false monitoring report, regardless of whether he knew it was unlawful to do so, or that the report was in error.

However, for "knowing endangerment" violations, which can subject a person to up to 15 years in prison, Congress required that violators must possess actual knowledge that their conduct places someone in imminent danger of death or serious bodily injury, and that such knowledge cannot be imputed to them by another employee's knowledge. 33 U.S.C. § 1319(c)(3)(B); 42 U.S.C. § 6928(f). As will be discussed, corporate officials nevertheless have been prosecuted and convicted for knowing endangerment where it appears that they did not cause or have actual knowledge of the conditions causing the endangerment.

In 1985, the Supreme Court, in *Liparota v. United States*, 471 U.S. 419 (1985), was faced with that question in interpreting a food stamp fraud statute that makes it a crime to "knowingly" possess, transfer or use food

stamps not authorized by law or applicable regulations. The Court required that the prosecutor must prove that the defendant knew his conduct was unauthorized; otherwise, to dispense with a showing of mens rea "would be to criminalize a broad range of apparently innocent conduct." *Id*. at 426. Similarly, in *Cheek v. United States*, 498 U.S. 192 (1991), the Court held that a defendant could not be convicted of a "willful" violation of IRS law if there was a subjective good faith confusion with the complex code, even if the belief was irrational.

The Supreme Court reaffirmed the necessity of proving mens rea for "knowing" violations in subsequent cases involving regulatory requirements. For example, in *Staples v. United States*, 511 U.S. 600 (1994), the Court held that prosecution under the National Firearms Act, which made it unlawful to possess a machine gun not properly registered with the government, required the government to prove the defendant knew the specific features of his weapon came within the definition of a regulated firearm under the law. Because violations of the firearm law subjected a person to lengthy prison terms, the Court concluded that Congress did not intend to eliminate the mens rea requirement.

Initially, some lower courts also began to require that "knowing" violations of environmental laws also required a showing of specific intent. General intent, on the other hand, only requires a showing that the person intended to commit an act that is prohibited, even if the person was unaware of the prohibition. For example, in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), the court held that the prosecution of defendants charged with disposing hazardous waste without a permit required the government to show that the defendants had a specific intent to violate RCRA. Similarly, in *United States v. Speach*, 968 F.2d 795 (9th Cir. 1992), the Ninth Circuit reversed a conviction in another RCRA illegal storage case, holding that the government had to prove that the defendant had actual knowledge that the facility did not possess the required RCRA permit; otherwise, removing the knowledge requirement "would criminalize innocent conduct." *Id*. at 796.

Unfortunately, this line of cases did not predominate in the courts. Instead, another line of case law has developed over the years, which has condoned the government's attempt to circumvent even the more relaxed general intent requirement for prosecuting regulatory offenses, particularly environmental offenses. This troubling jurisprudence was ushered in by the courts under the rubric of the public welfare offense doctrine and the related responsible corporate officer doctrine.

> *"[W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities."*
>
> **Associate Justice Clarence Thomas**
> *Hanousek v. United States* (dissenting from denial of *certiorari*) (2000).

Public Welfare Offenses. In *United States v. International Minerals & Chemical Corp*., 402 U.S. 558 (1971), the Supreme Court considered whether the defendant could be charged with a "knowing" violation for failing to properly identify a highly corrosive chemical on shipping documents without actual knowledge of the law. The Court held that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id*. at 565. Violating safety laws meant to protect the public is considered a "public welfare offense," which essentially eliminates the mens rea requirement altogether and imposes strict liability upon those who violate the law, whether wittingly or not.

However, extending the *International Minerals* holding to all environmental regulations is problematic in two major respects. First, *International Minerals* involved a misdemeanor violation, where punishment would likely result in a small fine rather than in lengthy prison sentences for felony violations available under current environmental statutes. Second, the chemical substance at issue was highly dangerous, whereas many pollutants subject to environmental laws, such as the CWA and CAA, include benign substances such as sand, dirt, and other substances which, at low levels, pose no immediate or irreparable harm, or threat to health or the environment.

Nevertheless, the first major case to address mens rea issues stemming from the 1987 CWA Amendments in the felony context, extended the logic of *International Minerals*. In *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), municipal workers were convicted of discharging waste-activated sludge in violation of the permit. The Court classified the violation as a public welfare offense and held that the "knowingly violated" provision of the statute means only that a person "knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit." *Id*. at 1284. Thus, a prosecutor need only show general intent to engage in the conduct, a relatively easy standard to meet.

As noted by five Ninth Circuit judges who vigorously dissented from the denial of rehearing *en banc* in *Weitzenhoff* by the other 19 circuit judges, Congress did not criminalize "knowing discharges," but "knowing violations," and thus specific intent to violate the permit requirements was required to be shown. *Id*. at 1293-94. Since the plant workers were hired to discharge pollutants up to a certain level, they could easily be prosecuted under a general intent standard whenever those pollutants happened to exceed permit levels. Inadvertent exceedances are not a rare occurrence. Furthermore, since Congress also provided for negligent violations — which do not require a showing of any intent — knowing and negligent violations would become impermissibly blurred if the two categories of offenses were treated the same.

More importantly, the dissent clearly distinguished the public welfare offense ruling in *International Minerals* from that upon which the *Weitzenhoff* majority relied. First, unlike the misdemeanor statute at issue in *International Minerals*, the defendants in *Weitzenhoff* were facing prison sentences up to 10 years. As the Supreme Court noted in *Staples*, "the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement."

511 U.S. at 616-18. Furthermore, the chemical substance at issue in *International Minerals* was highly caustic and dangerous to handle. Yet, as the dissent noted in *Weitzenhoff*, under the CWA, one could violate the law's prohibition on unpermitted discharges of "pollutants" simply by "skipping a stone into a lake" or "pouring hot stale coffee down the drain." 35 F.3d at 1298. Unfortunately, the Supreme Court declined to review this critical case. On the other hand, in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1992), the Fifth Circuit was the lone appeals court that did require the government to show that the defendant knew he was discharging a pollutant in violation of the CWA, ruling that "[s]erious felonies . . . should not fall within the [public welfare] exception `absent a clear statement from Congress that mens rea is not required.'" *Id*. at 391.

The Ninth Circuit would again have the opportunity to address the issue of mens rea under the CWA, but this time in the context of negligent conduct. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), a pipeline company hired an independent contractor to straighten out a section of railway track that required using a backhoe to load rocks onto rail cars. Unfortunately, when the backhoe operator attempted to pick up some of the rocks that fell onto the track, he accidentally struck the pipeline. The operator quickly radioed the pipeline's pump station and the pipeline was shut down. Nevertheless, a small amount of oil flowed into the nearby Skagway River.

Even though Mr. Hanousek, the railmaster, was off duty and at home, he was criminally charged and convicted of "negligently" discharging oil in harmful quantities to waters of the United States, a violation of the CWA, because of the negligence of the backhoe operator. As discussed in the next two chapters, this was a clear case of prosecutorial abuse because it violated both EPA and DOJ guidelines that non-criminal remedies should be used where there is little environmental harm and an absence of culpable conduct. Moreover, this once-removed negligent conduct was based on ordinary tort negligence standards instead of typical criminal negligence requiring reckless conduct. Nevertheless, for his "crime," Mr. Hanousek, a first-offender, was sentenced under the harsh Sentencing Guidelines to the *maximum* sentence of twelve months' imprisonment for a misdemeanor (six months' incarceration and six months in a halfway house) and an additional six months of supervised release. The Ninth Circuit upheld the conviction and sentence.

The Supreme Court denied review, but in a rare dissent from a denial of certiorari, Justice Clarence Thomas, joined by Justice O'Connor, decried the notion that the CWA could be categorized as a public welfare offense: "[t]he seriousness of these penalties counsels against concluding that the [CWA] can accurately be classified as a public welfare statute." *Hanousek*, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of *certiorari*). Thus, Justice Thomas recognized that substantial prison terms, which can be (and indeed have been) imposed under the CWA and other environmental statutes, should disqualify these laws as public welfare offenses where strict liability can be imposed. Justice Thomas further observed that the doctrine could virtually cover all criminal laws applicable to commercial activity when he remarked:

> [W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute

applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety. To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe the Courts of Appeals invoke this narrow doctrine too readily, I would grant certiorari to further delineate its limits.

Id. at 1104-05. Subsequent petitions to the Supreme Court in other cases urging it to review and clarify this important issue have also been denied. *See, e.g., United States v. Rubenstein*, 403 F.3d 93 (2d Cir. 2005), *cert. denied*, 546 U.S. 876 (2005). Nevertheless, future opportunities for review are likely to arise as more convictions and prison sentences are imposed for public welfare offenses.

"The message should be clear that prosecutions will go as high up the corporate hierarchy as the evidence permits and we will hold senior managers of corporations accountable, as well as the corporation itself."

Granta Y. Nakayama
EPA Assistant Administrator
Office of Enforcement and Compliance Assurance
June 12, 2006

Responsible Corporate Officer Doctrine. Both the EPA and the Justice Department have been overly aggressive in pursuing criminal charges and prison sentences against company officers and the company itself for environmental offenses. Under the so-called responsible corporate officer doctrine, corporate officers can be held criminally liable for conduct of their employees even if they did not participate in the conduct, were unaware of the conduct, or specifically forbade the activity. This imputation of criminal liability to individual officers is a corollary to the public welfare offense doctrine in that mens rea could essentially be dispensed with when considering both the nature of the offense and the supervisory role of the "offender." Accordingly, the responsible corporate officer doctrine suffers from the same flaws that allow for abusive prosecution of public welfare offenses.

The Supreme Court articulated the doctrine in *United States v. Dotterweich*, 320 U.S. 277 (1943), and later in *United States v. Park*, 421 U.S. 658 (1975). In *Dotterweich*, the president of a pharmaceutical company was prosecuted for shipping adulterated and misbranded drugs in violation of the Federal Food, Drug and Cosmetic Act (FFDCA). Although the adulteration of the drugs was found to have been accidental, the defendant's conviction was affirmed. Balancing the relative interests and burdens, the Supreme Court stated:

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative

> hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284-85.

Thirty years later, the Court once again reviewed a CEO's conviction for adulteration under the FFDCA. In *United States v. Park*, the CEO of a retail grocery chain received a notice from the Food and Drug Administration of unsanitary conditions at one of the company's food warehouses. Later inspections revealed that the unsanitary warehouse conditions had not been corrected. Because the CEO was in a position to have prevented the violation, the Court affirmed the CEO's conviction, stating:

> [T]he Act imposes not only a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

421 U.S. at 672. Central to the Court's decision to affirm the convictions in *Dotterweich* and *Park* was its finding that the FFDCA violations at issue were "public welfare offenses."

However, unlike these misdemeanor public welfare offenses, many environmental laws establish felony penalties for knowing conduct. For example, criminal provisions of the CWA, 33 U.S.C. § 1319(c)(2)(A), and RCRA, 42 U.S.C. §§ 6928(d)(2)(e) & (f) require "knowing" conduct on the part of the defendant, and for which substantial prison terms of several years are not only possible, but, likely to be imposed. Prosecutors have applied the responsible corporate officer doctrine to environmental offenses, which has generated conflicting decisions.

For example, in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), the First Circuit reversed the conviction of a company president for violating RCRA, because there was no evidence that the officer actually knew of the violations. The Court explicitly stated that the responsible corporate officer doctrine should not be applied to statutes requiring actual knowledge as a criterion for conviction. However, the Court suggested that a jury could infer actual knowledge from circumstantial evidence. Indeed, in *United States v. Baytank, Inc.*, 934 F.2d 599 (5th Cir. 1991), the Fifth Circuit apparently applied the responsible corporate officer doctrine implicitly. The Court affirmed the convictions of two of Baytank's officers apparently without direct evidence that they actually knew of the RCRA violations, because "both individuals were intimately versed in and responsible for Baytank's operations." *Id.* at 616-17.

More recently, the Third Circuit reversed a district court judge who dismissed a guilty verdict against the owner of a dry cleaning business for a RCRA violation. In *United States v. Wasserson*, 418 F.3d 225 (3d. Cir. 2005), the owner of a dry cleaning business was deemed criminally liable for improper disposal of certain dry cleaning chemicals by an employee who contacted a salvage company

to dispose of the chemicals. The Third Circuit ruled that RCRA liability is not limited to those who actually cause the unlawful disposal; therefore, the owner himself could be held vicariously liable.

The CWA and CAA's definition of "person" raises potential due process issues, because the definition includes "responsible corporate officer[s]," under 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6). This would mean that a person could be responsible for crimes that she neither committed, nor for which she possessed the requisite knowledge. CEOs have no choice but to delegate responsibility for compliance with environmental laws and regulations to corporate environmental managers. Under the responsible corporate officer doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without knowledge that a specific violation is occurring. Expanding the responsible corporate officer doctrine to CWA, CAA, and RCRA felonies will cause corporate industrial managers to rethink their career choice. Applying the responsible corporate officer doctrine to the prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. As the dissenters noted in *Weitzenhoff*, it would impose on these officers "a massive legal risk, unjustified by law or precedent." 35 F.3d at 1299.

One alarming case that illustrates how the responsible corporate officer doctrine can ensnare company officials is *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). In 1998, Christian Hansen, the owner of a Georgia chemical facility, his son Randall, and Alfred Taylor, the plant manager, were all indicted four years *after* the facility was shut down, for violating the CWA and RCRA, including one "knowing endangerment" count under RCRA, for violations that occurred nearly six years earlier. The last count, which provides for up to 15 years in prison, was based on allegations that workers had been exposed to wastewater containing mercury. Randall Hansen, a Harvard MBA, who lived with his wife and two children in New Jersey, agreed to temporarily help his father operate and manage the Georgia company that was in bankruptcy. The plant manager, Alfred Taylor, accepted the position after the relevant period and resigned once the company was unable to make repairs to the facility.

At the trial, only one employee testified that he recalled slipping in the wastewater, but could not remember in which *decade,* let alone the year, the accident took place. He did remember, however, that he failed to report the incident to the company as required by company policy and did not seek medical attention; he simply rinsed himself off and returned to work. As for the dangerousness of the exposure to the mercury in the wastewater, the government's so-called "expert" told the jury that the basis for the Mad Hatter's "madness" in *Alice in Wonderland* was due to mercury exposure, once used in curing the felt in the hatmaking process.

The jury convicted all defendants on the CWA and RCRA counts, including the one RCRA "knowing endangerment" count based on the court's jury instructions on the responsible corporate officer doctrine: that if corporate officers "failed to detect" violations that may have been caused by others, that would amount to "knowing endangerment" even if they did not know the violation existed. The government argued that Randall Hansen should have shut the plant down even though, as temporary CEO, he had no authority to do so. Such decisions were subject to approval by the Board of Directors, the creditors' committee and the Bankruptcy Court. Indeed, Randall

Hansen went so far as to seek funds to help remediate any lingering environmental problems after the plant was shut down, but his funding request was denied by the Bankruptcy Court. For their "crimes," Christian Hansen received eight years in prison, his son Randall received four years, and the plant manager received six years under the draconian Sentencing Guidelines.

It is clear that Congress did not intend to criminalize, what is, at most, managerial negligence, as a major felony "knowing endangerment" violation under RCRA which requires a willful scienter. Indeed, Congress stated that criminal liability under § 6928(e) should not attach to corporate officers who were "making difficult business judgments" or "for errors in judgment made without the necessary scienter, however dire may be the danger in fact created." S. Rep. No. 96-172 at 37-39. The *Hansen* case starkly illustrates how the responsible corporate officer doctrine can be abused by overly aggressive prosecutors and compliant courts. *See also United States v. Hong*, 242 F.3d 528 (4th Cir. 2001), *cert. denied*, 534 U.S. 823 (2001) (criminal liability and three-year sentence imposed on owner and investor in facility even though he was (1) not an officer of the company, (2) unaware of the violation, and (3) did not exercise direct supervision over wastewater treatment operations).

More recent prosecutions by DOJ underscore the risk corporate officers, and even directors face under the responsible corporate officer doctrine. In March 2007, Roderick Hills, an outside director of Chiquita Brands International, and former chairman of the SEC, was being threatened with a felony indictment even though he was not a corporate officer. His "crime" was that he voluntarily revealed to the Justice Department that Chiquita's subsidiary in Colombia had been making payments to a local militia group, which had extorted the company, in order to protect its employees from militia violence. When DOJ was asked whether the company should stop the payments, then Assistant Attorney General for the Criminal Division, Michael Chertoff, said he would get back to the company, but never did. Payments continued for the protection of the employees but finally stopped. The company was indicted and subsequently was forced to plead guilty in September 2007 for supporting a terrorist organization. Mr. Hills was fortunate to have been spared prosecution.

In another miscarriage of justice, three senior executives of Purdue Frederick Company were prosecuted and pled guilty in May 2007 for the unlawful marketing of OxyContin by the company sales representatives, even though they had no actual knowledge of or involvement in the offense, thus making them strictly liable under the responsible corporate officer doctrine.

Willful Blindness and Conscious Avoidance. Although many federal statutes require a conviction based on "knowing" violation of the law, prosecutors have tried to dilute the mens rea requirement further and make their jobs easier by requesting a "conscious avoidance" jury instruction. Such an instruction allows a jury to convict the defendant not on actual knowledge he possessed, but on the grounds that he could have known the facts of the unlawful conduct, but was unaware of them because of either willful blindness or conscious avoidance.

The circuit courts are split over whether a "conscious avoidance" jury instruction is permissible where the statute requires a "knowing" violation. As Circuit Judge Easterbrook has noted, "[k]nowledge in a criminal statute means actual knowledge. What one ought to have known, but did not know, is

not knowledge; it is not even (necessarily) recklessness." *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998). Other circuits are more liberal in allowing a "conscious avoidance" instruction. *See, e.g.*, *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003); *United States v. Heredia*, 483 F.3d 913 (2007) (en banc). In *Heredia*, the Ninth Circuit held, in an opinion written by Judge Kozinski, that a person can be convicted of a "knowing" violation if the defendant did not want to know the facts. In a strong dissent, Judge Graber, joined by three other judges, said, "[i]f Congress wants to criminalize willful ignorance, it is free to amend the statute to say so." *Id.* at 932 (Graber, J., dissenting). The Supreme Court declined to review this important mens rea issue on December 10, 2007, *Heredia v. United States*, 128 S. Ct. 804 (2007), and before that in *Ebbers v. United States*, 458 F.3d 110 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007).

However, in 2005, the Supreme Court reversed the conviction of Arthur Andersen on obstruction of justice charges because the jury instructions "failed to convey the requisite consciousness of wrongdoing" with regard to the shredding of company documents that were later sought by the SEC in its investigation of the collapse of Enron. *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 706 (2005). Hopefully, the Supreme Court will eventually clarify whether "willful blindness" or "conscious avoidance" is sufficient to show criminal knowledge.

Recent Criminal Legislation. Unfortunately, other recently enacted legislation has the potential to be abused by DOJ. For example, in March 2006, the USA PATRIOT Act, intended to detect potential terrorist activity, was amended to allow wiretapping of boardrooms and executives' phone conversations, if a suspected antitrust violation exists. DOJ has also used other legislation in ways not intended by Congress. For example, the Racketeer Influenced & Corrupt Organizations Act (RICO), enacted in 1970 to be used against the Mafia, was later directed against legitimate businesses. In 1986, Drexel-Burnham Lambert was threatened by then-U.S. Attorney Rudy Giuliani with a criminal RICO charge for securities violations, pled *nolo contendere*, and paid a $650 million fine. Since then, RICO has been invoked in other criminal cases, but more frequently in civil cases by one business against another or by the federal government against a business.

Other recent legislation that unfairly exposes corporations to criminal liability is the Health Insurers Portability & Accountability Act (HIPAA) enacted in 1996 and the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act enacted in 2000, criminalizing product liability with respect to defective tires. On February 25, 2008, Senator Pryor introduced S. 2663, a substitute for his Consumer Product Safety Commission Reform Act of 2007, in response to the recall of toys from China. His bill would impose massive fines for technical violations, allow state attorneys general and plaintiffs' lawyers to bring crippling civil lawsuits, and impose five-year prison terms for knowing and willful violations of product safety laws. The Senate approved the bill on March 6, 2008, which will be reconciled with a slightly less severe bill passed by the House in December 2007.

Sarbanes-Oxley: Certification Requirements. While Congress and the courts have imposed greater liability on corporate officers for environmental offenses, including the filing of false discharge monitoring reports, Congress has also greatly expanded criminal liability in the securities law area with the 2002 passage of the Sarbanes-Oxley Act (SOX).

SOX has been widely criticized as an overreaction to the Enron and WorldCom scandals. "SOX is one of many examples of the recent trend toward using criminal sanctions to deter and punish social and commercial conduct that traditionally has been subject only to civil sanctions." HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT 60 (AEI Press 2006). The direct costs of complying with SOX, including its unduly burdensome reporting requirements under Section 404, have been estimated to be $6 billion in 2006, with incalculable indirect costs, including reallocating corporate resources from maximizing shareholder value, reducing access to markets, and criminalizing corporate agency costs. *Id*.

Section 807 of SOX increases the penalty for knowingly committing securities fraud up to 25 years, and Section 903 increases related mail fraud violations from five to 20 years. But more troubling is the certification provision that imposes criminal liability upon CEOs and CFOs for certifying that complicated financial reports "fairly represent in all material respects the financial condition and results of the operations of the issuer." This criminal provision alone forces companies to overspend on compliance costs to prevent threats of criminal prosecution. Indeed, some public companies are going private and private companies are reconsidering whether they should go public.

Moreover, the criminalization of business activities by SOX and similar laws may cause the best and brightest to avoid taking responsible positions for fear that any misstep could trigger career-destroying prosecution. As two critics have pointed out, "[s]oaring penalties for corporate crimes and dilution of a mens rea requirement could have the paradoxical consequence of creating *more* corporate crime and not, as the standard story goes, less." Craig S. Lerner & Moin A. Yahya, *`Left Behind' after Sarbanes-Oxley* 30 REG. 44 (Cato Inst. Fall 2007).

Conclusion. The trend over the last two decades has been to eliminate mens rea as a requirement for criminal conviction of many regulatory offenses. Courts have even allowed prosecutors to use "knowing" statutes as if they were strict liability offenses. Because both corporations and corporate officers are being held vicariously criminally liable for employee misconduct, DOJ exerts tremendous leverage over them to waive their rights, extract guilty pleas, and accept severe punishments for regulatory offenses that should be handled administratively or civilly. Unless legislative reforms are instituted to prevent further erosion of the mens rea requirement in criminal prosecutions, the only recourse is a two-pronged approach: a more judicious use of prosecutorial discretion (as discussed in the next two chapters), and more vigilance by the courts.

RECOMMENDATIONS

1. The categories of mens rea should be standardized and clarified by the courts and the Congress similarly to the categories of mens rea in the Model Penal Code.

2. Convictions under the public welfare offense and responsible corporate officer doctrines should be appealed to circuit courts and the Supreme Court. The lower courts should address the issue in light of Justice Thomas's dissent to the denial of certiorari in *United States v. Hanousek*, and in light of the severe prison sentences currently imposed, which are in sharp contrast to the lenient sentences that informed the Court's early public welfare offense jurisprudence.

3. Corporate officers and managers charged with criminal prosecution of federal environmental and other regulatory laws should request jury instructions requiring a showing of criminal intent or actual knowledge, and object to "conscious avoidance" jury instructions. Convictions for "conscious avoidance" or "willful blindness" for "knowing" offenses should be appealed to the Supreme Court, which should review the issue in light of the split in the circuits.

4. Violation of agency-promulgated regulations should not be subject to criminal prosecution unless Congress codifies the regulations.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Randall S. Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. ENV. L. J. 304 (2001).

AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998).

John S. Baker, Jr., *Reforming Corporations through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004).

JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR L. & PUB. POL., MEASURING EXPLOSIVE GROWTH OF FED. CRIME LEGISLATION (2004).

HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT (AEI Press 2006).

Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729 (1996).

John C. Coffee, Jr., *Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193 (1991).

Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENVTL. L.J. 795 (1996).

Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002).

GENE HEALY, GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Cato Inst. 2004).

Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 LOY. C. CHI. L. J. 169 (1994).

Han Hyewon & Nelson Wagner, *Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 337 (2007).

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Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681 (2003).

William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049 (1992).

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Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402 (1998).

Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY (SYMPOSIUM 2006: THE CHANGING FACE OF WHITE-COLLAR CRIME) 643 (2006).

Jeffrey S. Parker, *Doctrine of Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381 (1996).

DANIEL RIESEL, *The Elements of Mens Rea*, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL, § 6.03. (Law Journal Press 2007).

Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003).

Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignoratia Juris and the White Collar Criminal*, 23 COLUM. J. ENVTL. L. 217 (1998).

TIMELINE: MENS REA, PUBLIC WELFARE OFFENSES, AND THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

1909: *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). Supreme Court holds that corporations can be held criminally liable for the acts of its employees and agents.

1943: *United States v. Dotterweich*, 320 U.S. 277 (1943). Corporate officers can be criminally liable for conduct even though they did not engage in or condone the conduct under the Responsible Corporate Officer Doctrine.

1952: *Morissette v. United States*, 342 U.S. 246, 250 (1952). The Supreme Court underscores importance of proving mens rea or an evil intent.

1970-1976: Congress enacts Clean Air Act (CAA) (1970); Clean Water Act (CWA) (1972); Resource Conservation and Recovery Act (RCRA) (1976).

1971: *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971). The Supreme Court upholds misdemeanor conviction of "knowing" violation of a law without showing actual knowledge of violation for so-called Public Welfare Offenses, e.g., handling dangerous products or hazardous wastes.

1975: *United States v. Park*, 421 U.S. 658 (1975). Similar to the *Dotterweich* case, the Supreme Court affirms conviction of corporate officer for a misdemeanor safety violation that he did not commit but over which he had authority and control.

1984: *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984). Court holds that the prosecution of defendants charged with disposing hazardous waste without a permit required the government to show that the defendants had a specific intent to violate RCRA.

1985: *Liparota v. United States*, 471 U.S. 419 (1985). In a food stamp fraud case, Supreme Court holds that government must show specific intent.

1987: Congress amends the CWA to provide for felony penalties of up to three years in prison for "knowing" violations and up to 15 years for "knowing endangerment" violations.

1987: *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987). "Collective knowledge" doctrine allows corporation and official to be convicted of crime even though no employee individually possesses criminal intent.

1990: Congress amends the CAA to provide for felony violations similar to those in the 1987 amended CWA.

1992: *United States v. Speach*, 968 F.2d 795 (9th Cir. 1992) (government had to prove that the defendant had actual knowledge that the facility did not possess the required RCRA permit). *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1992) (defendant must have actual knowledge that discharged substance was pollutant).

1993: *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993). The Ninth Circuit classified a felony violation of the CWA as a public welfare offense and upheld conviction when person "knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit." Supreme Court denies review.

1994: *Staples v. United States*, 511 U.S. 600 (1994). The Court held that the prosecution under the National Firearms Act for possessing a machine gun not properly registered with the government requires showing of specific intent.

1998: *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) ("Knowledge in a criminal statute means actual knowledge. What one ought to have known, but did not know, is not knowledge; it is not even (necessarily) recklessness.").

1999: *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). Ninth Circuit upholds conviction for negligent violation of the CWA of manager as result of negligent conduct of an independent contractor who accidentally caused pipeline break. The Supreme Court denies review, but Justice Thomas dissent criticizes misuse of the public welfare offense doctrine. 528 U.S. 1102, 1104 (2000).

2001: *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). Eleventh Circuit upholds conviction and prison sentences of eight, six, and four years for chemical facility's president, vice-president, and plant manager for "knowing endangerment" RCRA violation under responsible corporate officer doctrine.

July 2002: Congress enacts Sarbanes-Oxley Act that imposes duties on corporate officers to certify that financial reports filed with the Securities and Exchange Commission (SEC) are accurate.

2003: *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003) ("conscious avoidance" jury instruction can result in convicting defendant of a "knowing" violation).

2005: *United States v. Wasserson*, 418 F.3d 225 (3d. Cir. 2005) (owner of dry cleaning business could be held vicariously liable for employee's wrongful act).

2005: *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (Supreme Court reverses the conviction on obstruction of justice charges because different jury instruction "failed to convey the requisite consciousness of wrongdoing").

June 2006: Granta Nakayama, EPA's Assistant Administrator for Enforcement and Compliance, vows that EPA "will go as high up the corporate hierarchy as the evidence permits and we will hold senior managers of corporations accountable, as well as the corporation itself."

2007: Supreme Court declines to review question of whether "knowing" violations can be based on "willful ignorance." *Heredia v. United States*, 128 S. Ct. 804 (2007); *Ebbers v. United States*, 127 S. Ct. 1483 (2007).

May 2007: Three executives of Purdue Frederick Company were prosecuted under the responsible corporate officer doctrine and pled guilty in May 2007 for the unlawful marketing of drug, even though they had no actual knowledge or involvement in the offense.

Mar. 2008: U.S. Senate passes consumer product safety law (S. 2663) sponsored by Senator Pryor in response to China toy recall, which increases criminal penalties to $20 million and prison terms to five years.

Chapter Two

Environmental Protection Agency
Criminal Enforcement Policies

Chapter Two

EPA CRIMINAL ENFORCEMENT POLICIES

"There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders."

Earl Devaney
Director, EPA Office of Criminal Enforcement (1994)

"I'm a salesman. I sell jail time to people."

EPA Special Agent
Criminal Investigation Division (2003)

Overview. Established in 1970 by President Nixon, the Environmental Protection Agency (EPA) has grown into a large federal regulatory and enforcement agency, with over 17,000 employees around the country and a budget of $7 billion. Over the last 30 years, EPA has also developed a robust enforcement program that also has grown in size and budget, with a proposed 2009 budget of $563 million, of which a record high $52 million is allocated for criminal enforcement. EPA conducts over 20,000 inspections a year, any one of which could turn into a criminal action that can result in substantial fines and lengthy prison sentences.

Instead of utilizing more reasonable and effective administrative and civil remedies provided by Congress in the environmental statutes — and indeed, as recommended by EPA's own enforcement policy — the EPA has often resorted to using criminal proceedings in cases where they are unwarranted, because either there was no (or minimal) environmental harm or a lack of criminal intent or culpability, or both. Moreover, EPA has exercised its enhanced criminal investigative and enforcement powers in an arbitrary, aggressive and abusive manner, running roughshod over the constitutional rights of businesses, managers, and employees.

Unfortunately, the EPA and the Department of Justice (DOJ) have exploited judicial rulings, as discussed in Chapter One, which relaxed the standard of mens rea or scienter required for "knowing" violations for environmental infractions, thereby making it easy to prosecute and convict by showing only general intent rather than specific intent for felony violations. Similarly, EPA and DOJ have invoked criminal misdemeanor provisions to prosecute acts of simple negligence and have exploited the public welfare offense and responsible corporate officer doctrines, also making it easy to level criminal charges and extort plea bargains or obtain convictions. As will be discussed in Chapter Three, DOJ has

aided and abetted EPA in its zeal to criminalize regulatory enforcement by accepting questionable referrals for prosecution from the agency as well as from other federal agencies that administer other environmental laws, such as the U.S. Army Corps of Engineers, the Department of Interior, and the National Marine Fisheries Service.

To be sure, even EPA's administrative and civil enforcement activities, which comprise the bulk of EPA's enforcement program, are themselves often arbitrary, unfair, and punitive. However, this chapter will focus on the growth of EPA's criminal enforcement program, discuss EPA's enforcement practices, provide case examples of arbitrary and abusive criminal enforcement, and offer recommended reforms.

Growth of EPA's Criminal Enforcement Resources and Powers. In June 1976, the EPA began to develop guidelines for the criminal prosecution of the earlier enacted environmental laws, such as the CWA, CAA, RCRA, as well as the myriad of often vague and confusing EPA regulations promulgated pursuant to those laws.

On January 5, 1981, EPA authorized the creation of the Office of Criminal Enforcement and by September 1982, had hired 23 experienced criminal investigators. By August 1985, EPA's staff of criminal investigators grew by 50 percent to 34 criminal investigators located throughout each of EPA's 10 regional offices. The investigators lacked police powers, could not execute search warrants, or make arrests. They relied instead on the agents from the Federal Bureau of Investigation (FBI) to provide assistance in conducting criminal investigations.

In 1988, Congress responded to EPA's request for increased police powers for its agents. In a provision of the Medical Waste Tracking Act, Congress conferred law enforcement powers on EPA agents, allowing them to carry firearms and to execute search warrants. By November 1990, the number of EPA Special Agents had again doubled to 55. In response to calls for even more criminal enforcement resources, Congress enacted the Pollution Prosecution Act of 1990. That law required an almost a four-fold increase in the number of criminal agents by requiring the hiring of at least 200 Special Agents, and provided for increased funding for enforcement training. Despite its enhanced powers, EPA continued to use FBI and local law enforcement agents to carry out searches.

In 1994, EPA Administrator Carol Browner reorganized EPA's enforcement office and established the Office of Enforcement and Compliance Assurance (OECA), headed by an Assistant Administrator. In that same year, EPA's Office of Criminal Enforcement developed guidelines for selecting criminal cases, which are discussed later in this chapter. In August 1995, the Office of Criminal Enforcement, Forensics, and Training (OCEFT) was established within OECA to manage the Criminal Investigation Division (CID), which had grown by then to 210 agents, as Congress mandated. By 2003, the CID staff increased to a record number of 237 agents, highly dispersed, with 90 percent located in area and resident offices around the country. By 2007, the number of CID agents dropped to 172, but more are expected to be hired as Congress presses the agency to beef up its cadre of Special Agents.

State/EPA Enforcement. The EPA is able to leverage its enforcement resources by relying heavily on state enforcement actions. Major federal environmental statutes have delegated enforcement authority to those states meeting certain EPA requirements, which, in turn, allows the states to initiate civil actions and

penalties. These laws also permit the EPA to take enforcement action when the states fail to act or are not tough enough when they do. This so-called "overfiling" option raises serious statutory authority and double jeopardy questions, which the courts have addressed with mixed results.

However, EPA's criminal enforcement program is not "delegated" to the states, although EPA often refers environmental cases to the states for enforcement under their own laws. The states are increasingly using their resources to bring criminal actions against companies at the state and local level. Indeed, the EPA, states, and local agencies work closely together, collect data, share information, and conduct joint investigations via the four Regional Environmental Enforcement Associations (REEAs), which include four Canadian Provinces, Law Enforcement Coordinating Committees (LECCs), and Environmental Crime Task Forces on which EPA-CID Special Agents serve.

Increased Criminal Penalties. In addition to having more criminal enforcement resources at its disposal, EPA's criminal enforcement program was also shaped by the increase in statutory criminal penalties. In 1987, Congress amended the CWA by upgrading "knowing violations" from misdemeanors to felonies, and kept simple negligent violations as misdemeanors, subjecting violators to up to one year in prison. Filing a single incorrect monitoring report, even if no harm occurs, is a felony that can land a plant manager in prison for up to two years. Other knowing violations, such as violating permit conditions, however minor, provide up to three years in prison; and "knowing endangerment" violations can result in up to 15 years in prison. A few years later, Congress similarly amended the CAA in 1990 by adding felony provisions that provided up to five years in prison.

In the meantime, the U.S. Sentencing Commission issued new Sentencing Guidelines for individuals convicted of federal offenses, including environmental offenses that arbitrarily imposed unusually severe prison sentences, quite unlike the typical probationary sentence meted out before 1987 for the relatively few criminal prosecutions. Because parole was abolished, white-collar defendants would no longer be eligible for parole after serving only one-third of their sentence. Thus, as explained in Chapter Seven on the Sentencing Guidelines, a post-Guideline determinate sentence of two years in prison is functionally equivalent to a pre-Guideline sentence of six years, which was then considered to be a very severe sentence.

Thus, since 1987, the combination of felony statutory penalties and tougher prison sentences for environmental violations propelled overzealous EPA criminal agents to refer cases to DOJ and local federal prosecutors for criminal prosecution. And if the local U.S. Attorneys were reticent in pursuing certain cases due to a lack of interest or resources, EPA attorneys would volunteer to be appointed as Special Assistant U.S. Attorneys to prosecute the cases.

Criminal Enforcement Quotas. EPA's criminal enforcement program appears to be partly driven by a desire to increase enforcement statistics rather than to improve environmental quality, seemingly as a way to justify its congressionally-funded resources. Indeed, the EPA sets yearly targets for the number of criminal cases it should generate. For example, for fiscal year 2004, the target number set by EPA for criminal investigations was 400; the actual number was 425 criminal investigations. In order "to meet or beat its numbers," EPA enforcement personnel are

therefore likely to treat what should be a civil or administrative matter as a criminal one. In fact, EPA criminal agents report that they have a quota of two criminal referrals a year. U.S. ENVTL. PROTECTION AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING 56 (Nov. 2003). Thus, a cadre of 200 criminal agents is expected to yield 400 criminal referrals per year. As one EPA CID Agent put it, "I'm a salesman. I sell jail time to people." *Id*. at 57.

While the number of DOJ environmental criminal prosecutions have decreased slightly, EPA investigations continue to proceed at a relatively brisk pace. The recent Supreme Court rulings, which struck down the mandatory feature of the Sentencing Guidelines (discussed in Chapter Seven), have resulted in somewhat lower prison sentences. However, many judges are still wedded to the unreasonably severe and flawed Guidelines, particularly the Part 2Q Environmental Sentencing Guidelines, and mete out harsh sentences at the urging of aggressive prosecutors. *See, e.g., United States v. Hagerman*, 525 F. Supp. 2d 1058 (S.D. Ind. 2007) (five-year prison sentence imposed on owner of treatment facility for making false statements on discharge monitoring reports under the CWA, even though no environmental harm resulted and no charges were filed that facility exceeded its permit levels).

In addition to the harsh sentences, corporations have spent tens of millions of dollars for court ordered Supplemental Environmental Projects (SEPs) that were effectively tagged onto their sentences. SEPs require businesses to spend money for pollution control equipment and projects that otherwise are not required by law. For example, the costs of the SEPs were $6 million in FY 2004 and $29 million in FY 2006. One year later, it skyrocketed to $135 million for FY 2007, a 350 percent jump from the previous year.

Increased criminal prosecutions can be expected as EPA acquires more criminal investigators, spends millions of dollars for enhanced training and facilities, and continues to promote EPA's criminal enforcement as a priority. Furthermore, a lack of uniform case selection procedures among EPA's 10 regional offices and the 93 U.S. Attorney Offices means that one can never know whether a minor violation will be handled by non-criminal or criminal remedies. *See generally* U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT (June 2000). Hence, the regulated community should not be lulled by a somewhat lower number of criminal prosecutions by DOJ in 2007 into thinking that an infraction will be disposed of by non-criminal remedies.

This is particularly so in light of public statements by EPA enforcement officials in 2006 and 2007 that criminal enforcement will remain a priority. Indeed, EPA, as part of its public awareness efforts, urges citizens to file complaints against alleged polluters through a link on its Internet homepage, which has generated additional criminal investigations. Other efforts include the annual National Environmental Crime Prevention Week held in April. Launched by the Bush Administration in 2002, the activities include having EPA Special Agents teach middle school students how to detect and report environmental crimes, using lesson plans and comic books that depict polluters as slimy-looking monsters.

The larger public policy question is whether this increased emphasis on criminal enforcement not only runs afoul of EPA's long-standing policy on the exercise of criminal enforcement discretion, but also jeopardizes the

civil liberties of individual businesses and their employees, both of whom are both entitled to the fair enforcement of environmental laws and regulations.

The Devaney Memorandum: Exercising Criminal Enforcement Discretion. As noted, EPA conducts over 20,000 inspections a year, any one of which can turn into a criminal enforcement action. Accordingly, it is imperative that the EPA provide clear case selection guidance to its enforcement staff. On January 12, 1994, EPA attempted to do just that when it updated its criminal enforcement policy. *See* Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement Program, The Exercise of Investigative Discretion (Jan. 12, 1994) (Devaney Memo). The Devaney Memo, which outlines case selection criteria, was issued in apparent response to criticism about EPA's aggressive and indiscriminate use of criminal proceedings. Hence, the Devaney Memo "sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities." *Id.* at 1. Notably, the Devaney Memo recognizes the seriousness of EPA's criminal enforcement duties:

> [T]he Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.
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> * * *
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> The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

Id. at 2 (emphasis added). The Devaney Memo further emphasizes congressional intent, noting that criminal enforcement is not appropriate for "minor or technical variations from permit regulations or conditions." *Id.* Accordingly, the memo specifies that the case selection criteria for criminal prosecution "will be guided by two general measures - significant environmental harm and culpable conduct." *Id.* (emphasis added).

The Devaney Memo defines "significant environmental harm" as "actual harm" that "has an identifiable and significant harmful impact on human health and the environment" or the "threat" of such significant harm. *Id.* at 4. Simple failure to report emission data or information to the EPA, although a regulatory violation, should be subject to criminal investigation only when the failure to report "is coupled with actual or threatened environmental harm." *Id.*

As for "culpable conduct," the Devaney Memo lists several factors to consider, such as a history of repeated violations and concealment of misconduct or falsification of records. Significantly, a "major factor" indicating culpable conduct is "deliberate" misconduct: "[a]lthough the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted." *Id.* at 5 (emphasis added). Thus, despite the erosion of mens rea or criminal

intent discussed in Chapter One, the Devaney Memo, to its credit, calls for a heightened showing of intent to warrant a criminal investigation.

More importantly, the Devaney Memo concludes with a cautionary note on initiating criminal enforcement actions:

> EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

Id. at 6 (emphasis added).

On its face, then, the Devaney Memo appears to recognize that criminal enforcement of environmental laws should be the last resort, to be undertaken only where there is both significant environmental harm and genuine culpable conduct, taking into account any past history of violations. Yet, as the following case examples illustrate, one has to wonder whether EPA agents and officials (as well as federal prosecutors) have even read, let alone heeded, the criminal enforcement principles outlined in the Devaney Memo. At any rate, EPA officials are not meeting the challenge in practice to distinguish between conduct that warrants criminal as opposed to civil enforcement actions.

Case Examples of EPA's Disregard of Devaney Memo Guidance

Trinity Marine Baton Rouge, Inc. and Hubert Vidrine. On September 5, 1996, a "SWAT Team" of some two dozen armed Special Agents from EPA's CID, FBI, U.S. Coast Guard, and other state and local law enforcement officers with police dogs, 9mm handguns and automatic rifles, raided Canal Refinery Company. Canal is a small Louisiana refinery that allegedly received hazardous waste in violation of RCRA from Trinity Marine Baton Rouge, Inc. EPA criminal agents, lead by Special Agent Ivan Vikin, confronted Canal's new plant manager, Hubert Vidrine, accusing him of storing hazardous waste and lying about it; yelling at employees that Mr. Vidrine had been poisoning them and giving them cancer; threatening employees with imprisonment unless they provided damaging evidence against Mr. Vidrine; and preventing female employees from using the rest rooms for several hours or allowing them to make arrangements to have their children picked up from school and day care, all while EPA agents continued to ransack offices and search the facility for several hours.

After more than three years had elapsed since the raid, Mr. Vidrine was shocked to hear the news on the radio on December 15, 1999 that he (but not his company) and Trinity Marine, along with its manager, had been indicted for violating RCRA. Mr. Vidrine was charged with one count of knowingly storing hazardous waste in a tank at Canal Refinery; he faced five years in prison and a daily fine of $50,000. He denied any wrongdoing and steadfastly rejected all attempts by the prosecutors to force him to plead guilty and receive prison time.

During the pre-trial proceedings, serious questions were raised by Mr. Vidrine and his

co-defendants about the nature of the "hazardous waste" and about the way in which this case was initiated and prosecuted by the Assistant U.S. Attorney, Howard Parker, and EPA agents, employees, and consultants. EPA's chief witness, informant Mike Franklin, claimed that he had taken samples of the alleged hazardous waste and had it tested. However, neither the EPA nor federal prosecutors could produce the test results allegedly proving RCRA violations. Nevertheless, federal prosecutors and the EPA insisted on using Mr. Franklin as their key witness, even though subpoenas issued by the prosecutors to chemical testing laboratories failed to turn up any lab results of the alleged hazardous waste in question. Desperate prosecutors went so far as to place Mr. Franklin under hypnosis in a vain attempt to obtain information about the alleged testing samples. Defense attorneys investigated the unsavory background of EPA's star witness. Mr. Franklin's credibility was questionable because of a history of cocaine addiction which can cause hallucinations. The court ordered that Mr. Franklin's testimony could not be used.

Undaunted, the federal prosecutor, at EPA's urging, continued to insist that the government should be able to use Mr. Franklin as their key witness and filed a notice of appeal to the Fifth Circuit of the judge's ruling. He reluctantly withdrew the appeal when the Solicitor General's Office wisely decided not to approve it. On September 17, 2003, on the eve of trial — seven years since the initial September 1996 raid — federal prosecutors filed a motion to dismiss the indictment against all three defendants, stating that "[d]evelopments in this matter since the indictment have revealed facts and circumstances which, in the interests of justice, warrant dismissal of the indictment." The district court granted the motion the next day.

Mr. Vidrine was forced to spend his entire retirement savings of $180,000 on attorney's fees to mount a four-year defense against the bogus charges, when his company, which was not charged, refused to pay his defense fees. "Anybody who has to go through this and not lose their sanity or life, it's just amazing. I didn't think it could happen in America," Vidrine said after the dismissal.

On July 23, 2007, with assistance from the Washington Legal Foundation, Mr. Vidrine filed a malicious prosecution lawsuit under the Federal Tort Claims Act against the United States after the EPA failed to respond to the FTCA administrative claim for damages submitted to EPA and DOJ in September 2005. *Vidrine v. United States*, No. 6:07-cv-1204 (W.D. La). On October 31, 2007, the government filed an Answer, denying the allegations in the Complaint and asserting various immunity and other defenses. In December 2007, the court ordered that copies of the Grand Jury transcripts be released to the parties for use in the civil suit. Pretrial discovery is scheduled through 2008. Clearly, considering the lack of evidence of any violation, the absence of environmental harm, and no prior violations, this case did not meet the criteria for a criminal prosecution under the Devaney Memo.

Riverdale Mills Corporation and James M. Knott, Sr. Riverdale Mills Corporation (RMC) is a small manufacturing company located in Northbridge, Massachusetts that produces plastic-coated steel wire mesh used for lobster traps and erosion control. On October 21, 1997, two EPA civil inspectors came to the facility to take samples of the company's rinsewater, and were granted conditional consent to do so by RMC's owner; namely, that RMC personnel were to accompany the investigators at all times. Two weeks later, on November 7, 1997, "a virtual

`SWAT team' consisting of twenty-one EPA law enforcement officers and agents, many of whom were armed, stormed the RMC facility to conduct pH samplings. They vigorously interrogated and videotaped employees causing them great distress and discomfort." *United States v. Knott*, 106 F. Supp. 2d 174, 180 (D. Mass. 2000). Business records and computers were also seized during the all-day search.

With much fanfare, EPA's Regional Office in Boston and the then-U.S. Attorney for Massachusetts, Donald K. Stern (former Chair of the Attorney General's Advisory Committee), announced to the media on August 12, 1998, that RMC and its 70-year-old owner, James M. Knott, Jr., had been indicted on two felony charges under the CWA and faced six years in prison and a $1.5 million fine. Their "crime" was allegedly polluting the nearby Blackstone River by the facility's discharge into the public sewer of a small volume of "acidic" rinsewater, with a pH level of less than 5.0 standard units, in violation of EPA's pre-treatment CWA regulations. Mr. Knott vigorously denied any wrongdoing.

The EPA did not claim that the town's wastewater treatment facility was damaged in any way by RMC's allegedly acidic rinsewater. Nor were there any allegations that RMC's rinsewater caused the town's treatment facility to violate any EPA regulations governing its discharge of treated water into the nearby Blackstone River, the very purpose of these regulations. Indeed, the facility's pH levels were well within the permitted levels at all times. In short, there simply was no environmental harm, let alone significant harm; nor was there any history of prior CWA violations.

When the government was forced by Mr. Knott to turn over the original EPA log books of the water sample tests from the first visit, the agents' hand-written notes revealed that lawful and neutral pH readings of 7 were marked over to look like a 4 and 2, below the required minimum of 5 pH. Moreover, the pH readings from the subsequent SWAT team raid all showed lawful pH readings of 5 or above at the point where the public sewer line actually connected to the end of RMC's sewer pipe. On April 23, 1999, shortly before trial was to begin, the U.S. Attorney dismissed all charges against RMC and Knott. The grueling two-year legal battle cost the Harvard-educated businessman and his award-winning company (for developing pollution control technology) hundreds of thousands of dollars in lost business and legal defense fees, not to mention great humiliation and distress.

Subsequent lawsuits by RMC and Mr. Knott against the government and EPA agents under the Hyde Amendment, Federal Tort Claims Act, and *Bivens* claims, assisted by the Washington Legal Foundation, produced mixed results and were ultimately denied due to qualified immunity defenses. *Riverdale Mills Corp. v. United States*, 392 F.3d 55 (1st Cir. 2004). Nevertheless, the district court pointedly "reproved [the EPA] for its sloppy recording of pH values . . . and subsequent heavy-handed treatment of RMC, including the conduct of an unconsented and therefore unconstitutional search of the plant. That negligent conduct caused the Plaintiffs, a law enforcement agency and, ultimately, the taxpayers unnecessary expense." *Riverdale Mills Corp. v. United States*, 345 F. Supp. 2d 50, 60 (D. Mass. 2004).

The EPA's heavy-handed criminal enforcement tactics against RMC, Mr. Knott, and his employees, were featured on a special segment of CBS's *60 Minutes* that aired on March 25, 2001. Even if the allegations were true, Mr. Knott clearly was not one of the "most significant and egregious violators" who caused

"significant environmental harm" as specified in the Devaney Memo so as to warrant using criminal enforcement rather than non-criminal remedies.

American Carolina Stamping. On April 15, 1999, in a raid similar to the ones carried out at Canal Refining Company, and Riverdale Mills, 34 armed EPA CID agents, led by Special Agent in Charge Ivan Vikin (who also led the raid at Canal Refining), U.S. Marshals, and North Carolina state and county police officers, some wearing flak jackets, helmets, and body armor, stormed a small family-owned metal stamping plant, American Carolina Stamping (ACS), in rural Penrose, North Carolina. The "crime" was disposing of a commercial solvent, which EPA alleged was a hazardous waste, in violation of RCRA. The owner, Steve McNabb, denied any wrongdoing, and when he tried to retrieve his tape recorder to record the event, he was threatened by EPA agents who drew weapons and placed him in handcuffs. Meanwhile, other EPA agents from the Science and Ecosystem Support Division, wearing protective moon suits, took a small soil sample, while other agents searched the premises for over nine hours. Seven boxes of files and computer backups were hauled away. Mr. McNabb vigorously complained about EPA's strong-armed tactics to his congressman, then-U.S. Rep. Charles Taylor, who investigated the matter.

A grand jury was convened shortly thereafter, and Mr. McNabb insisted on appearing before it, which he did. No criminal charges were filed. Nevertheless, in the meantime, McNabb's small company had been cut off from all government contracts, upon which his business primarily relied. His case was featured, along with the Riverdale Mills case, on CBS's *60 Minutes* in 2001. Unfortunately, McNabb's subsequent lawsuit for damages against state and federal officials was dismissed on immunity grounds. *McNabb v. North Carolina*, 2001 U.S. Dist. LEXIS 13181 (W.D.N.C.). But this would not be the end of the matter.

On September 19, 2003, well over four *years* after the 1999 raid (but within the five-year statute of limitations) — during which time ACS was never told to cease activity or clean up waste — EPA Region 4 suddenly decided to initiate administrative proceedings. A Complaint and Compliance Order was issued that day alleging the storing and disposing of hazardous waste in eight drums without a permit, and three related RCRA charges. The Order specified penalties up to $27,500 per day, which, computing from the date of the 1999 raid, amounted to several hundred million dollars. McNabb vigorously objected to the baseless and belated charges.

On October 17, 2003, the EPA, noting such mitigating factors as the lack of history of noncompliance, reduced the proposed penalty to $78,759. McNabb complained this time to the EPA Administrator for Region 4 in Atlanta, Jimmy Palmer. After an on-site visit by Palmer's Chief of Staff, Allen Barnes, Region 4 wisely filed a Notice of Withdrawal on November 10, 2003, dropping all charges against McNabb's business. Clearly, this abusive criminal enforcement action should never have been initiated under the case selection criteria in the Devaney Memo. Indeed, as is evident from the withdrawal of all charges, it did not even merit administrative action.

United States v. Wabash Valley Service Co. 426 F. Supp. 2d 835 (S.D. Ill. 2006). While EPA seems to have curbed its penchant for SWAT Team-type raids in recent years, it continues to bring criminal cases that are unwarranted, as determined by the Devaney Memo. In 2005, a company, its operations

manager, and another employee were criminally charged for applying fertilizer pellets containing pesticides on a farm in a manner contrary to the label instructions, in violation of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). One general provision on the label said that the product should be applied in a way that would not cause it to come in contact with people, while another provision advised to avoid "spray drift" in "windy" conditions. The defendants moved to dismiss the criminal charges because the labeling was unconstitutionally vague.

In a thorough and well-written 29-page ruling, the court agreed, stating that the label did not provide the user with "reasonable notice of what conduct it proscribes." *Id*. at 846. Furthermore, since the pesticide was in pellet rather than liquid form, the term "windy" was too vague. The court said this was analogous to telling drivers not to drive "too fast." *Id*. at 849. Indeed, the court noted that EPA guidance suggests that the warning applies only to liquid rather than solid sprays. The court concluded that the label instructions were unconstitutionally vague as applied, but not before rebuking the government for even bringing the case as a criminal matter in the first place:

> When experienced trial attorneys decide whether to file a lawsuit, they often look at the instructions the court will give to the jury if the case makes it to trial. By analyzing what he must prove to the jury, an attorney can make a reasonable approximation of the strength of his case. The Court wonders if the government considered this simple question.

Id. at 844-45. The Court also was disturbed to learn that, because some drift will almost always occur, "every applicator is potentially subject to criminal liability for what is essentially an unavoidable byproduct of his work." The prosecutor replied to a skeptical court that he "hope[d] that the government would use its discretion." *Id*. at 845. In short, the court's ruling suggests that even as a civil matter, the government's case was exceedingly weak. The court concluded that "[u]nder this label it is not just [that] the marginal situations are unclear, it is all but the most egregious situations that are unclear." *Id*. at 853. Similar to the other cases discussed in this section, bringing this case as a criminal matter against the company and two of its employees clearly` violated the Devaney Memo's guidance that only the "most significant and egregious violators" where there is "significant environmental harm" should be criminally prosecuted.

United States v. Chief Ethanol Fuels Inc. (D. Neb. No. 4:06-cr-03153). Chief Ethanol Fuels of Nebraska, the nation's leading producer of ethanol, which reduces air pollution from auto emissions, was charged in 2006 with filing false discharge monitoring reports about the temperature of the wastewater discharges from its facility. The water discharged into the river ranged between 90 degrees and 94 degrees Fahrenheit, but the discharge report stated that the temperatures were within the 90 degree limit set by its discharge permit. The government did not allege there was any environmental harm caused by the slightly warmer wastewater. In fact, the company subsequently received a new permit to allow for discharges of up to 104 degrees. Nevertheless, the company was criminally prosecuted, pled guilty on October 25, 2006, fined $100,000, forced to pay another $100,000 to a National Audubon Society affiliate, and was placed on probation for one year. This reporting violation, which apparently caused no environmental harm, is a perfect example of a case that should have been

handled administratively or civilly under the Devaney Memo.

United States v. McWane, Inc., 505 F.3d 1208 (11th Cir. 2007). McWane, Inc., a cast iron pipe manufacturing plant, and three of its managers were charged with discharging wastewater into a navigable river from more than one permitted discharge point in violation of the company's permit. The company was also charged with one count of making a false statement under 18 U.S.C. § 1001 based on certifications by its manager. The Eleventh Circuit reversed the convictions. The court held that the government failed to show under Justice Kennedy's "significant nexus" test in *Rapanos v. United States*, that the nearby creek was connected to a "navigable water." *Id.* at 1221. The court also noted that the EPA failed to show any actual harm or injury, or risk of harm, to the river that was the navigable water. *Id.* at 1212. Finally, the court ruled that 18 U.S.C. § 1001 is a specific intent crime, and that the government failed to show actual knowledge of the falsity of the statement submitted. *Id.* at 1229. Because of the lack of any environmental harm and questionable jurisdiction, this case should have been resolved with non-criminal penalties.

EPA Management Review. In November 2003, EPA officials completed a management review study of its enforcement programs and issued its findings and conclusions. EPA REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING (NOV. 2003). Some candid observations were made that should hopefully guide and redirect EPA's criminal enforcement efforts. For example, the report noted that as an enforcement agency which reacts to complaints, there is "little distinction between important and trivial cases, and a preoccupation with traditional statistics rather than real accomplishments, in this case in preventing pollution." *Id.* at 58. As the report further observed:

> [T]here is a palpable sense within OCEFT, and especially CID, that the desire to produce favorable traditional enforcement statistics — the so-called "bean count" — creates pressures for action which may not represent the most effective strategic use of limited investigative and prosecutorial resources. As one agent report, "It's always quality over quantity until the end of the year comes."
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> Many within OCEFT . . . think of criminal enforcement as a value in itself. As such, they argue that "success" in the traditional measures — investigations, referrals, indictments, convictions, sentences, probations — justifies the Agency's investment in such activities, and indeed with more investment, they could get more "results."
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> Without [reform], the program will continue [to] be judged solely on numbers of investigative and prosecutorial activities without asking the more important question of what these numbers signify for environmental protection.

Id. at 54-55. In a May 2007 memorandum, Granta Nakayama, EPA's Assistant Administrator for Enforcement and Compliance, directed EPA's criminal agents to better document their requests for prosecutorial assistance and made a passing reference to the 1994 Devaney Memo as the governing case

selection guidance. Other than that, EPA has not announced what concrete steps it has taken or plans to take in light of this management report and the criticism it has received from the regulated community, to redirect and refocus its criminal enforcement program as originally intended by the Devaney Memo.

New Enforcement Partnerships: EPA and SEC. The Sarbanes-Oxley Act of 2002 imposes reporting obligations in addition to the Securities and Exchange Commission's (SEC) 20-year-old requirements to disclose environmental liabilities. Under the law, companies are required to disclose "material" environmental liabilities to better inform investors about the company's financial exposure; however, the SEC has not provided any clear definition of what is "material," relying instead on case law. SOX requires corporate management to sign or certify the accuracy of the annual environmental compliance certifications. If a company guesses wrong as to what is "material," individuals certifying a periodic report are subject to one million dollars in fines and 10 years in prison for simple "knowing" offenses, which, as Chapter One discussed, require only a showing of general intent. For "willful" offenses, company CEOs are subject to a $5 million fine and 20 years in prison.

As one leading practitioner observed, "Sarbanes-Oxley has spawned a new era of cooperation between the U.S. Environmental Protection Agency and the SEC." Steven P. Solow, *Greening the Bottom Line: Environmental Management as a Competitive Tool*, EXECUTIVE COUNSEL (Fall 2004). In 2003, EPA launched its "environmental liability enforcement initiative" to enhance sharing of information with SEC about EPA enforcement actions against publicly-traded companies. The EPA is also cross-checking information required to be disclosed in SEC filings against its own data for consistency and completeness.

New Enforcement Partnerships: EPA, OSHA, and DOJ. EPA and the Occupational Safety & Health Administration (OSHA) began a joint effort in 1991 to enforce certain worker safety violations under related EPA statutes because the penalties for environmental laws are much tougher than those for OSHA violations and because they are easier to prove. A "knowing endangerment" conviction under RCRA with respect to the storage or disposal of hazardous waste is a felony that can bring stiff sentences of up to 15 years whereas a "willful" violation of OSHA rules is a misdemeanor, but only if the violation results in the death of a worker. The maximum prison sentence is six months for the first offense or one year for a repeat offense. In addition, fines for OSHA violations are much lower than those for environmental offenses. This same strategy was launched by then-Attorney General Eliot Spitzer in 2004 to use New York environmental laws to prosecute workplace safety violations that otherwise would come under the jurisdiction of OSHA.

A prime example of the misuse of environmental laws to enforce workplace safety laws was *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). As discussed in Chapter One, the owner, his son, who agreed to temporarily serve as CEO, and the plant manager were indicted and convicted of "knowing endangerment" of employees at the chemical plant and received prison terms ranging from four to nine years. OSHA had inspected the plant and the company took some corrective actions to prevent workers from being exposed to certain chemicals. One worker testified that he had slipped on the floor and simply rinsed himself off, without seeking medical treatment for his "minor burns" or reporting the incident to the company. In short,

this case should have been handled by OSHA or, at best, by administrative or civil remedies under the environmental statutes.

To be sure, there are some cases where serious workplace injuries have occurred. In *United States v. Elias*, the owner of a fertilizer company received a 17-year sentence for knowing endangerment under RCRA when an employee, who was exposed to cyanide fumes in a sludge tank, suffered brain damage. 269 F.3d 1003 (9th Cir. 2001). While this was a significant injury, and the prison sentence was longer than the average sentences for murder and rape, the policy question is whether Congress should revise OSHA penalties rather than have prosecutors use EPA laws to punish safety violations at the workplace.

In May 2005, the EPA, OSHA, and DOJ launched a more formal initiative to investigate and prosecute violations of environmental laws and regulations that have harmed workers, rather than the public at large. EPA's vigorous pursuit of these and other OSHA-related violations, however, seems to conflict with information posted on its website about submitting complaints to EPA of suspected environmental violations. Under the category of "What Not to Report," EPA provides the following guidance to the public:

> Problems with the environment **inside the workplace**, such as the presence or handling of chemicals or noxious fumes, are under the jurisdiction of the Occupational Safety and Health Administration, an arm of the U.S. Department of Labor.

www.epa.gov/tips (emphasis in original). Despite this disclaimer, EPA is expected to continue to be an active partner not only with OSHA, but with other federal, state, and local agencies and enforcement authorities in using its criminal investigation and enforcement resources.

New Enforcement Partnerships: EPA, DOT, and DOJ. In September 2003, EPA began to work with the Department of Transportation (DOT) and DOJ in coordinating enforcement of the Hazardous Materials Transportation Act regulating the shipment of hazardous materials to thwart possible terrorist attacks. The result was the prosecution of defunct Emery Worldwide Airlines, which pled guilty in 2003 for failing to provide its pilots with proper paperwork that hazardous materials were shipped in 1998 and 1999. The company was fined the maximum of $500,000 for each of the dozen regulatory violations, for a total of $6 million. Further criminal enforcement is expected to continue in this area to demonstrate the government's efforts to combat terrorism.

Parallel Investigations. Another major EPA initiative also suggests that greater criminal enforcement activity may be looming on the horizon: closer coordination between EPA's criminal and civil enforcement staff. Beginning in July 2005, EPA began to physically co-locate civil and criminal staff in EPA's regional offices, with a pledge by EPA's Nakayama in early 2006 to continue the process and spend millions of dollars on training and equipment. The publicly stated goal was to focus on all major civil enforcement cases as possible candidates for criminal investigation and prosecution. However, sharing information between civil and criminal enforcement staff raises serious questions about potential abusive and unfair criminal prosecution, such as using civil investigations as a pretext to gather incriminating information for criminal cases. Indeed, as discussed in Chapter Four, the right to due process, right to counsel, and the rights against self-incrimination and double jeopardy, are weakened by improper joint or parallel

investigations by the civil and criminal enforcement staff.

Conclusion. EPA's Granta Nakayama has vowed to "protect the public by criminally prosecuting *willful, intentional, and serious* violations of the federal environmental laws." U.S. ENVTL. PROTECTION AGENCY, 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE 128 (2006) (emphasis added). The use of these three modifiers suggests a strong reaffirmation of the Devaney Memo guidance on criminal case selection. "Willful" violations generally require a finding of specific intent rather than the general intent standard associated with "knowing" violations, the standard of mens rea in many environmental statutes. However, Nakayama's statement does not mean that EPA will criminally prosecute *only* serious or culpable cases. As one commentator observed, "when it comes to case selection, the Exxon Valdez is definitely in, but the mom-and-pop dry cleaners is not ruled out." David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1409 (2002). Until there is better supervision over the case selection process, unwarranted criminal investigations, referrals, and prosecutions will likely continue.

RECOMMENDATIONS

1. Congress should conduct oversight hearings on EPA's abusive criminal enforcement policies and practices and request the Government Accountability Office (GAO) to investigate and report on those policies and practices.

2. EPA should conduct a thorough review of the Devaney Memorandum and its application to ensure that EPA's criminal enforcement program and case selection procedures, both on paper and in practice, do not resort unnecessarily to criminal investigation and referral when more appropriate administrative and civil remedies are available.

3. EPA should act on its 2003 management review report and enact specific procedures and reforms to ensure that criminal enforcement resources are properly utilized.

4. Before any criminal investigation is undertaken in the field, pre-approval and close supervision from the appropriate EPA Regions should be required to determine whether administrative or civil remedies should be used instead. EPA Headquarters should approve any referral to DOJ or a U.S. Attorney's Office for criminal prosecution. This would help ensure uniformity and procedural fairness.

5. Once a field investigation is authorized, EPA CID Agents should not use strong- armed tactics and harassment in executing search warrants. EPA Agents should advise company officials and employees of their rights, including the right to refuse to answer questions and the right to consult an attorney. Armed EPA agents should refrain from contacting and intimidating employees at their home after work.

6. EPA should consider whether, as a matter of law and economics, a combination of increased fines and criminal enforcement actions is an efficient use of resources or whether it is likely to cause over-deterrence.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Charles J. Babbitt, et al., *Discretion and the Criminalization of Environmental Law,* 15 DUKE ENVTL. L. & POL'Y F. 1 (2007).

David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387 (2002).

Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. & CRIMINOLOGY 1054 (1992).

JOHN F. COONEY, ET AL., ENVIRONMENTAL CRIMES DESKBOOK (Envtl. Law Inst. 1996).

JAMES V. DELONG, OUT OF BOUNDS, OUT OF CONTROL: REGULATORY ENFORCEMENT AT THE EPA (Cato Inst. 2002).

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TIMELINE: EPA CRIMINAL ENFORCEMENT POLICIES

1969: National Environmental Policy Act of 1969 is enacted.

1970: Environmental Protection Agency (EPA) is created by an Executive Reorganization Plan to assume regulatory authority over certain environmental and health related laws administered by other agencies.

1970: Congress enacts the Clean Air Act (CAA).

1972: Congress enacts the Federal Water Pollution Control Act, and later amends it in 1977 as the Clean Water Act (CWA).

1976: EPA begins to develop guidelines for criminal investigation and enforcement of environmental laws under its jurisdiction.

1985: EPA's criminal enforcement staff grows to 34 agents, 50 percent higher than the 1982 level.

1987: Congress amends the Clean Water Act (CWA) to add felony penalties for the first time. Filing false monitoring reports provided for up to two years in prison; other "knowing" violations provided for up to three years in prison; and "knowing endangerment" violations provided up to 15 years in prison.

1988: Congress enacts provision in the Medical Waste Tracking Act that confers police power on EPA criminal agents and authorizes them to carry firearms in conducting searches.

1990: Congress amends the penalty provisions of the Clean Air Act (CAA) to provide for felony violations similar to those found in the CWA.

1990: Congress enacts the Pollution Prevent Act (PPA) and directs EPA to hire 200 criminal enforcement agents.

1991: EPA and OSHA begin joint program on enforcing certain worker safety violations.

Jan. 1994: Earl Devaney, Director of EPA's Office of Criminal Enforcement issues a Memorandum, *The Exercise of Investigative Discretion*. The Devaney Memo sets forth criteria for criminal enforcement standards, limiting criminal investigations to cases where there is both significant environmental harm and a high degree of culpability. However, Memo is ignored in a number of cases where there was little or no environmental harm and a lack of criminal intent.

Aug. 1995: EPA established the Office of Criminal Enforcement, Forensics, and Training (OCEFT) within OECA to manage the Criminal Investigation Division (CID),

which increased to 210 agents.

Dec. 1995: EPA issues policy on "Incentives for Self Policing: Discover, Disclosure, Correction and Prevention of Violations" ("Audit Policy") that tracks Sentencing Guidelines' compliance criteria, which, if followed, may warrant reduced civil penalties and no criminal sanctions. Final version was issued April 2000 at 65 Fed. Reg. 19618.

1999-2003: EPA conducts an average of approximately 475 criminal investigations per year in FYs 1999-2003. Many searches are carried out in an aggressive manner by armed EPA agents, who threaten employees and harass them at their homes in the evening, demanding incriminating evidence of their company and their bosses. By 2003, EPA has criminal enforcement staff of 237.

2003: Following passage of Sarbanes-Oxley in 2002, EPA commences enforcement initiatives with the Securities and Exchange Commission (SEC) to ensure accurate reporting of material environmental liabilities.

Nov. 2003: EPA officials complete a management review of its enforcement programs and issue findings and conclusions in a report entitled, U.S. EPA REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING. Notably, the Report criticizes EPA enforcement policy that measures its success by the number of prosecutions, fines, and jail time rather than by pollution prevention.

May 2005: EPA, OSHA, and DOJ launched formal initiative to use tougher environmental laws to prosecute OSHA violations.

2003-2007: EPA coordinates enforcement efforts in various task forces with other regulatory agencies, including OSHA, Coast Guard, Postal Authorities, and the IRS.

2007: The number of CID agents is reduced to 172, but more agents are expected to be hired as Congress presses for more staffing. Criminal investigations continue at a relatively high rate.

May 2007: Granta Nakayama, EPA's Assistant Administrator for the Office of Environmental Compliance Assurance (OECA), revises procedures for EPA's criminal agents for better documenting their requests for prosecutorial assistance and reaffirms the Devaney Memo as the governing case selection guidance.

Chapter Three

Department of Justice
Criminal Prosecution Policies

Chapter Three

DEPARTMENT OF JUSTICE CRIMINAL PROSECUTION POLICIES

"*The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. . . . [He should] select the cases for prosecution . . . in which the offense is the most flagrant, the public harm the greatest, and the proof most certain. . . .*"

Attorney General Robert H. Jackson (April 1940)
Second Annual Conference of U.S. Attorneys

Overview. The Department of Justice (DOJ) and its 93 U.S. Attorney Offices have, as former Attorney General Robert Jackson poignantly remarked, "more control over life, liberty, and reputation than any other person in America." How DOJ and federal prosecutors are guided in the exercise of their awesome prosecutorial powers is critical to our constitutional system, which protects individuals and businesses with a right to counsel, right to a jury trial, and due process, among other important liberties and safeguards.

The judicious exercise of this power is particularly important with respect to prosecuting individuals and businesses for regulatory offenses, which are not inherently wrongful. Rather, business regulations restrict otherwise socially useful and beneficial activities, such as refining oil, producing energy, manufacturing chemicals, pharmaceuticals, and other products, and providing other goods and services needed by a modern industrial and free-market society. At the same time, these beneficial activities provide jobs and stimulate economic growth and development at the local and national levels. Hence, the proper exercise of prosecutorial discretion is all the more important in this heavily regulated field.

This chapter will discuss DOJ's prosecution policies and practices, with a focus on the prosecution of environmental and regulatory cases referred by the EPA and other agencies. In particular, DOJ has often neglected to use more appropriate non-criminal remedies to address regulatory infractions, contrary to DOJ's own criminal prosecution policies, as well as EPA's policy as discussed in Chapter Two. As Professor John Hasnas has concluded, "[w]ith regard to the offenses that can adequately be handled by civil liability, the proper solution may be abstaining from any efforts at criminal enforcement at all." JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY

IS AGAINST THE LAW 14 (Cato Inst. 2006). DOJ prosecution policies implicate individual and business civil liberties in a number of ways, including parallel civil and criminal prosecutions, attorney-client and work product privileges, and deferred prosecution and non-prosecution agreements, which are treated in Chapters Four, Five, and Six, respectively.

DOJ General Criminal Prosecution Policy. In 1980, U.S. Attorney General Benjamin Civiletti promulgated comprehensive guidelines on how all U.S. Attorneys should exercise their prosecutorial discretion. DOJ's *Principles of Federal Prosecution*, reprinted in DOJ's United States Attorneys' Manual (USAM), properly recognizes the serious nature of filing criminal charges against individuals and corporations, regardless of the subject matter of the offense.

> The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances -- recognizing both that serious violations of Federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results.
>
> The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.

USAM 9-27.001 **Preface** (emphasis added).

As discussed in Chapter One dealing with mens rea, the judicious use of criminal enforcement powers is all the more important with respect to prosecuting environmental and other regulatory offenses, since those offenses are not inherently wrongful or *malum in se* crimes, such as bank robbery or fraud. Rather, they are regulatory offenses involving complex and confusing laws and regulations that can be easily violated without even knowing that the law or regulation exists, or without any resulting harm. More importantly, there are non-criminal alternatives that can be and should be used to address and remedy the offense.

Indeed, DOJ's *Principles of Federal Prosecution* for U.S. Attorneys outlines the options available to them once they receive a referral from the EPA or other regulatory agency:

> USAM 9-27.200 **Initiating and Declining Prosecution–Probable Cause Requirement.**
>
> A. If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:
>
> 1. Request or conduct further investigation;
> 2. Commence or recommend prosecution;
> 3. Decline prosecution and refer the matter for prosecutorial consideration

in another jurisdiction;

4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or

5. Decline prosecution without taking other action.

Id. (emphasis added).

DOJ thus has ample discretion to decline prosecution altogether, refer the matter to state authorities, or to recommend pretrial diversion or other non-criminal disposition as provided by subsections A(3)-(5) with respect to environmental and regulatory offenses. In another provision of the USAM, DOJ's criminal enforcement policy reiterates the view that criminal prosecutions should be declined if "[t]here exists an adequate non-criminal alternative to prosecution." USAM 9-27.220(A)(3).

This policy of utilizing non-criminal remedies is further explained in the USAM as follows:

> USAM 9-17.150 **Non-Criminal Alternatives to Prosecution.**
>
> A. In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:
>
> 1. The sanctions available under the alternative means of disposition;
>
> 2. The likelihood that an effective sanction will be imposed; and
>
> 3. The effect of non-criminal disposition on Federal law enforcement interests.
>
> B. **Comment**. When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; . . . Another potentially useful alternative to prosecution in some cases is pretrial diversion. *See* USAM 9-22.000.
>
> Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case.

Id. (emphasis added). Unfortunately, DOJ prosecutors have often ignored or failed to heed this policy by failing to take full advantage of the non-criminal remedies Congress made available under the environmental and other regulatory statutes. On the contrary, DOJ prosecutors began to use Title 18 laws governing false statements, mail and wire fraud, and conspiracy laws around 1982 to "supplement" their targeting of regulatory and reporting offenses, and to obtain stiffer penalties and punishment than would otherwise be warranted for the underlying substantive offense. Barry M. Hartman & Stephen W. Grafman, *Beware Environmental Defendants: Failure To Understand Title 18 Can Get You 20,* WLF LEGAL BACKGROUNDER, Vol. 9, No.

22 (July 1, 1994). Indeed, almost half of the RCRA prosecutions from 1983-1992 were Title 18 "hybrid" cases. *See* Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L. J. 1077, 1108 (2001).

DOJ's Environmental Crimes Prosecution Policies. As discussed in Chapter Two, EPA has not been faithful to the Devaney Memo's case selection criteria, evidenced by its launching of criminal investigations against companies and individuals where there was little or no environmental harm and a lack of culpable intent. However troublesome that may be, it would be much better if DOJ and U.S. Attorneys were more selective in accepting criminal referrals from EPA. All too often, however, case selection decisions by prosecutors result in abusive, wasteful, and inconsistent criminal enforcement of federal environmental laws, as illustrated by the cases cited in Chapter Two. *See, e.g., U.S. v. Riverdale Mills* and *U.S. v. Hubert Vidrine*, where bogus felony charges were dropped and subsequent malicious prosecution lawsuits were filed against the government.

In 1985, DOJ established an Environmental Crimes Section (ECS) within the Environment and Natural Resources Division. ECS works closely with EPA criminal investigators, the FBI, and the Fish & Wildlife Service to enforce the major environmental statutes. ECS, which had a record number of 40 criminal prosecutors as of October 2007, only takes the lead in prosecuting around 30 percent of the cases that are considered "national interest" cases. Yet, ECS often assists the local U.S. Attorneys in prosecuting environmental offenses and the Department, with the agreement of the local United States Attorney, may "deputize" an EPA attorney to act as a "Special Assistant U.S. Attorney" to prosecute a specific case.

Thus, the bulk of the criminal enforcement of environmental laws is often initiated and prosecuted by the 93 local U.S. Attorneys Offices around the country rather than under the uniform guidance of DOJ in Washington, D.C. A minor wetland infraction under the Clean Water Act (CWA), for example, may be viewed by one U.S. Attorney's Office as a simple regulatory matter that is better handled administratively or civilly by EPA or state authorities. Yet another U.S. Attorney's Office may see that same case as warranting a major felony criminal prosecution, even if there is little or no environmental harm, or a lack culpable criminal intent.

To illustrate, in one case, a federal prosecutor filed criminal charges against a homeowner for poisoning a couple of noisy blackbirds and pigeons roosting on his property. Although the population of these common birds are in the hundreds of millions, they are still covered under the federal Migratory Bird Treaty Act, due to the fact that some of migrate between the United States, Canada, and Mexico. The prosecutor shipped the bird carcasses to the Smithsonian Institution for autopsy and considered this "crime" to be "one of the most important cases" of his office. The conviction was upheld on appeal, albeit reluctantly. *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990) (remarking that "[t]his case is for the birds"). Other U.S. Attorneys' Offices would hopefully focus on more serious criminal activity, given their scarce resources.

In 1987, DOJ's case selection criteria for environmental criminal prosecution was clarified by Assistant Attorney General Henry Habicht of the Land & Natural Resources Division (LNRD), listing four factors to consider: (1) intent, (2) harm, (3) economic gain to the violator, and (4) repeated offenders. It also focused on two classes of violators, so-called "midnight dumpers" and those who

concealed violations or made false statements. On July 1, 1991, LNRD's Acting Assistant Attorney General Barry Hartman issued a formal memorandum, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, which encouraged leniency in the exercise of prosecutorial discretion for those companies and individuals that voluntarily disclosed environmental infractions, cooperated with authorities, and had effective compliance programs. This memo did not purport to supersede DOJ's 1987 policy or the more general 1980 *Principles of Federal Prosecution*, both of which require a consideration of intent and harm. Rather, the 1991 memo seems to be an additional policy or overlay that constitutes a further level of case selection criteria after the intent and harm factors have been met. In many respects, the 1991 guidance was a precursor to DOJ's 1999 Holder Memorandum, discussed herein, that also listed voluntary compliance, disclosure, and cooperation as factors prosecutors should consider when considering the appropriateness of filing criminal charges.

Lack of Oversight by Main DOJ. The autonomy of the U.S. Attorneys in environmental prosecution, unlike other areas of federal criminal enforcement such as antitrust, tax, and civil rights, all of which require Main Justice approval, can be traced to a 1994 policy change. In response to sharp criticism from Congressman John Dingell that Main Justice was viewed as unduly limiting the discretion of local U.S. Attorneys to bring environmental prosecutions, then-Attorney General Janet Reno gave U.S. Attorneys much broader discretion to bring criminal charges in most environmental cases, with little or no oversight by Main Justice. This policy was made part of the U.S. Attorneys Manual. *See* USAM 5-11.104 Responsibility for Case Development and Prosecution. As a result, criminal prosecution of environmental violations varied across the country with no real oversight by Main Justice, often leading to abusive prosecutions and a waste of scarce enforcement resources. Moreover, the lack of any effective means of assuring that national laws are enforced with some degree of consistency arguably prevents the development of a coherent, effective, and consistent national criminal enforcement policy.

Abuse of Discretion in Prosecuting Environmental Offenses. As the following cases illustrate, DOJ and local U.S. Attorneys have abused their discretion in prosecuting regulatory offenses. The main criticism is that the offenses did not satisfy either EPA's Devaney Memo, which requires a showing of significant environmental harm and a culpable intent, or DOJ's own prosecution policies regarding the alternative use of administrative and civil remedies. Indeed, in many environmental cases, prosecutors have regularly filed motions in limine or pretrial motions to prevent the defendant from showing the jury that no environmental harm occurred.

United States v. Linden Beverage Co. A good example of unwarranted criminal prosecution is *United States v. Linden Beverage Co.*, Crim. No. 94-122R (W.D. Va), where a small family-owned apple juice business and its owner were charged with CWA wastewater violations. The pollutants from Linden Beverage consisted primarily of rinsewater from the small bottling company, including a mixture of water and apple and grape juices. The owner, Benjamin Lacy, was convicted of one count of knowingly discharging pollutants to waters of the United States in excess of the permitted levels and making false statements on discharge monitoring reports.

The discharges from the small facility were above the permitted levels, but were insignificant and caused no harm to the nearby stream. No fish were killed or even threatened. Even at a short distance downstream from the outfall, which had been monitored by an environmental group, there were never any conditions indicative of pollution or degradation; indeed, the group's data showed dissolved oxygen levels at or above the levels necessary to support stream life of all kind, but unfortunately, the jury was not allowed to hear this evidence. Prosecutors successfully filed pre-trial or in limine motions to prevent the defendants from showing the jury that the nearby stream was not harmed. In short, the "pollution" that occurred was clearly not a "heartland" offense under the CWA where waters are fouled and aquatic life harmed.

Federal prosecutors demanded a 33-month prison sentence for the elderly owner of the facility, a first offender and pillar of his community. The court instead imposed probation, a reasonable sentence which the prosecutors nevertheless appealed. Mr. Lacy's conviction was overturned by the Fourth Circuit because the jury instructions failed to allow consideration of Mr. Lacy's character. *United States v. Lacy*, 1997 U.S. App. LEXIS 35093. The government sought to retry Mr. Lacy again, who finally agreed to plea to a misdemeanor, and who was resentenced to his original probationary term. This case could have — and should have—- been handled by administrative and civil remedies under the Devaney Memo and DOJ guidelines, due to the lack of environmental harm and the nature of the offense as, essentially, a minor reporting violation. While a persistent pattern of filing false reports coupled with environmental harm may justify a criminal prosecution, under the relaxed intent standard, just one mistake amid thousands of entries is enough to prosecute.

United States v. McNab, 324 F.3d 1266 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004). Three hard-working U.S. seafood importers/wholesalers Robert Blandford, Abner Schoenwetter and Diane Huang (all represented by WLF in the Supreme Court) and one Honduran seafood exporter, David Henson McNab, were convicted for the "crime" of importing frozen seafood in the wrong containers. In an outrageous case of abuse of prosecutorial discretion, the seafood dealers were indicted under the Lacey Act for importing frozen lobster tails from Honduras allegedly in violation of an obscure Honduran regulation requiring that frozen seafood be shipped in cardboard boxes, instead of in transparent plastic bags. Also, because about three percent of the 70,000 pound shipment consisted of lobster tails that were less than 5.5 inches in length, those lobster tails allegedly violated another Honduran regulation on size limits (even though the U.S. National Marine Fishery Service, which enforces the Lacey Act and launched the criminal investigation, published official monthly price lists for the U.S. seafood industry, listing the market price of Honduran spiny lobster tails measuring less than 5.5 inches).

At best, this Lacey Act violation should have been subject to administrative or civil penalties (including civil forfeiture). However, DOJ prosecutors, led by Senior Trial Attorney Elinor Colbourn from Main Justice, brought additional criminal charges in order to ratchet up the prison sentence under the Sentencing Guidelines, a common tactic for prosecutors to "pile on" redundant charges. Thus, because the seafood was shipped in clear, transparent plastic bags, instead of opaque cardboard boxes, they were also charged with "smuggling," even though the shipments regularly cleared through U.S. Customs and Food and Drug Administration (FDA) inspections. Oddly, if the seafood had been

shipped in opaque cardboard boxes, which would need to be ripped open to inspect the contents, it would not be considered smuggling.

DOJ prosecutors, not content with adding the smuggling felony charges to the Lacey Act counts, added more counts by also charging the defendants with money laundering. According to prosecutors, because the importers paid for the "illegal" seafood that was "smuggled" into the country in the normal course of their business, they were considered to be trafficking in illegal goods in violation of money laundering statutes. This novel and troubling use of the money laundering statute prompted the trial judge to tell the DOJ prosecutor, "I find that difficult to understand how that's money laundering." *United States v. McNab*, Trial Transcript, Vol. VI, p. 1060, lines 24-25 (Oct. 23, 2000).

For these "crimes," McNab, Blandford, and Schoenwetter, all first offenders, were sentenced to an outrageous prison term of 97 months, or eight *years* under the flawed and harsh Sentencing Guidelines, as well as being ordered to pay stiff fines and to forfeit their property. Ms. Huang, also a first-offender and mother of two small children, was sentenced to prison for two years.

Incredibly, the Honduran regulations that served as the predicate for the Lacey Act charges (and thus, for the smuggling and money laundering charges as well) were declared by Honduran courts, the Honduran Attorney General, and other high level Honduran officials, to be null and void, repealed, and otherwise of no legal effect. Nevertheless, in a 2-1 decision, the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions and excessive sentences. *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003). In a strongly worded dissent, Circuit Judge Fay declared, "what was thought to be a crime turns out not to be a crime under Honduran law;" therefore, "under both U.S. and Honduran law, retroactive application [of the Honduran rulings invalidating the laws] is warranted for a criminal defendant charged or convicted of a subsequently declared invalid criminal statute." *Id*. at 1248-50.

On October 24, 2003, WLF filed a petition for certiorari to the U.S. Supreme Court on behalf of the importers, and a separate petition was filed on behalf of the exporter, both of which were supported by a brief filed by the Government of Honduras. Unfortunately, the Court denied review on January 15, 2004. The defendants are currently serving their stiff eight-year prison terms in federal prison for these environmental "crimes."

Rapanos v. United States. A property owner/developer was criminally prosecuted for moving sand on his property without a permit which the government alleged was required because the property contained wetlands subject to federal jurisdiction. In the related civil suit, the Supreme Court ultimately ruled that the federal government did not have jurisdiction over Mr. Rapanos's property. *Rapanos v. United States*, 547 U.S. 715 (2006). In any event, even if there were federal jurisdiction, the relentless and unnecessary criminal prosecution of Mr. Rapanos was clearly an abuse of prosecutorial discretion. The following exchange at Mr. Rapanos's sentencing hearing in the U.S. District Court for the Eastern District of Michigan between Chief Judge Lawrence P. Zatkoff and Assistant U.S. Attorney Jennifer Peregord on March 15, 2005, illustrates the abusive nature of this prosecution:

> **THE COURT**: I'm asking myself and people are asking me, why is the government so determined to send this defendant to prison for moving his sand?

Number one— I think it's a two-prong thing — number one, this defendant is a very disagreeable person.
. . . .

Number two, this person . . . had the audacity and the temerity to insist upon his constitutional rights.
. . . .

And this is the kind of person that the Constitution was passed to protect. He is exactly the person who should be protected by the Constitution.

People ask, well, what did this person dump to pollute the waters of the United States? Did he dump oil, radioactive substances, sewage, garbage, herbicides, pesticides, insecticides, fungicides, fertilizer, detergent, lead, iron, copper, mercury, benzene, dioxin, PCB's, PCP's, bacteria, DDT, chlordane, nitrates or cyanide? No. He didn't dump that. He polluted the waters of the United States by moving sand from one area of his property to the other.
. . . .

I am finding that the average US citizen is incredulous that it can be a crime for which the government demands [a substantial term of] prison for a person to move dirt or sand from one end of their property to the other end of their property and not impact the public in any way whatsoever.
. . . .

MS. PEREGORD: Just very briefly, your Honor. It is the government's position that the likeability or lack thereof of the defendant had absolutely nothing to do with this prosecution. *Moreover, sand is more toxic and destructive to wetlands than any of the substances the Court mentioned.*

United States v. Rapanos, No. 03-20023, Sentencing Transcript at 12, 16 (March 15, 2005) (emphasis added).

The government's astonishing response to the court's valid concerns is remarkable in at least two major respects. First, the DOJ prosecutor did *not* contest the Court's observation that another major factor was driving the prosecution, namely, that the defendant insisted on asserting his constitutional rights. Second, the absurd representation to the Court that non-toxic sand "is more toxic and destructive to wetlands" and the environment than deposits of lead, mercury, radioactive wastes, sewage, and other pollutants is truly bizarre, undermines DOJ's credibility, and only serves to further demonstrate why *Rapanos* is the paradigm of prosecutorial abuse. Where there is no demonstrable or significant harm, DOJ should refrain from criminal prosecution.

In other cases, as discussed in Chapter Two, criminal charges have been dropped before trial when prosecutors finally recognize the cases lack sufficient evidence, even though the defects may have been evident for some time. For example, in *United States v. Knott*, 106 F. Supp. 2d 174 (D. Mass. 2000), a small facility was raided by some 20 armed EPA and other federal agents because its wastewater was allegedly too acidic. The felony CWA charges were dropped shortly before trial when it was discovered that EPA agents had altered critical pH level readings of the company's wastewater. Further, in *United States v. Trinity Marine Baton Rouge, Inc. and Hubert Vidrine*, Crim. No. CR99-60053, the government filed indictments against a small chemical company and plant manager for allegedly violating RCRA by improperly storing hazardous waste,

namely, recycled oil. Ironically, another set of EPA rules actually encourage the used of recycled oil. The charges were dropped four years later on the eve of trial when defense attorneys discovered that the EPA's chief witness, who allegedly had tested the substance showing it met EPA's "hazardous" criteria, was a cocaine addict who could not recall under hypnosis what he did with the material.

Single Violation-Multiple Jurisdictions. DOJ's environmental prosecution policy also merits criticism in those cases where a violation of an environmental statute or regulation occurs or has effects in more than one jurisdiction. This may happen where the pollutants or emissions migrate through the environment via the air or water. These multi-jurisdictional cases present their own enforcement problems. As one commentator and practitioner put it, "[t]he pattern of prosecutions in the multi-district cases of the last decade demonstrates that in some cases, the standing Department policy governing successive prosecutions has not been followed, resulting in a substantial waste of scarce prosecutorial resources and unfairness to corporate defendants." John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach,* 96 J. CRIM. L. & CRIMINOLOGY 435 (2006). In these cases, companies find themselves facing multiple and successive prosecutions for essentially the same violation.

The Holder, Thompson, and McNulty Memoranda. In addition to DOJ's general *Principles of Federal Prosecution* discussed above, and the specific guidance for environmental prosecutions, DOJ also began to issue supplemental guidance beginning in 1999, which focused on the prosecution of businesses.

Holder Memo. On June 16, 1999, the first related memorandum was issued by Eric H. Holder, Jr., then-Deputy Attorney General, entitled *Bringing Criminal Charges Against Corporations*. The Holder Memo lists eight non-binding criteria for prosecutors to consider in deciding whether to prosecute corporations: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the corporation's history of similar conduct, (4) timely and voluntary cooperation, "including, if necessary, the waiver of the corporate attorney-client and work product privileges," (5) the existence and adequacy of a compliance program, (6) the remedial actions taken, (7) collateral consequences on innocent third parties, and (8) the adequacy of non-criminal remedies. Many of these factors (except waiver) were modeled after those specified in 1991 Sentencing Guidelines on effective corporate compliance programs that warrant lenient punishment, discussed further in Chapter Seven, and the 1991 DOJ guidance governing environmental prosecutions, discussed above, on voluntary disclosure and cooperation. Indeed, footnote one of the Holder Memo expressly refers to the Sentencing Guidelines which "reward voluntary disclosure and cooperation with a reduction in the corporation's offense level."

Corporate Fraud Task Force. On July 2, 2002, President Bush established the Corporate Fraud Task Force in response to the Enron scandal and other high profile cases, such as WorldCom, which all raised securities fraud issues. Chaired by the Deputy Attorney General, the Task Force encouraged and coordinated corporate fraud prosecution by local U.S. Attorneys across the country. Congress also enacted the Sarbanes-Oxley Act in 2002 to require greater financial disclosure by corporations and to impose tougher criminal penalties for obstruction of justice and fraud. One of DOJ's biggest targets was Arthur

Andersen, LLP, which was prosecuted because the shredding of internal documents by certain employees per the company's document retention policy was viewed as obstruction of justice for a yet-to-be instituted Securities and Exchange Commission investigation of Arthur Andersen's role in the Enron scandal.

> *"To lose a case like this is huge. Arthur Andersen was the poster-child of all the corporate fraud cases."*
>
> **William B. Mateja**
> Former Member of DOJ Corporate Fraud Task Force
> June 1, 2005

Ignoring the collateral consequences to innocent third parties, as the then-Holder Memo cautioned prosecutors to consider, 28,000 innocent employees lost their job when Arthur Andersen was prosecuted and convicted. However, three years later, the U.S. Supreme Court unanimously reversed the conviction on May 31, 2005, because the law was vague and the jury instruction allowed Arthur Andersen to be convicted even if it honestly and sincerely believed that the company's conduct was lawful. *Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005). As William B. Mateja, a former member of DOJ's Task Force admitted, "[t]o lose a case like this is huge. Arthur Andersen was the poster-child of all the corporate fraud cases." Charles Lane, *Justices Overturn Andersen Conviction*, WASH. POST, June 1, 2005, at A1. In July 2007, the Corporate Fraud Task Force issued a five-year review of accomplishments, noting 1,236 corporate fraud convictions, including 214 CEOs and presidents; 53 CFOs, 23 corporate counsels or attorneys, and 129 vice presidents. Some of these cases have been reversed on appeal and others are being challenged.

Thompson Memo. In the midst of the Enron-related scandals, on January 20, 2003, the Holder Memorandum was replaced by a memorandum by Larry Thompson, then Deputy Attorney General. Renamed as *Principles of Federal Prosecution of Business Organizations*, the Thompson Memo revised the Holder Memo by making it mandatory for prosecutors to consider the same eight criteria as the Holder Memo plus one more, namely, "the adequacy of prosecution of individuals for the corporation's malfeasance." The primary emphasis, however, was on ensuring there was "authentic" cooperation, which placed a premium on the same fourth factor as found in the Holder Memo ("the corporation's willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections"). The ramification of the Thompson Memo's emphasis on cooperation and waiver is discussed further in Chapter Five.

Meanwhile, in September 2003, Attorney General Ashcroft directed U.S. Attorneys to file the "most serious" charge in a case and seek the toughest sentence. This policy further forced many defendants to plead guilty to "lesser"

charges, when in reality, the other charges overstated the offense. Thus, in some environmental cases where the underlying charge is only a misdemeanor, collateral false statement and mail and wire fraud charges — "most serious" charges with penalties of five years or more in prison — were added on to place undue pressure on defendants to waive their right to a trial and an appeal.

McNulty Memo. On December 12, 2006, the Thompson Memorandum was replaced with a newer version by then Deputy Attorney General Paul J. McNulty. One of the primary reasons for the revision was the widespread complaint that under the Thompson Memo, U.S. Attorneys' Offices were unfairly demanding or pressuring corporate targets to waive their attorney-client privilege in order to be deemed "cooperative" in a criminal investigation and thus, deserving leniency. The impact of the Holder, Thompson, and McNulty Memos as they relate to the erosion of the attorney-client privilege is discussed in detail in Chapter Five.

Notably, the McNulty Memo reaffirmed the Thompson Memo in its primary focus of targeting businesses, but emphasized only a subset of corporate crimes, namely, corporate fraud. When the McNulty Memo was released, the headline of DOJ's Press Release was "U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting *Corporate Fraud*" (Dec. 12, 2006) (emphasis added). In the press release, Deputy McNulty touted DOJ's past efforts "to investigate and prosecute *corporate fraud*" over the last five years, as part of DOJ's Corporate Fraud Task Force. *Id*. (emphasis added). Indeed, in a public speech the same day, McNulty again emphasized the criminal prosecution of "corporate fraud," making references to Enron and similar cases, and emphasizing the protection of the investing public and the integrity of the stock markets. *See* "Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in *Corporate Fraud* Prosecutions," (New York, Dec. 12, 2006) (emphasis added).

On March 8, 2007, McNulty again emphasized the prosecution of "corporate fraud" in a speech before the Corporate Counsel Institute in which he noted that "[t]he cornerstone to a sustained law enforcement effort involving corporate fraud is corporate self-policing." He concluded his remarks by stating: "As the Chairman of the Corporate Fraud Task Force, I can tell you that the Department is committed as ever to fighting corporate fraud."

Moreover, corporate general counsel seem to be increasingly targeted by DOJ for civil and criminal prosecutions. *See* Association of Corporate Counsel, ACC REPORTS: IN-HOUSE COUNSEL IN THE LIABILITY CROSSHAIRS (Sept. 2007). In one case, DOJ filed a civil False Claims Act lawsuit against the General Counsel of Tenet Healthcare based on information gleaned from an internal 1997 report that the company voluntarily released to settle unrelated charges in 2006. And while prosecutions in the securities area may be down somewhat from the earlier Enron days, white-collar prosecutions continue at a high rate in 2007 in areas such as Medicare fraud and False Claims Act cases.

McNulty Memo Equates Environmental Offenses With Fraud. Despite DOJ's repeated emphasis on fighting "corporate fraud," the McNulty Memo improperly lumps so-called "environmental crimes," which are regulatory or *mala prohibita* offenses, into the fraud/*malum in se* category; "[f]irst and foremost, prosecutors should be aware of the

important public benefits that may flow from indicting a corporation in appropriate cases." McNulty Memo, section II(B). In particular, "certain crimes carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation." *Id.* (emphasis added).

DOJ's post-Enron emphasis on prosecuting corporate fraud cases raises distinct legal and policy issues that are different from prosecuting environmental offenses. In the first place, fraud cases generally require a showing of specific knowledge and intent by individuals, whereas environmental offenses can be prosecuted by a showing of general intent. Accordingly, justice can be served by prosecuting the culpable individuals engaged in any such fraud without prosecuting the organization, which, as the Arthur Andersen case illustrates, prosecuting the organization has the deleterious effect of punishing innocent employees and shareholders. More troubling, however, is that the McNulty Memo not only sends the wrong and contradictory message by treating so-called environmental crimes on a par with financial fraud, it also leaves unresolved the distinction between an "environmental crime" and a non-criminal infraction. Even where a regulatory offense might be categorized as an "environmental crime," DOJ attorneys are still required, by other provisions of the USAM, to consider whether non-criminal penalties are more appropriate for this type of regulatory offense.

The McNulty Memo may start off in the right direction, by describing DOJ's general policy of prosecuting business organizations for regulatory offenses, but sends a mixed and confusing message to federal prosecutors. In particular, section III of the McNulty Memo, "Charging a Corporation: Factors to Be Considered," specifies nine factors that the Memo says "must be" considered in exercising prosecutorial discretion, factors which are essentially the same factors in determining whether to charge an individual. *Id.* (emphasis added). One of the factors that must be considered is the "adequacy of remedies such as civil or regulatory enforcement actions," which is referenced in section XI. *Id.* However, when one refers to section XI of the McNulty Memo, the mandatory "must be considered" terminology of section III is inexplicably absent; instead, the permissive "may consider" and the hortatory "should consider" language appear as follows:

> **XI. Charging a Corporation: Non-Criminal Alternatives**
>
> A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:
>
> 1. the sanctions available under the alternative means of disposition;
> 2. the likelihood that an effective sanction will be imposed; and
> 3. the effect of non-criminal disposition on federal law enforcement interests.
>
> B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions

> without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution.

Id. (emphasis added). Thus, this subtle but critical discrepancy in phrasing between the mandatory in section III of the McNulty Memo to the permissive in section XI gives prosecutors broader discretion than they otherwise should have in bringing criminal actions against businesses for regulatory offenses. There simply is no effective check on the abuse of prosecutorial discretion by local U.S. Attorneys or the attorneys in the Environmental Crimes Section of Main Justice.

New Enforcement Strategies and Partnerships. As previously noted, DOJ and EPA have been working closely with OSHA in using environmental laws as a supplement to worker safety laws, due to the environmental statutes' greatly increased penalties. This is particularly true in the area of asbestos removal cases where the CAA has specific provisions regulating the handling and removal of asbestos from buildings. DOJ and EPA have also worked jointly with other agencies sharing environmental jurisdiction, such as the Department of Interior, and the Postal and Internal Revenue Services, where the environmental offenses include charges of wire or mail fraud.

In addition, DOJ has established task forces with the EPA and the Coast Guard to crack down on violations of the Act to Prevent Pollution from Ships, which regulates the discharge of oil and wastes from both cargo and cruise ships. Enforcement is enhanced by whistleblower provisions that allow the whistleblower to receive up to 50 percent of the fine levied. Due to vicarious liability principles, the ship carriers may be liable for the crime, even where caused by a rogue employee. Further, beginning in 1992, many of the U.S. Attorneys' Offices have set up Joint Environmental Crime Task Forces (ECTF) around the country with federal, state, and local environmental enforcement agencies and prosecutors, to investigate and prosecute environmental violations that often are subject to both federal and state laws.

Prosecution Trends. From 1998-2006, the number of defendants criminally charged by the Department of Justice for environmental offenses has fluctuated somewhat, from a high of 477 in 2001, to a low of 247 in 2003, but has averaged more than 300 per year. In 1998 there were 350 defendants charged, and in 2005, there were 320, a small decline overall of less than 10 percent. The highest rejection rate of all criminal EPA investigations was in 1998, during the Clinton Administration. In that year, there were 636 EPA criminal investigations, but only 350 defendants were charged. By comparison, during the first year of the Bush Administration, 482 criminal investigations resulted in 372 defendants charged. Regardless of the modest statistical fluctuations over the years, both the EPA and DOJ continue to have a robust environmental prosecution policy and the trend is that such prosecutions will continue to be a priority.

DOJ's War on Drugs: Infringing on the First Amendment. Besides using the heavy hand of criminal prosecution against businesses and individuals for minor regulatory offenses

where non-criminal remedies would be more appropriate, DOJ is also unfairly targeting pharmaceutical companies for criminal prosecution for questionable regulatory offenses. For example, in 2005, Eli Lilly & Co. was prosecuted and forced to plead guilty and pay a $36 million fine for informing doctors that its drug Evista was helpful in reducing the risk of invasive breast cancer in postmenopausal women. Because the FDA had approved Evista only for treating osteoporosis, the FDA and DOJ regarded this communication to be illegal off-label promotion of an FDA-approved drug for a non-approved use. However, doctors are free to prescribe drugs for off-label use, and indeed, can be sued for malpractice in some cases if they don't.

> *"[T]he government is trying to criminalize an important potentially life-saving scientific debate. When the government does that, the patients who have deadly incurable diseases and their families are the ones who suffer."*
>
> **James J. Brosnahan, Esq.**
> Morrison & Foertster
> March 18, 2008

Prosecuting Eli Lilly clearly implicated the First Amendment commercial free speech rights of the company to disseminate truthful, non-misleading information about its drugs to doctors. Furthermore, in September 2007, the FDA finally approved Evista for breast cancer, eight long years after the first results showing the drug to be effective were published. Clearly, DOJ's prosecution of Eli Lilly was abusive and unwarranted on several levels. Not only did it infringe on First Amendment freedoms, but it likely will cost lives by over deterring pharmaceutical companies from disseminating the off-label health benefits of its drugs. *See* Scott Gottlieb, *Stop the War on Drugs*, WALL ST. J., at A1 (Dec. 17, 2007). Indeed, this may have happened when the U.S. Attorney in Philadelphia launched a criminal investigation in 2004 against Genentech for allegedly promoting off-label use of Rituxan, another cancer-fighting drug, which was even touted on the National Cancer Institute's Web site. Genentech was understandably reticent to disseminate the good news about another one of its promising cancer-fighting drug in 2005, Herceptin, which the FDA finally approved in 2006.

The latest salvo by DOJ in its war on off-label promotion was fired on March 17, 2008, when DOJ indicted the former CEO of InterMune, Inc., Dr. W. Scott Harkonen, for off-label promotion of Actimmune. *United States v. Harkonen*, CR 08-0164 (N.D. Ca.). The indictment claims that Dr. Harkonen promoted Actimmune, approved by FDA for certain uses, to treat Idiopathic Pulmonary Fibrosis (IDF), a fatal disease affecting middle-aged people, for which the FDA had not approved the drug. However, a New England Journal of Medicine study showed that improvement in the conditions of IPF patients

was associated with Actimmune.

Even though DOJ entered into a deferred prosecution agreement (DPA) with InterMune in October 2006 to resolve civil and criminal charges, and imposed a fine of $37 million, DOJ abused its prosecutorial discretion by filing criminal charges against Dr. Harkonen instead of using non-criminal remedies. Indeed, DOJ's Press Release announcing the indictment quotes Jeffrey Bucholtz, acting Assistant Attorney General for the *Civil* Division, further suggesting that the case was more suitable for civil resolution. Back in 2005, WLF submitted a petition to DOJ to that end. WLF criticized the manner in which DOJ's Civil Division, instead of its Criminal Division, was ostensibly coordinating criminal prosecution with local U.S. Attorneys, leading to an incoherent and uncoordinated prosecution policy in this critical area.

More troubling about the case is the fact that the indictment against Dr. Harkonen cites to a 2002 press release by his company filed with the SEC, describing the Phase 3 clinical trials for the promising drug. The SEC requires significant information about the progress of clinical trials to be disclosed to the investing public, yet, on the other hand, the FDA views such information as unlawful off-label promotion. Indeed, in 1996, WLF filed a joint petition with the FDA and the SEC requesting the agencies to resolve their conflict on the proper disclosure of the results of clinical trials for new drugs. It appears that no corrective action was taken by the DOJ, FDA, and SEC on WLF's petitions and complaints.

Conclusion. In many cases, DOJ is not justified in accepting criminal referrals from the EPA, the FDA, or other agencies, where they fail to adequately consider alternative non-criminal remedies, as specified in EPA's Devaney Memo and in DOJ's internal prosecution policies. As long as local U.S. Attorneys are able to make their own prosecutorial decisions with little oversight by Main Justice, one can expect these unwarranted abusive prosecutions to continue.

RECOMMENDATIONS

1. DOJ should require the referral agency, whether it is the EPA, the National Marine Fisheries Services, the Department of Interior, the FBI, the FDA, or another agency, to justify the expenditure of DOJ's scarce prosecutorial resources, as opposed to using adequate administrative and civil remedies.

2. All criminal prosecutions for environmental violations by local U.S. Attorneys should be approved by Main Justice to ensure a uniform and consistent national enforcement policy in the same way that prosecutions for antitrust and tax violations are approved.

3. Criminal prosecutions should be reserved for egregious cases where the violation results in substantial environmental damage that is irremediable or causes serious bodily harm *and* where there is culpable conduct reflected by past violations and a high degree of specific intent to deliberately violate the law.

4. DOJ should establish an environmental enforcement policy review group or task force composed of appropriate representatives from DOJ, including DOJ's Environmental and Natural Resource Division, Criminal Division, and the Attorney General's Advisory Committee (AGAC), including its Environmental Issues Subcommittee. The task force should conduct a thorough review of all of its enforcement policies, including the 1994 Reno policy; the handling of multi-jurisdictional violations; and the practice of successive prosecutions by U.S. Attorneys' Offices for the same offense.

5. DOJ should decline to prosecute pharmaceutical companies for off-label promotion of FDA-approved drugs where there is no serious allegation that the information being disseminated is false or misleading. Moreover, the Criminal Division, rather than the Civil Division, should be coordinating criminal enforcement efforts with local U.S. Attorneys, as WLF recommended to DOJ in 2006.

6. The McNulty Memo should be amended to make the consideration of non-criminal alternatives in section XI mandatory rather than permissive for prosecutors when making their charging decisions, particularly for environmental and other regulatory offenses.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

ASSOCIATION OF CORPORATE COUNSEL, ACC REPORTS: IN-HOUSE COUNSEL IN THE LIABILITY CROSSHAIRS (Sept. 2007).

Katy Bartelma, et al., *Environmental Crimes*, 44 AM. CRIM. L. REV. 409 (2007).

Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L. J. 1077 (2001).

Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007).

John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach,* 96 J. CRIM. L. & CRIMINOLOGY 435 (2006).

Inna Dexter, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515 (2007).

George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985 (2005).

Scott Gottlieb, *Stop the War on Drugs*, WALL ST. J., at A1 (Dec. 17, 2007).

JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW (Cato Inst. 2006).

Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006).

Joseph F. Savage & Stephanie A. Martz, *How Corporations Spell Relief: Substituting Civil Sanctions for Criminal Prosecutions*, 11 CRIM. JUST. 10 (Spring 1996).

U.S. ENVTL. PROTECTION AGENCY, FY1998-FY2006 CRIMINAL ENFORCEMENT PROGRAM ACTIVITIES.

Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095 (2006).

TIMELINE: DOJ CRIMINAL PROSECUTION POLICIES

1980: U.S. Attorney General Benjamin Civiletti promulgates *Principles of Federal Prosecution* to serve as guidelines for all U.S. Attorneys on the exercise of prosecution discretion for all federal crimes. Published in the U.S. Attorneys Manual (USAM), the Principles emphasize that prosecutors should consider declining criminal prosecution for regulatory offenses that have non-criminal alternative remedies. USAM 9-17.150.

1991: DOJ Land and Natural Resources Division issues Criminal Enforcement Policy Memorandum on Voluntary Compliance and Disclosure, which is a precursor to the 1999 Holder Memorandum.

1992: DOJ begins establishing Environmental Crime Task Forces (ECTF) with U.S. Attorneys Offices, to include working with other federal agencies such as OSHA, IRS, Postal Service, Department of Interior, Fish & Wildlife Service, as well as state and local environmental enforcement agencies.

1994: Attorney General Janet Reno, responding to criticism from Congressman John Dingell, changes DOJ's oversight of environmental prosecutions and gives more discretion to local U.S. Attorneys to initiate criminal prosecution in this area. *See* USAM 5-11.104 Responsibility for Case Development and Prosecution.

June 1999: Holder Memo: Deputy Attorney General Eric Holder, Jr. issues Memorandum, *Bringing Criminal Charges Against Corporations*. The Holder Memo consists of *non-binding* criteria for prosecutors to consider in assessing a corporation's cooperation in a criminal investigation to warrant more lenient treatment, including whether it disclosed wrongdoing, waived attorney-client privileges, and advanced legal defense fees to suspected employees.

Mar. 2002: Arthur Andersen, LLP indicted in connection with Enron scandal.

July 2002: President Bush establishes Corporate Fraud Task Force, chaired by the Deputy Attorney General, in response to Enron-related fraud scandals.

July 2002: Congress enacts Sarbanes-Oxley Act that imposes duties on corporate officers to certify that financial reports filed with the Securities and Exchange Commission (SEC) are accurate, including reporting on material environmental liabilities.

Jan. 2003: Thompson Memo: Deputy Attorney General Larry Thompson revises Holder Memo and issues Memorandum, *Principles of Federal Prosecution of Business Organizations*. Thompson Memo makes it mandatory that prosecutors consider the various factors to assess whether a company under investigation is

"authentic" with its cooperation.

Sept. 2003: Attorney General Ashcroft directs U.S. Attorneys to file the "most serious" charges in a case and seek the toughest sentence.

2004-2005: DOJ investigates or prosecutes Genentech, Warner-Lambert and Eli Lilly for off-label promotion of lifesaving anti-cancer drugs.

Jan. 2005: The U.S. Supreme Court reverses the conviction of Arthur Andersen. *Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005).

Dec. 2006: McNulty Memo: Deputy Attorney General Paul McNulty, responding to widespread criticism, revises Thompson Memo, placing stricter restrictions on the discretion of U.S. Attorneys to seek waiver of attorney-client privileges and curtailing advancement of defense fees to employees. McNulty Memo reiterates targeting corporations in financial fraud cases, but includes "environmental crimes" in the corporate fraud category.

Mar. 2007: McNulty announces that DOJ's Corporate Fraud Task Force which he chairs, is committed to prosecuting corporate fraud as a continued priority.

July 2007: Corporate Fraud Task Force issues five-year review of accomplishments, noting 1,236 corporate fraud convictions, including 214 CEOs and presidents, 53 CFOs, 23 corporate counsels or attorneys, and 129 vice presidents. Some of these cases have been reversed on appeal or are being challenged.

Mar. 2008: DOJ indicts Dr. Scott Harkonen, former CEO of InterMune, for promoting off-label use of FDA-approved drug to treat fatal disease, despite entering into deferred prosecution agreement with company two years earlier. Indictment relies on press release by company filed with the SEC describing clinical trial results.

Chapter Four

Parallel Civil and Criminal Prosecutions

Chapter Four

PARALLEL CIVIL AND CRIMINAL PROSECUTIONS

"The 'criminalization' of the environmental regulatory scheme presents grave issues relating to the standards upon which convictions can be maintained, and questions of fundamental fairness to members of the regulated community who now may face parallel civil and criminal actions for what appears to be the same activity."

Daniel Riesel, Esq.
ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL
(New York: Law Journal Press 2007)

Overview. Many federal regulatory statutes, including environmental, securities, and health care laws, provide for administrative, civil and criminal enforcement remedies. Agency attorneys and prosecutors have broad discretion over which remedy to pursue. Corporations are often forced to defend themselves simultaneously on several fronts, responding to regulatory enforcement actions, civil lawsuits, and criminal investigations for the same alleged misconduct. While parallel and successive criminal and civil cases have always posed a challenge for a corporation, the growing prevalence of parallel investigations has significantly increased the risk that the constitutional rights of corporations and their employees will be violated.

While administrative and civil remedies are more appropriate in resolving many regulatory offenses (discussed in Chapters Two and Three), overly zealous prosecutors often abuse their discretion by either bringing criminal charges while civil proceedings are pending or after they are completed. More sinister, however, is the practice of initiating administrative or civil proceedings as a pretext for obtaining incriminating evidence for use in a subsequent criminal prosecution. In the latter scenario, investigators from the Securities and Exchange Commission (SEC) or other regulatory agencies lull their targets into thinking that the matter is being investigated only as a civil matter.

In these circumstances, serious public policy and constitutional issues are raised under the Double Jeopardy, Self Incrimination, Equal Protection, and Due Process Clauses. Indeed, in several recent cases discussed herein, courts have barred prosecutors from using testimony provided by the defendant in the related civil proceeding. In a few cases, courts have gone so far as to dismiss the indictments altogether for serious prosecutorial misconduct, including deceit, trickery and fraud. Unfortunately, there is a growing trend to use parallel civil and criminal prosecutions. This abusive practice should be curtailed by the Department of Justice, SEC, and other agencies. Moreover, courts should provide closer scrutiny and impose appropriate sanctions to deter this practice.

Parallel Prosecution Policy for Environmental Offenses. In 1987, the Justice Department's Land and Natural Resources Division issued Directive No. 5-87, *Guidelines for Civil and Criminal Parallel Proceedings* in the environmental area. First, criminal enforcement proceedings were to be undertaken before any civil action, except where there was imminent and significant harm to the environment, in which case quicker civil injunctive relief should be first sought. Obtaining a criminal conviction, which requires a higher level of proof (beyond a reasonable doubt) than that for a civil proceeding (preponderance of the evidence), would make it easier to establish liability in a subsequent civil proceeding under collateral estoppel principles. Second, information gathered during the criminal investigation could only be shared with civil enforcement attorneys. However, information gleaned from any administrative or civil proceedings *could* be shared with criminal prosecutors as long as there was a "good faith" basis to undertake an administrative or civil investigation that was "objectively reasonable," and that the civil investigation was not a pretext for building a criminal case.

When enforcing environmental laws and regulations, EPA and other agency personnel would on occasion conduct inspections at a site and, soon thereafter, initiate administrative or civil proceedings, only to switch quickly to criminal prosecution as the preferred enforcement vehicle. This practice raises questions as to whether the civil proceedings were indeed a pretext for bringing criminal charges. For example, in *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), DOJ civil enforcement attorneys obtained a temporary restraining order to enjoin a property owner from placing clean fill on his property deemed a regulated wetland without a permit. Yet, a few days before the civil enforcement proceedings began, the property owner was arrested and prosecuted, much to the surprise and dismay of the judge handling the civil matter. Following Mr. Pozsgai's criminal conviction, the civil proceedings resumed, but DOJ's argument that collateral estoppel should bar relitigation of civil liability did not prevail. The owner's wife, who had not been criminally prosecuted, was also named by the government in the civil suit but had not yet had her day in court. DOJ's offer to drop her as a party from the civil suit was opposed by her and rejected by the court. Not surprisingly, the court of appeals, having upheld the criminal conviction without any opinion, ruled in favor of the government in the civil appeal despite valid arguments that there was no jurisdiction over the isolated wetland.

Similarly, in *United States v. Knott*, 106 F. Supp. 2d 174 (D. Mass. 2000) (discussed in Chapter Two), civil inspectors inspected a facility in late October 1997 to sample the pH levels of the wastewater and allegedly found the pH levels to be below the minimum level of 5 pH. Within two weeks — a suspiciously short period of time following the civil inspection — a 21-man "virtual SWAT Team," as the trial court later described it, raided the facility for more sampling and seizing records. *Id*. at 180. The timing of the civil inspection and criminal raid suggested that the civil inspection was a pretext for obtaining the criminal search warrant. One month after the raid, a routine administrative notice of violation (based upon the civil inspection) was issued for the alleged infraction, further suggesting a pre-planned criminal prosecution. Thus, the felony criminal charges subsequently brought against the facility and its owner completely co-opted the routine administrative proceeding. All criminal charges were dropped shortly before trial, but only after it was discovered that the EPA civil inspector had altered the pH level readings in his log book, and had taken the

sample in violation of the owner's qualified consent to search the facility.

Supreme Court Rulings. As noted, parallel and successive civil and criminal prosecutions raise self-incrimination, double jeopardy and other related constitutional questions. In *United States v. Kordel*, 397 U.S. 1 (1970), the Court held that evidence obtained from a civil investigation can generally be used later in a criminal investigation without violating the self-incrimination or due process clauses. But if the civil proceeding was brought solely to obtain information for a criminal investigation, or if the government attorney fails to notify the civil target that he is also a criminal target, then the right against self-incrimination is violated. While remaining silent in a criminal investigation cannot be used against a defendant, the same is not true in a civil proceeding. Asserting one's right to remain silent in a civil proceeding can be construed against the defendant; hence, a civil target may be pressured to cooperate with government attorneys if they believe that no criminal proceedings are underway or likely to occur.

As for the Double Jeopardy Clause, in 1989, the Supreme Court was faced with the question of whether the clause is violated where there is an imposition of civil fines following a criminal conviction. In *United States v. Halper*, 490 U.S. 435 (1989), a medical laboratory manager was prosecuted and convicted for "upcoding" 65 office visit claims, resulting in a total loss to the government of only $585. He was sentenced to prison for two years and paid a fine of $5,000. Not satisfied with this significant criminal punishment, the government sued Mr. Halper under the False Claims Act, seeking over $130,000 in damages based on the civil penalty statutory formula of $2,000 per violation.

Mr. Halper argued that the civil fines were so excessive that they constituted a second punishment for the same offense, and hence, were barred by the Double Jeopardy Clause. The Supreme Court unanimously agreed, finding that the penalty imposed was "so extreme and so divorced from the Government's damage and expenses as to constitute punishment." 490 U.S. at 442. Thus, the imposition of civil penalties following a criminal prosecution would be barred if the primary purpose of the civil sanctions was to punish or deter the conduct in question. Likewise, *Halper* suggested that the opposite could be true: imposing punitive civil penalties first could foreclose subsequent criminal prosecution under the Double Jeopardy Clause. To avoid that scenario from happening, DOJ's Civil Division devised a so-called "*Halper* waiver," whereby corporations would be forced to waive their double jeopardy claims if follow-up criminal prosecution ensued, in return for the Civil Division's agreement not to characterize the company's payments being sought. Indeed, that very scenario was presented before the Court nine years later.

The Supreme Court was faced with a case where the chairman of two national banks was administratively sanctioned by a government agency for violating banking laws and fined $16,500. Three years later, he was indicted and convicted. On appeal, he argued that the Double Jeopardy Clause prohibited his criminal prosecution. In *Hudson v. United States*, 522 U.S. 93 (1997), the Supreme Court reversed its holding in *Halper,* ruling that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Id.* at 99. If Congress intended penalties to be civil in nature, that characterization would usually control, unless the "clearest proof" shows otherwise.

However, several Justices, including Justices Breyer and Souter, who joined in the opinion, did not close the door to challenging successive punishments, regardless of whether they were civil sanctions following criminal prosecution. In his concurring opinion, Justice Breyer suggested that a closer examination of the civil remedy may indeed rise to the level of being punitive. *Id.* at 113-14. Even Justice Rehnquist, who authored the opinion for the Court, noted that civil sanctions that are "irrational" or excessive can be challenged under the Due Process, Equal Protection, or the Excessive Fines Clauses. *Id*. at 103. Indeed, a year later, the Supreme Court ruled that a civil fine was so excessive, even though authorized under the particular forfeiture statute, that it violated the Excessive Fines Clause. *United States v. Bajakajian*, 524 U.S. 321 (1998).

EPA's Response to *Hudson*. Following the pro-government *Hudson* decision in 1997, DOJ's Environment and Natural Resource Division (ENRD) revisited and revised its 1987 parallel prosecution policy with two new procedures. In 1999, EPA issued Directive 99-20, *Global Settlement Policy* (1999) and Directive 99-21, *Integrated Enforcement Policy* (1999). The *Integrated Enforcement Policy* explicitly allows for joint criminal and civil investigations and the sharing of jointly developed information until the grand jury has been convened. Even though the policy cautions against using administrative or civil discovery as a pretext for later criminal charges, EPA began to use parallel proceedings even more aggressively.

In addition, the *Global Settlement Policy* requires that criminal prosecutors handle criminal pleas, while civil attorneys handle any civil settlement pursuant to their respective criteria for resolving their cases against a single defendant for the same conduct. Civil relief or settlement may not be traded off for a reduction in the criminal penalty. On the other hand, civilly imposed cleanup orders can be made a part of a supplemental sentence imposed by the court in the parallel or subsequent criminal proceeding. Indeed, as discussed in Chapter Two, these court-mandated SEPs can be quite expensive, amounting to $135 million in FY 2007.

In July 2005, EPA announced that one of its priorities was to integrate EPA's civil and criminal enforcement programs, including physically co-locating the civil and criminal offices around the country. This initiative was intended to facilitate the sharing of information between civil and criminal investigators. In practice, it has only increased the risk of abusive parallel civil and criminal enforcement actions. EPA has cautioned its investigators, however, that once criminal charges are filed, the civil enforcement agents should stop sharing information with the criminal investigators.

Courts Rebuke DOJ for Abusive Parallel Prosecutions. Courts are beginning to address those situations where federal prosecutors use regulatory agencies, such as the Securities and Exchange Commission (SEC), as a stalking horse to develop information for their criminal investigation and to circumvent the strictures of criminal discovery. As discussed, in *United States v. Kordel*, 397 U.S. 1 (1970), the Court warned against the use of evidence obtained from civil proceedings if those proceedings were brought to obtain evidence for a criminal investigation. In *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), the district court suppressed the testimony given by the defendant in an SEC deposition because the supposedly parallel investigations of the U.S. Attorney's Office and the SEC were, in fact, a single investigation. *Id.* at 1139.

In another case, the SEC investigators essentially were being used by criminal prosecutors to develop their criminal case under the pretext that the matter was being handled only in civil proceedings. In *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), criminal prosecutors attempted to gain a strategic advantage by concealing a criminal investigation behind the guise of an ongoing civil investigation. Specifically, the prosecutors sought to leverage the difficult choice facing defendants: namely, either assert their Fifth Amendment privilege against self-incrimination or protect their professional standing and financial interests in the civil or regulatory proceedings. While the SEC attorneys knew the defendants were targets of a criminal investigation, they did not reveal that critical information, when specifically asked by the defendants. Thus, the defendants cooperated with the SEC investigators and waived their privilege against self-incrimination. However, the district court in *Stringer* sharply rebuked the prosecutors for their deceiving the defendants into waiving their Fifth Amendment rights, and dismissed the indictments because of the government misconduct. *Id.* at 1088. The Justice Department appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit where the case was pending as of March 2008.

Not only does the SEC engage in impermissible parallel prosecutions, the agency blocks defendants from getting access to discovery in the civil proceedings once the criminal charges are filed. One court has aptly called this practice "gamesmanship," and other courts have rightfully decried and rejected this manipulative practice in similarly forceful terms. *See, e.g.*, *SEC v. Sandifur*, No. C05-1631, 2006 WL 3692611 (W.D. Wash. Dec. 11, 2006); *SEC v. Kornman*, No. 3:04-CV-1803-L, 2006 WL 1506954 (N.D. Tex. May 31, 2006); *SEC v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005); *United States v. Mahaffy*, 446 F. Supp. 2d 115 (E.D.N.Y. 2006). In all of these cases, the government's playbook is strikingly similar; without informing the target, the government uses a civil investigation to develop evidence supporting criminal charges, brings civil and criminal charges simultaneously, and then moves to stay the civil proceedings in favor of the criminal proceeding, thus ensuring that a defendant will "barely receive any discovery at all." *Saad*, 229 F.R.D. at 91.

United States v. Cassese. Another outrageous case of parallel civil and criminal proceedings by SEC and DOJ involved the prosecution of John J. Cassese, founder and CEO of Computer Horizons Corporation, a leading information technology services company. In 1999, Cassese was in merger negotiations with Compuware. Subsequently, the CEO of Compuware called Cassese and said his company would not be merging with Computer Horizons, but was going to merge with Data Processing Resources Corporation (DPRC), a company of similar size as Computer Horizons. The next day, Cassese, who had previously owned DPRC stock, purchased 10,000 shares of DPRC. It is lawful to purchase such stock on non-public information so long as the merger is not a tender offer and the purchaser has no fiduciary duties to the company whose stock is being purchased.

Two days later, Compuware announced that its acquisition of DPRC would be by tender offer. When Cassese's broker called him with that information, Cassese was surprised and told him to cancel the trades, but they could not be undone. Cassese made $150,000 in profits. In 2002, the SEC brought civil charges against Cassese for unlawful insider trading which does not require a showing of intent. Cassese settled promptly with the SEC and paid penalties more than double his profits, approximately

$320,000. Cassese never tried to hide anything; in fact, he attempted to correct the situation. Nevertheless, in March 2003, the U.S. Attorney for the Southern District of New York, a member of the Corporate Fraud Task Force, indicted Cassese on two felony charges for the 1999 trades, which carried penalties of stiff fines and up to 10 years in prison for each count. The judge threw out one of the charges of insider trading since Cassese was neither an insider nor misappropriated information in violation of a fiduciary duty to Compuware since he had no such duty. *United States v. Cassese*, 273 F. Supp. 2d 481, 485-88 (S.D.N.Y. 2003). Indeed, the SEC did not even charge Cassese with that violation in its civil proceeding.

The remaining charge was for violation of a different SEC insider trading regulation that required the SEC to show that Cassese had the necessary criminal intent to violate the law, specifically, that he knew that the merger was going to be by a tender offer rather than by a cash merger. The jury convicted Cassese on this count, but the district judge set aside the verdict because the evidence was insufficient to prove the requisite willful or specific intent by Cassese to commit the crime. *Cassese II*, 290 F. Supp. 2d at 445. The government appealed the dismissal, but the Second Circuit affirmed, taking the government to task: "Since few events in the life of an individual assume the importance of a criminal conviction, we take the `beyond a reasonable doubt' requirement with utmost seriousness. Here, we find that the Government's evidence failed to reach that threshold." *United States v. Cassese*, 428 F.3d 92 (2d Cir. 2005).

In a more recent case, a federal judge dismissed an indictment charging immigration fraud against an anti-Castro Cuban political figure seeking naturalization after withdrawing his political asylum application. In *United States v. Carriles*, 486 F. Supp. 2d 599 (W.D. Tex. 2007), the judge held that "the evidence is overwhelming that the Government improperly manipulated" the administrative and civil investigation process by misrepresenting the true purpose of its investigation and interview of the applicant; namely, that the investigation was a pretext to obtain incriminating evidence for a criminal prosecution. The government appealed the *Carriles* case to the Fifth Circuit on June 5, 2007, where it was pending as of March 1, 2008.

Conclusion. The government's use of civil investigative and enforcement proceedings as a pretext to obtain evidence for subsequent criminal cases is a troubling trend, which appears to be on the rise. It is the responsibility of counsel, the courts, and DOJ to monitor this practice vigilantly, as to ensure that the constitutional rights of both corporations and individuals are not violated.

RECOMMENDATIONS

1. Agency civil enforcement attorneys should be forthright with investigative targets about whether the attorneys are, in fact, sharing information with prosecutors, whether such information-sharing has been authorized, and whether the attorneys are aware of any pending criminal investigations before conducting discovery and attempting to seek "voluntary" waivers of their constitutional rights.

2. DOJ should decline to initiate parallel criminal proceedings against corporations and their employees where administrative and civil options can remedy the violation, and where the civil penalties alone can serve as an effective punishment and deterrent.

3. If criminal enforcement proceedings have been initiated while civil enforcement proceedings are underway, the defendant should be able to obtain discovery from the civil action or, at his option, have those proceedings stayed until the criminal proceedings have been completed.

4. Defense counsel suspecting grand jury abuse by the prosecutor should file a motion with the court requesting direct supervision of the grand jury.

5. Any penalties, fines, or injunctive relief imposed administratively or civilly should be permitted as an offset for any criminal penalties that a court may impose if criminal prosecution ensues and results in a conviction.

6. Courts should carefully scrutinize claims by defendants that Government attorneys engaged in deceit, trickery, or fraud to gain evidence for criminal prosecutions.

7. Counsel should heed Justice Breyer's concurring opinion in *Hudson* and scrutinize civil fines to see whether they are excessive under the Eighth Amendment and whether other constitutional protections have been violated.

8. SEC Form 1662, which is given to witnesses in civil investigations prior to questioning by SEC attorneys, should be revised to make the waiver of rights notification more prominent and more informative, preferably at the top of page one and in bold print. Signatures by the witnesses/targets should be required to further demonstrate a knowing and voluntary waiver. EPA and other regulatory agencies should also provide witnesses or targets with written notification of their rights to prevent inadvertent waiver of important constitutional rights, including the right to counsel and the right not to make self-incriminating statements.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Lee G. Dunst, *The Future of Parallel Criminal-Civil Investigations: Business as Usual or Increased Judicial Oversight*, *in* BNA WHITE COLLAR CRIM. REP. (Mar. 17, 2006).

Ralph C. Ferrara & David A. Garcia, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, *in* BNA SEC. REG. & L. REP. 1329 (Vol. 28, 2006).

Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends,* 68 MO. L. REV. 149 (2003).

Robert G. Morvillo & Robert J. Anello, *Crafting a Defense in the Face of Parallel Proceedings,* 230 N.Y.L.J. 3 (Aug. 5, 2003).

DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL (Law Journal Press 2007).

TIMELINE: PARALLEL CIVIL AND CRIMINAL PROSECUTIONS

1970: *United States v. Kordel*, 397 U.S. 1 (1970) (evidence obtained from a civil investigation can generally be used later in a criminal investigation without violating the self-incrimination or due process clauses).

1987: DOJ's Land and Nat. Resources Division (ENRD) issues *Guidelines for Civil and Criminal Parallel Proceedings.* Directive No. 5-87 emphasizes bringing and completing criminal proceedings first to facilitate finding liability later in civil proceedings.

1989: *United States v. Halper*, 490 U.S. 435 (1989). Supreme Court holds that the Double Jeopardy Clause could prevent the imposition of civil penalties following a criminal prosecution if the primary purpose of the civil sanctions were to punish or deter the conduct in question.

1997: *Hudson v. United States*, 522 U.S. 93 (1997). Court reverses *Halper* and holds that civil or administrative penalties do not bar subsequent criminal prosecutions under the Double Jeopardy Clause, but suggests that other constitutional protections such as Due Process could protect against abusive parallel prosecutions.

1999: DOJ's ENRD revises 1987 policy with two additions: (1) Directive 99-20, *Global Settlement Policy* requires criminal and civil prosecutors with authority to settle separate proceedings relating to same conduct but precludes civil penalties to offset criminal sanctions; and (2) Directive 99-21, *Integrated Enforcement Policy* provides for joint civil and criminal investigations which allow sharing of jointly developed information until the grand jury convenes.

July 2005: EPA begins to co-locate civil and criminal offices to facilitate sharing of information in joint and parallel investigations.

2005-2007: Selected court decisions sanctioning DOJ for abusive parallel civil and criminal prosecutions:

United States v. Scrushy, 366 F. Supp. 2d 1134 (N.D. Ala. 2005).
United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006).
SEC v. Sandifur, 2006 WL 3692611 (W.D. Wash. Dec. 11, 2006).
United States v. Carriles, 486 F. Supp. 2d 599 (W.D. Tex. 2007).

Chapter Five

Attorney-Client and Work Product Privileges

Chapter Five

ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

"What is astonishing is that the attorney-client privilege, one of the foundational rights on which rests Anglo-American legal culture . . . should now be under siege. The two federal agencies that have been most vigorous in seeking waiver of the attorney-client privilege have been the Department of Justice and — unfortunately, I must say — the Securities and Exchange Commission."

Paul S. Atkins
SEC Commissioner
January 18, 2008

Background. The attorney-client privilege, the oldest evidentiary privilege with historical common law roots in England from the 1500s, is designed to protect the disclosure of confidential communications between attorney and client. The privilege was originally limited to confidential communications between an attorney and individuals, but has now been expanded to include communications between corporations and their attorneys. *See United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

Extending this privilege to corporations was particularly important inasmuch as the Supreme Court had ruled just a few years before *Louisville* that corporations have no Fifth Amendment right against self-incrimination. *Hale v. Henkel*, 201 U.S. 43, 86 (1906). Without this constitutional protection, the attorney-client privilege is the only protection that corporations can invoke to protect certain forms of confidential communication within the corporate structure. Unfortunately, as SEC Commissioner Paul S. Atkins has noted, this privilege is now under siege by federal prosecutors and government agencies.

The attorney-client privilege serves a valuable societal function. As the Supreme Court recognized, its purpose is to foster "full and frank communication between attorneys and their clients and thereby promote the broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In *Upjohn*, the Supreme Court broadened the scope of the privilege from communications with the so-called "control group" or higher management, to encompass communications between low-level employees and corporate counsel under the so-called "subject matter" test. Under this test, communications from lower level employees would be protected if the subject matter was necessary for counsel to give legal advice to the

corporate entity and its officers. Thus, the privilege enables corporate counsel to better facilitate the corporation's compliance with the current myriad of laws and regulations. Conversely, the erosion of the privilege makes corporate counsel's job more difficult.

In addition, the privilege belongs to the client and can only be waived by the client, not the attorney. In the corporate setting, the corporation is the client, not the individual employee. This relationship may compel counsel to give an "*Upjohn* warning" to employees that their statements can be revealed to the government if the company were to waive the privilege. The privilege can also be expressly waived if the client voluntarily chooses to do so, even if, as will be discussed, the waiver was effectively compelled. Finally, the attorney-client privilege does not protect communications between an attorney and client for the purpose of committing a crime or fraud (the "crime-fraud exception").

The work product doctrine is a related privilege that protects the disclosure of work product by the client's lawyer to his adversary regarding litigation that is pending or reasonably anticipated. The attorney-client privilege is thus designed to foster communication between attorney and client, while the work product privilege is designed to encourage attorneys to engage in careful preparation for litigation and to protect the attorney's work product from disclosure. The work product privilege was also recognized by the Supreme Court to be available to corporations. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). However, unlike the attorney-client privilege which is absolute, work product materials can be obtained by parties in limited circumstances as specified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

As the following discussion of events demonstrates, DOJ and other government agencies, particularly the SEC and the U.S. Sentencing Commission, have developed policies and practices over recent years that have seriously eroded these fundamental privileges in both the criminal and civil enforcement contexts. In the process, prosecutors have stifled intra-corporate communications, thus generating considerable management problems and making compliance with the law and conducting internal investigations more difficult.

Erosion of the Privilege by the Department of Justice and SEC. The federal erosion of the corporate attorney-client and work product privileges by DOJ commenced in 1999 with the issuance of the first of four memoranda issued by Deputy Attorneys General in the Justice Department. As discussed in Chapter Three, Deputy Attorney General Eric Holder issued a Memorandum, *Federal Prosecution of Corporations*, in June 1999 listing eight factors for prosecutors to consider in exercising their discretion as to whether or not to prosecute a corporation. One factor that prosecutors could and did consider was whether the corporation was willing to cooperate with the government's criminal investigation. This willingness to cooperate "includ[ed], if necessary, the waiver of corporate attorney-client and work product protection," and whether it was protecting allegedly culpable employees "through the advancing of attorneys fees." Obtaining waivers provided a shortcut for prosecutors to develop their cases.

Regulatory agencies also began to gauge a corporation's level of cooperation in making enforcement decisions by whether or not the organization waived its attorney-client and work product privileges. For example, on October 23, 2001, the SEC issued its so-called

"Seaboard Report" listing 13 criteria that the SEC would use in making enforcement decisions. One of the criteria encourages corporations to waive their privileges to gain cooperation credit along with self-policing, self-reporting, and remediation. The SEC later supplemented its Seaboard Report by issuing a Statement Concerning Financial Penalties in January 2006. That policy also provided that the extent of cooperation in an investigation will be a factor in determining the level of a civil monetary penalty. While the SEC's penalty policy does not expressly call for waiver of privilege, the not-so-subtle message to the corporate community is clear: you will be punished more severely for not waiving your privileges. Other agencies, such as the Commodity Futures Trading Commission (CFTC), EPA, Department of Health and Human Services (HHS), IRS, Federal Communications Commission (FCC), Department of Labor (DOL), and Federal Energy Regulatory Commission (FERC) have followed suit with similar waiver policies or practices. *See, e.g.*, Judson W. Starr & Yvette W. Smallwood, *Environmental Crimes in Perspective*, THE ENVIRONMENTAL COUNSELOR (Jan. 15, 2003) (privilege waivers required in some EPA cases to show cooperation).

Moreover, the 2002 passage SOX further jeopardized the confidentiality of communications between corporate counsel and management. Section 307 requires counsel to report material violations of the securities law "up the ladder" in the company, and permits attorneys to "blow the whistle" to the SEC if necessary to prevent the corporation from violating the securities laws. In addition, SEC proposed so-called "noisy withdrawals" regulations that would require or permit counsel to withdraw from representation of the company if the violations continued. This proposed rule received strong opposition from the bar and it is uncertain what the SEC will do in this area. Nevertheless, SOX has further complicated the application of state ethical rules relating to the attorney-client privilege and the crime-fraud exception.

As noted in Chapter Three, in the wake of the Enron and WorldCom scandals and the establishment of the Corporate Fraud Task Force, Deputy Attorney General Larry Thompson issued *Principles of Federal Prosecution of Business Organizations* on January 20, 2003. The Thompson Memo revised and fortified the 1999 Holder Memo by requiring "authentic cooperation" from corporations in determining whether to file criminal charges against them, and requiring that the factors be considered "in every matter involving business crimes." The mandatory nature of the Thompson Memo further emboldened prosecutors to demand and expect corporations to waive their privileges and to refrain from paying the attorneys' fees of targeted employees. Compliance with these demands would demonstrate that they were fully cooperative, and hence, deserved lenient treatment. Even if a corporation waived its privilege and acceded to the prosecutor's demands, there was no assurance that cooperation would actually preclude criminal prosecution. Further, proposed deferred prosecution agreements, in lieu of indictments (discussed in Chapter Six), often required the corporation to waive its privileges as part of the deal.

According to 2005 and 2006 surveys conducted by the Association of Corporate Counsel (ACC) and the National Association of Criminal Defense Lawyers (NACDL), approximately 75 percent of responding lawyers agreed that there is a widespread "culture of waiver." Companies had been routinely requested or expected by prosecutors to waive their attorney-client and work product privileges in order to demonstrate adequate

cooperation with the government's investigation. Even the author of the Holder Memo, now in private practice, lamented, "Today, it's maddening. . . You'll go into a prosecutor's office . . . and fifteen minutes into our first meeting they say, `Are you going to waive?'" Peter Lattman, *The Holder Memo and Its Progeny*, WSJ.com., http://blogs.wsj.com/law/2006/12/13/the-holder-memo/(Dec. 13, 2006).

The "culture of waiver" was further exacerbated by the U.S. Sentencing Commission's 2004 provision to its corporate compliance guidelines, as discussed in Chapter Seven. Like the Thompson Memo, the Sentencing Guidelines provision measured "cooperation" by the waiver of privileges in determining the level of punishment a corporation should receive if found guilty of an offense. To qualify for a reduced sentence under the U.S. Sentencing Guidelines Manual § 8C2.5 (Application Note 12), a corporation's cooperation must be "timely and thorough," including "disclosure of all pertinent information known by the organization," such as information otherwise protected by the attorney-client and work product privileges. While this policy was only invoked after a company was convicted, it nonetheless clearly bolstered the "culture of waiver" spawned by the Thompson Memo.

Adverse Consequences from Waiver. The adverse consequences of forcing corporations to waive their privileges and terminate payment of attorneys fees to employees were predictable and palpable:

- Compliance programs and corporate governance depend upon free and open communications between employees, management, and both in-house and outside corporate counsel. Waiving attorney-client privilege has a "chilling effect" on communications between employees and corporate counsel and is therefore counter-productive. It reduces the effectiveness of corporate compliance programs, including those mandated by law, such as the reporting requirements of SOX.

- Corporate counsel are effectively deputized as agents for prosecutors and regulatory agencies, thereby undermining their professional obligations to their client, as well as their perceived role by company employees.

- The forced waiver of the attorney-client privilege is a Hobson's choice for employees when corporate counsel request that they cooperate in an internal investigation. If they refuse, they can be disciplined or fired by their employer; if they cooperate, they effectively surrender their Fifth Amendment rights by risking the disclosure of their communications by the company to the government. They are then vulnerable to ruinous prosecution, particularly when the company is forced to stop paying attorneys' fees for their defense. Employees lose a shared sense of duty and loyalty to the corporation and foster a defensive "every man for himself" workplace mentality that harms productivity.

- There is an increased reluctance among qualified candidates to assume board positions at public companies, thereby reducing available talent to oversee company operations and compliance to the detriment of shareholders.

- Plaintiffs' attorneys are able to use the disclosed information as a "roadmap" for third-party follow-on civil lawsuits.

- Due to conflicting judicial authority as to the validity of limited waivers, businesses are reluctant to cooperate voluntarily with government investigations.

As the Supreme Court noted, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The mere uncertainty as to whether a corporation will be forced to waive its attorney-client and work-product privileges greatly diminishes their value.

A Crescendo of Criticism. Throughout 2005 and 2006, a growing chorus of criticism came from a broad spectrum within the legal and policy-making community. The Coalition to Preserve the Attorney-Client Privilege, consisting of members of the corporate community, the defense bar, business and trade groups, and organizations, including the ACC, NACDL, the U.S. Chamber of Commerce, the Washington Legal Foundation, Business Civil Liberties, Inc. and the ACLU, began a concerted effort to reverse DOJ's waiver policy and practice. Joining this effort was the ABA and its Task Force on the Attorney-Client Privilege, which strongly campaigned in support of preserving the privilege. On August 9, 2005, the ABA House of Delegates *unanimously* adopted Resolution 111 opposing "the routine practice by government officials of seeking to obtain waiver of the attorney-client privilege or work product doctrine."

In the interim, Acting Deputy Attorney General Robert McCallum issued a memorandum on October 21, 2005, instructing all U.S. Attorneys and Department Heads to adopt a written waiver review process for their district or component. Robert McCallum, Acting Deputy Attorney General, *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21 2005). This tepid response to the criticism only made matters worse. With this directive, U.S. Attorneys were now free to develop policies that varied from district to district or component to component, thereby reducing certainty and predictability of the waiver process. The McCallum Memo only further delayed the much needed substantive revision to the Thompson Memo's waiver policy.

Bipartisan support also began to grow in Congress to examine and halt DOJ's withering assault on the attorney-client and work product privileges. On March 7, 2006, former Attorney General Dick Thornburgh testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security — apparently the first ever congressional hearing on the subject of the attorney-client privilege — strongly opposing waiver requests by prosecutors and agency attorneys. In response to the escalating criticism of the "culture of waiver," former top DOJ officials from both parties, led by the former Attorney General, submitted statements to the Justice Department, the Sentencing Commission, and Congress, in which they vigorously opposed the dangerous erosion of these essential privileges.

In the meantime, the Sentencing Commission on April 5, 2006 unanimously reversed its 2004 policy, similar to the Thompson Memo, that waiver could be considered in considering the sufficiency of cooperation with prosecutors, after receiving strong objections to the policy from the legal

and business community. While this is a welcomed revision, the Sentencing Commission policy is not triggered until after there is a conviction; hence, DOJ's waiver policy during the pre-charging stage is more relevant to businesses under investigation.

Even the courts began to weigh-in against prosecutors for forcing companies to curtail paying defense attorneys fees to targeted employees. As discussed in greater detail in Chapter Six, in August 2005, DOJ and KPMG, a major accounting firm, entered into a deferred prosecution agreement (DPA), which included a waiver provision. While there was no express term in the DPA that the company could not pay the attorneys' fees of targeted partners, the prosecutor grilled the company *before* signing the agreement about whether it intended to advance defense fees as its policy and practice had previously allowed. KPMG quickly got the message: in order to be spared criminal prosecution and the same fate of Arthur Andersen, it had better stop supporting its employees.

In his landmark follow-up opinion, Judge Kaplan dismissed the indictments against 13 KPMG employees, ruling that DOJ's heavy-handed pressure on KPMG to deny the advancement for fees violated the employees' Sixth Amendment right to counsel and Fifth Amendment right to due process and a fair trial. *United States v. Stein (Stein II),* 495 F. Supp. 2d 390 (S.D.N.Y. 2007). DOJ has appealed Judge Kaplan's decision to the U.S. Court of Appeals for the Second Circuit, which will likely hear the case in mid-2008.

The McNulty Memorandum. Reacting to the widespread criticism from Congress, the courts, and the legal community, then-Deputy Attorney General Paul McNulty issued a memorandum on December 12, 2006 replacing the Thompson Memo. The McNulty Memo was intended to allay concerns about compelled waivers and forcing companies not to pay their employees' attorneys fees. Henceforth, line prosecutors were required to obtain prior written approval from their respective local U.S. Attorney, in consultation with the Assistant Attorney General at Main Justice, before requesting disclosure of purely factual information (so-called Category I information). Prior written approval from the Deputy Attorney General was required to request and obtain the disclosure of attorney-client materials (so-called Category II information). However, not only is the line between Category I and II information vague, but also companies are still encouraged to "voluntarily" waive the privilege in order to be viewed favorably when the charging decision is being made. In addition, the McNulty Memo states that "prosecutors generally should not take into account whether a corporation is advancing attorney's fees to employees under investigation or indictment."

In particular, McNulty's public statement that companies will be rewarded for waiving the privilege undercuts the Memo's assertion that companies will not be punished for *not* waiving the privilege. While the McNulty Memo was considered by some to be a small step in the right direction, it was insufficient to dispel the notion that prosecutors could and would continue to force waivers without having to expressly request them. The message remained the same: waive the privilege or else face ruinous criminal prosecution. Employees would continue to view corporate counsel as *de facto* government agents, thereby chilling communications the attorney-client privilege was designed to protect. As one practitioner concluded, "the McNulty Memorandum fails miserably and, in many respects, exacerbates the deterioration of the corporate attorney-client privilege and the interest in compliance that the privilege seeks to further." Michael N. Levy,

Selective Waiver, McNulty, and the Stealth Attack on Privilege (McKee Nelson LLP 2007). Moreover, the McNulty Memo had no effect on the myriad of agencies that continued to coerce privilege waivers. Furthermore, DOJ continued to discourage joint defense agreements between the corporation and targeted employees, including the sharing of corporate documents for the employees' defense.

Crime-Fraud Exception and Selective Waiver. In addition to the assault on the attorney-client privilege by DOJ and regulatory agencies, there have been several judicial developments concerning the applicability of the privilege that have also contributed to its erosion. One issue is the scope of the crime-fraud exception to the privilege, and the second issue involves limited or selective waiver.

The crime-fraud exception to the attorney-client privilege provides that communications between the client and the attorney which involve the planning or commission of a crime or fraud are not protected by the privilege. For obvious reasons, the benefit of confidential communications is outweighed by the cost to society of perpetrating crimes or frauds. Yet, judicial rulings have unreasonably broadened this exception, and thus, limited the applicability of the privilege. In his Monograph on the subject, former Attorney General Thornburgh traces the judicial expansion of the crime-fraud exception. *Attorney-Client Privilege and "Crime-Fraud" Exception: The Erosion of Business and Privacy,* WLF MONOGRAPH (Sept. 1999). For example, in *Duttle v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989), the court held that even when the corporation innocently acted as intermediary for others who were engaging in fraud, the crime-fraud exception would apply, and thus the attorney-client privilege was lost. Moreover, since minor regulatory offenses can be prosecuted by aggressive prosecutors as a "crime," communications between attorney and client on legal advice regarding simple or minor regulatory matters may void the privilege with unduly expansive interpretation of the "crime-fraud exception."

Courts have also weighed in on the issue of limited or selective waivers. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), the court created the concept of selective waiver. In this case, the court properly held that a corporate document turned over to the SEC in a nonpublic investigation did not waive the attorney-client privilege with respect to third parties, such as plaintiffs' attorneys seeking evidence for class action lawsuits. "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." However, most courts have ruled the other way. For example, in *In re: Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996), the court ruled that the attorney-client and work product privileges were waived for documents in a corporate internal report given to the SEC, even if there was no intent to waive the information with respect to third parties. The most recent circuit joining the chorus against selective waiver was the Tenth Circuit in *In re: Qwest Communications Int'l Inc. Securities Litigation*, 450 F.3d 1179 (10th Cir. 2006). In *Qwest*, the court held that internal corporate documents given to DOJ and SEC were not protected, even though the company did not intend to waive the privilege with respect to third parties based upon the agreement by both DOJ and SEC to keep the documents confidential with respect to third parties.

Congressional and Agency Responses. Senator Arlen Specter, with bipartisan support, proposed the Attorney-Client Privilege

Protection Act (S. 30) on December 7, 2006, just before the release of the McNulty Memo. The bill would expressly bar government attorneys, prosecutors and agency attorneys alike, from seeking waiver of the attorney-client privilege. Senator Specter reintroduced the legislation in the new congressional session in January 2007 (S. 186). Similar legislation was introduced in the House by Rep. Robert Scott (H.R. 3013) on July 12, 2007.

Throughout 2007, there was a groundswell of bipartisan support for the legislation. For example, on July 30, 2007, former DOJ officials from both Republican and Democrat Administrations, including Dick Thornburgh, Edwin Meese III, Stuart M. Gerson, Carol E. Dinkins, Jamie Gorelick, Walter E. Dellinger, III, Theodore B. Olson, Kenneth W. Starr, and Seth P. Waxman, signed a letter supporting the legislation. Former Delaware Chief Justice E. Norman Veasey, now a senior partner at Weil, Gothshal & Manges, issued a report and testified in favor of the legislation before the Senate Judiciary Committee on September 19, 2007. Judge Veasey's testimony recounted examples of abusive, if not contemptuous practices of federal prosecutors both pre- and post-McNulty Memo to coerce privilege waivers. In one case, defense counsel recounted that his objection to a waiver request by a prosecutor who failed to follow the McNulty Memo's procedures was met with a profane scolding, "I don't give a flying ---- about the [McNulty] policy." On November 13, 2007, the House approved the Attorney-Client Privilege Protection Act and sent it to the Senate, which has not yet acted on Senator Specter's bill.

Selective Waiver. In May 2006, the Advisory Committee on Evidence Rules of the U.S. Judicial Conference proposed amendments to Federal Rule of Evidence 502. The proposed rule would limit waiver as the result of inadvertent disclosure but expand an intentional waiver of privileged documents to other non-disclosed documents with the same subject matter in limited circumstances. Originally, the committee considered a provision to codify selective waiver, *i.e.*, releasing privileged information to government agencies would not waive the privilege as to third parties. While selective waiver at first blush appears to be reasonable, many voices in the corporate community, such as the Association of Corporate Counsel, were wary of this provision supported by DOJ. Selective waiver would simply give the government an added weapon to force the corporation to waive its privileges by assuring it that the information would not be released to third parties. In response to such criticism, the committee did not recommend a selective waiver provision to Congress.

On December 11, 2007, Senators Patrick Leahy and Arlen Specter introduced S. 2450, which would add a new Rule 502 regarding waiver of attorney-client and work product privileges. Notably, the legislation does not contain a selective waiver provision; however, it does permit a federal court to order that any waiver be limited to the litigation at hand, and not waived with respect to other or future litigation. On the other hand, the legislation would extend an intentional waiver of documents to a federal agency to certain undisclosed documents as well. The waiver would cover documents that concern the same subject matter of those already disclosed, but only if they "ought in fairness . . . be considered together" with the disclosed documents. More importantly, the legislation would protect the inadvertent disclosure of privileged documents so long as the holder of the privilege promptly takes steps to prevent and rectify the error.

Conclusion. The tide is turning against coercive DOJ and agency waiver policies, due to the efforts of outspoken defenders of the

privileges, including judges like U.S. District Court Judge Kaplan. However, more needs to be done. While the CFTC eliminated the waiver of privileges when assessing cooperation in March 2007, the SEC has yet to change its policy as SEC Commissioner Paul Atkins has publicly acknowledged. Other enforcement agencies, such as the EPA, also continue to seek privilege waivers. The passage of the Attorney-Client Privilege Protection Act by the Senate to match the House's legislation will go a long way to stop the erosion of the privileges.

RECOMMENDATIONS

1. Privilege waivers are not necessary for prosecutors and agencies to enforce the law. Accordingly, DOJ should modify the McNulty Memo and regulatory agencies should similarly revise their own waiver policies (such as the SEC's *Seaboard Report*), to make clear that (1) requests for waiver of attorney-client and work product information will never be made, and (2) that the refusal of a corporation to voluntarily waive its privilege would not be used against the corporation in determining whether to pursue criminal or civil action.

2. Corporate counsel should educate their client and company employees about the nature and limited scope of the attorney-client and work product privileges, and oppose government attempts to have the corporation waive the privileges.

3. At a minimum, DOJ prosecutors should regard a corporation's voluntary disclosure of purely factual information, as opposed to opinion work product and other communications, as a sufficient demonstration of corporate cooperation and not deem such limited disclosures as constituting a waiver of attorney-client or work product privileges.

4. If a corporation decides to waive its privileges, it should expressly condition or limit their availability to third parties, such as plaintiffs' attorneys in follow-on civil litigation. Courts should enforce those conditions and provide clarity concerning the validity of selective waiver agreements.

5. The Attorney-Client Privilege Protection Act, if enacted into law, will stem the erosion of the privilege if DOJ and regulatory agencies, such as the SEC, refuse to voluntarily curb their current policies that encourage waivers.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003).

Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

Susan Hackett, *Corporate Confidentiality Is Only for the "Privileged" Few*, 9 WALL ST. LAWYER No. 2 (July 2005).

John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579 (2005).

Oren M. Henry, *Privilege? What Privilege? Culture of Waiver in the Corporate World*, 20 GEO. J. LEGAL ETHICS 679 (2007).

Michael N. Levy, *Selective Waiver, McNulty, and the Stealth Attack on Privilege* (McKee Nelson LLP 2007).

William R. McLucas, et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. OF CRIM. LAW & CRIMINOLOGY 621 (2006).

Earl J. Silbert & Demme Doefekias Joannou, *The Impact of Corporate Privilege Waivers on the Adversarial System,* 43 AM. CRIM. L. REV. 1225 (2006).

Judson W. Starr & Yvette W. Smallwood, *Environmental Crimes in Perspective*, THE ENVTL. COUNSELOR (Jan. 15, 2003).

George J. Terwilliger III & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations,* 7 ENGAGE: THE J. OF THE FEDERALIST SOC'Y PRACTICE GROUPS 25 (2006).

Brian Walsh, *What We Have Here Is Failure to Cooperate: The Thompson Memorandum and Federal Prosecution of White-Collar Crime*, HERITAGE FOUNDATION LEGAL MEMORANDUM, No. 19 (Nov. 6, 2006).

Websites:

American Bar Association: *http://www.abanet.org/buslaw/attorneyclient/*

Association of Corporate Counsel*: http://www.acc.com/public/article/attyclient/acc-ac-biblio.pdf*

TIMELINE: ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

1906:	*Hale v. Henkel*, 201 U.S. 43 (1906) (corporations have no Fifth Amendment right against self-incrimination).
1947:	*Hickman v. Taylor*, 329 U.S. 495 (1947) (work-product doctrine extends to corporations).
1977:	*Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir.) (Eighth Circuit recognizes a limited or selective waiver of privileged documents; most circuits rule otherwise).
1981:	*Upjohn v. United States*, 449 U.S. 383 (1981) (Supreme Court expands corporate attorney-client privilege from executives in the "control group" to include communications from lower-level employees).
1989:	*Duttle v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989) (attorney-client privilege lost under the "crime-fraud" exception even when the corporation innocently acted as intermediary for others engaging in fraud).
1996:	*In re: Kidder Peabody*, 168 F.R.D. 459 (S.D.N.Y. 1996) (privileged documents are waived for communications and information from a corporate internal report given to the SEC, even if no intent to waive for third parties).
June 16, 1999:	Holder Memorandum issued listing waiver of attorney-client and work product privileges as one indicator of cooperation that prosecutors could consider in making their charging decision.
Oct. 23, 2001:	SEC issues "Seaboard Report" which pressures corporations to waive privileges to obtain leniency.
Jan. 20, 2003:	Thompson Memorandum issued reinforcing waiver of privileges as an indicator of "authentic" cooperation; spawns "culture of waiver."
Nov. 1, 2004:	Sentencing Commission adopts waiver of privilege as criteria for assessing corporation's cooperation.
Mar. 2005:	Coalition of business and public interest groups urge Sentencing Commission to eliminate waiver as a criteria for cooperation.

Apr. 2005:	American Corporation Counsel (ACC) and National Association of Criminal Defense Lawyers (NACDL) publish surveys showing widespread practice of waiver demands.
Aug. 11, 2005:	ABA adopts Resolution 111 opposing government requests for waiver.
Oct. 8, 2005:	Acting Deputy AG Robert McCallum instructs all U.S. Attorneys and Department Heads to adopt individual written waiver review policies; lacks nationwide uniformity and predictability.
Nov. 15, 2005:	Former Attorney General Dick Thornburgh testifies before U.S. Sentencing Commission to delete waiver provision from Guidelines.
Mar. 7, 2006:	ACC and NACDL releases second survey showing that 75 percent of counsel responding confirm government request for waivers are routine.
Mar. 7, 2006:	Thornburgh testifies before House Judiciary Subcommittee opposing DOJ's waiver policies and practices.
Apr. 5, 2006:	Sentencing Commission unanimously approves removal of privilege waiver language from guideline commentary. Revised policy becomes effective November 1, 2006.
2006:	*In re: Qwest Communications Int'l Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006) (Tenth Circuit surveys law on selective waiver and joins most other circuits rejecting selective waiver first established in 1977 by the Eighth Circuit).
May 2006:	Advisory Committee on Evidence Rules of the U.S. Judicial Conference proposes amendments to Federal Rule of Evidence 502 to protect inadvertent waiver and limited subject matter waiver. Selective waiver protection not proposed due to objection by business community.
June 2006:	*United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (court rebukes DOJ for pressuring KPMG to cut off defense fees to its employees under investigation).
Sept. 5, 2006:	Former top DOJ officials urge Attorney General Gonzales to revise Thompson Memo on waiver provision.
Sept. 12, 2006:	Senator Specter holds Senate Judiciary Committee hearings on waiver issue.

Dec. 7, 2006:	Senator Specter introduces Attorney-Client Privilege Protection Act of 2006 barring all DOJ and agency attorneys from requesting waivers.
Dec. 12, 2006:	McNulty Memorandum issued in response to widespread criticism; provides DOJ review process for requests for waiver to limit abuse and bars consideration of payment of fees to employees in charging decision. However, these changes do not curtail abusive waiver practices.
Jan. 4, 2007:	Senator Specter reintroduces Attorney-Client Privilege Protection Act of 2007 as S. 186.
Mar. 1, 2007:	Commodity Futures Trading Commission (CFTC) issues enforcement advisory reversing its waiver policy.
July 2007:	*United States v. Stein (Stein II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (court dismissed indictments against KPMG employees due to DOJ's pressure on company to cut off payment of attorneys fees).
July 30, 2007:	Bipartisan group of former top DOJ officials urge passage of both S. 186 and H.R. 3013 to bar waiver requests.
Sept. 13, 2007:	Former Delaware Chief Justice Norman Veasey issues scathing report documenting abusive practices pre- and post-McNulty Memo by prosecutors to force waiver.
Sept. 18, 2007:	Senate Judiciary Committee holds hearings on S.186.
Nov. 13, 2007:	U.S. House of Representatives approves H.R. 3013.
Dec. 11, 2007:	Senators Patrick Leahy and Arlen Specter introduce S. 2450, which would add a new Rule 502 to Fed. Rules of Evidence on waiver of attorney-client and work product that would protect inadvertent waiver and limit subject matter waiver. However, selective waiver protection is excluded from bill due to opposition from business community.

Chapter Six

Deferred Prosecution and Non-Prosecution Agreements

Chapter Six

DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

"[Deferred and non-prosecution] agreements can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse, and not just in the extravagant amounts of money the corporations are forced to pay."

Former Attorney General Dick Thornburgh
March 17, 2007

Overview. Historically, federal prosecutors have had three basic options when handling criminal cases. They could decline to prosecute their targets, file charges and extract a plea agreement, or proceed to trial. In recent years, however, a more controversial weapon has been wielded by prosecutors against the corporate community: pretrial diversion in the form of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).

The authority to enter into these agreements is found in the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(2). That provision provides that the time limits under the Act are suspended during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."

Once sporadically used for individuals in minor criminal matters, pretrial diversion is being used more frequently to resolve corporate criminal cases. These agreements are essentially one-sided arrangements crafted by prosecutors with unchecked power, and "agreed" to by their corporate targets. There is no formal guilty plea or conviction; rather, the company usually acknowledges wrongdoing and agrees to cooperate with the government's ongoing investigation, pay massive fines or penalties, reform its business operations, and comply with other specified and varied conditions, often under the watchful eye of an expensive "corporate monitor" selected or strongly recommended by the prosecutor. In return, at the end of a "probationary" period that usually lasts from one to three years, the government agrees to drop the charges against the company if prosecutors, in their sole unreviewable discretion, believe the company has not violated the terms of the agreement.

At the same time, prosecutors have largely ignored pretrial diversion as an option for

resolving cases against company employees, executives, or other individuals accused of violating regulatory offenses. Instead of declining prosecution or referring the case to the agency for civil or administrative remedies, which should be the preferred outcome, prosecutors generally disregard the option of pretrial diversion for individuals, file criminal charges, and effectively extort unfair plea agreements or convictions that often result in excessive prison terms under the Sentencing Guidelines.

NPAs generally do not require an admission of guilt from the targeted company because the prosecutor does not file criminal charges. NPAs are often quite informal and usually come in the form of a letter from the U.S. Attorney's Office signed by both parties. On the other hand, the more frequently employed DPAs require a more complex procedure. Prosecutors file criminal charges (the company having waived its right to indictment by a grand jury), but "defer" prosecuting the case as long as the company complies with certain conditions specified in the DPA. The conditions usually are more detailed and burdensome than those found in NPAs. Because criminal charges are filed, DPAs read much more like pleadings and are more formal in nature. For example, the DPA that the accounting firm KPMG entered into in 2005 (discussed below) numbered 28 pages, not including the Statement of Facts (another 10 pages), and the criminal information (another 34 pages).

Because of their almost limitless charging discretion, prosecutors are able to exercise powerful leverage over their corporate targets. To avoid indictment and not risk conviction either by a jury or plea agreement, companies seek and prefer pretrial diversion despite its heavy price. A criminal investigation and indictment alone could have enormous adverse consequences even if a company were ultimately acquitted at trial. For example, under federal procurement regulations, companies under investigation or indictment are suspended from applying for or receiving government contracts, subsidies, and assistance — effectively suspending any and all of their government-related business. Publicly traded corporations typically face a sharp drop in share value and debilitating class action lawsuits. A conviction could effectively result in a corporate death sentence, harming innocent employees, stockholders, and the economy. Accordingly, federal prosecutors can dictate harsh DPA and NPA terms and conditions, even if the underlying case is weak and even if any individuals charged are acquitted.

Growing Trend of Pretrial Diversion. The first corporate NPA was entered into in May 1992 with Salomon Brothers, resulting in a civil penalty of $290 million for improperly auctioning Treasury securities. The first DPA was made with Armour of America in 1993, which required only a $20,000 civil penalty and a corporate compliance program, but no admission of criminal or civil liability for an arms export violation. In 1997, DOJ established general guidelines for U.S. Attorneys to consider in deciding whether to use pretrial diversion, but they were designed more for individuals than corporations, and allowed for inconsistent application. *See* U.S. Attorneys' Manual § 9-22.010 (1997).

From 1992 through 2002, there were only 11 corporate DPAs and 7 NPAs, totaling 18 agreements, or an average of less than 2 per year. However, after the creation of the Corporate Fraud Task Force in 2002 following the Enron scandal, the subsequent indictment and collapse of Arthur Andersen LLP, and the issuance of the Thompson Memorandum in January 2003, overly aggressive prosecutors increasingly turned their sights on companies

and their executives for criminal prosecution. The number of DPAs and NPAs rose accordingly. The Thompson Memo's inclusion of alternative resolutions to indictment for companies that have cooperated with DOJ as a prosecutorial option may have also spurred more DPAs and NPAs. During the five-year period from 2003 to 2007, there was a record number of 55 DPAs and 30 NPAs, a total of 85 agreements, or an average of 17 per year. Most of those were entered into over the last two years. In 2006, there were 20 agreements, whereas in 2007, there were 38, almost a 100 percent increase.

Approximately 60 percent of those agreements involved alleged violations of federal health care laws, food and drug laws, and the Foreign Corrupt Practices Act (FCPA). As for environmental offenses, the current head of DOJ's Environmental Crimes Section, Stacy Mitchell, stated on March 7, 2008 at the ABA Annual Institute on White Collar Crime that she does not believe in DPAs, and that if DOJ is not going to prosecute, then the matter should be referred for civil disposition. However, she also said her section will continue to follow the Holder, Thompson, and McNulty Memos, which contemplate the use of DPAs. Nevertheless, as these overall numbers reflect, there is a growing trend to use DPAs and NPAs, which will continue so long as aggressive prosecutors target companies and hold them vicariously liable for the wrongdoing of their employees.

While DPAs are generally used by DOJ for resolving criminal cases against corporations, they have been used recently in a few cases to settle charges against corporate executives *after* indictment where the government's case was particularly weak. For example, DPAs were entered into by DOJ with Frank Quattrone of Credit Suisse in 2006, and with four executives of Reliant Energy Services, Inc. in 2007.

DOJ's Corporate Leniency Policy: Stolt-Nielsen. In addition to NPAs and DPAs, there are other pretrial diversion programs that are sometimes used either by the Justice Department or certain government agencies for specific areas of the law. For example, in August 1993 the Antitrust Division of DOJ instituted a Corporate Leniency Policy whereby a corporation is given amnesty if it is the first to come forward to report illegal anti-competitive activity with other companies, cooperates with the government investigation, and makes restitution to any injured parties.

However, as one major company quickly discovered, immunity from prosecution under this policy is not guaranteed. In January 2003, Stolt-Nielsen, S.A., a shipping company, entered into a Conditional Leniency Agreement (a form of NPA) with DOJ, reciting that the company had terminated its anticompetitive activity involving customer allocation as soon as it was discovered and agreeing to cooperate in the government's investigation. On March 2, 2004, without any warning, DOJ decided to revoke the agreement because it believed that Stolt-Nielsen continued its anticompetitive practices after March 2002, the date the company represented that it had ceased the activity.

Stolt-Nielsen sued the government in district court to enforce the amnesty agreement and prevailed; unfortunately, the decision was reversed on appeal. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 494 (2006). In a dubious opinion, the Third Circuit held that DOJ's claim — that Stolt-Nielsen breached the conditions of the leniency agreement — was not subject to preindictment review, absent specific provision in the agreement to the contrary. In short, Stolt-Nielsen had to wait until it was indicted before it could seek any judicial review.

DOJ subsequently indicted Stolt-Nielsen, which, in turn, renewed its challenge. On November 29, 2007, the district court sharply rebuked DOJ for precipitously revoking the immunity agreement and dismissed the indictment. The court found that DOJ simply did not prove that Stolt-Nielsen failed to take prompt action to terminate its anticompetitive activity or that the company breached the agreement in any way. *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp. 2d 609 (E.D. Pa. 2007). On December 21, 2007, the Justice Department wisely announced that it would not appeal the dismissal, likely sensing an unfavorable outcome.

Corporate Integrity Agreements (CIAs). In addition to DOJ's Antitrust Corporate Leniency Policy, the Departments of Defense (DOD) in 1986 and Health and Human Services (HHS) in 1994 developed Corporate Integrity Agreements (CIAs). Under these settlement agreements, which are akin to NPAs, companies doing business with those federal agencies agree to disclose fraud and other wrongdoing, provide periodic reports over a five-year period, and institute corporate compliance and reform programs. In return, the companies avoid being suspended or debarred from future government contracts and likely avoid being referred to DOJ for criminal prosecution. In some cases, CIAs are used in conjunction with DPAs. The use of CIAs by the Office of Inspector General of HHS rose sharply from only four CIAs in 1994 to a peak of 233 in 1998, with a current rate of approximately 100 per year.

Many of the CIAs provide for set penalties if the company fails to comply with its terms, as interpreted by HHS. As in their DPA counterparts, many of the terms in CIAs are burdensome, intrusive, or of questionable validity. For example, many CIAs ban off-label marketing by pharmaceutical and medical device companies, which infringes on their First Amendment commercial free speech rights and effectively precludes a judicial challenge to the ban. To underscore the power of HHS to enforce this questionable ban, as discussed in Chapter One, Purdue Frederick and three of its corporate officers were forced to plead guilty in May 2007 for "unlawful" pharmaceutical marketing practices by lower-level employees, of which they were unaware. In late 2007, HHS began proceedings to exclude these executives from working for the company.

Criticism of Abusive DPAs and NPAs. Precisely because a targeted company is facing ruinous liability both criminally and civilly, there is a great deal of compulsion and economic duress that forces companies to accede to prosecutors' demands on the conditions they insert into DPAs and NPAs, no matter how burdensome. Accordingly, some have argued that doctrines of duress and unconscionability, which courts have used to void commercial contracts, may also be used in the criminal context. *See* Candace M. Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through The Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007). Indeed, in the interest of justice and fair dealing, courts generally impose a higher standard of good faith and fair dealing when the government, rather than a private party, is setting the conditions.

The terms and conditions of DPAs can vary widely from one case to the next, and from one prosecutor to another. Some terms, such as the payment of restitution and an agreement to comply with the law in the future, are generally non-controversial, although they can become problematic. For example, a company's agreement to comply with the law includes all corporate employees; thus, a minor breach of any regulatory offense by any employee can

negate the DPA.

Other terms, drawn from the nine charging factors in the Thompson Memo and those specified in the U.S. Sentencing Guidelines Corporate Compliance Program, raise more serious questions and go well beyond the sanctions that otherwise could be imposed by a court even if the company were prosecuted and found guilty of an offense.

For example, forbidding a company from publicly denying aspects of their "wrongful" conduct raises both First Amendment and business concerns. In a 2006 DPA settling government charges about the safety conditions at its nuclear power plant, FirstEnergy Nuclear Operation Company paid $28 million in fines and penalties for the alleged violations and agreed not to dispute the company's culpability. However, the company subsequently submitted a $200 million claim to its insurer for the corrosion damage that led to the charges giving rise to the DPA. Questions were then raised as to whether FirstEnergy's otherwise routine submission of an insurance claim violated the DPA, which forbade the company from denying the charges that it was responsible for the plant's damage.

Corporate counsel and commentators have identified the following features of DPAs and NPAs to be of particular concern and in need of being addressed:

1. ***Waiver of Attorney-Client Privilege***.

One of the more objectionable conditions found in many agreements requires the corporation to waive attorney-client and work product privileges. Encouraged by the Thompson Memo, which spawned a "culture of waiver" (discussed in greater detail in Chapter Five), prosecutors often require waivers to facilitate their ongoing investigation of possible wrongdoing by company employees and to make it easier to verify the company's compliance efforts. However, since the issuance of the McNulty Memo in December 2006, which was intended to formalize requests for waivers by prosecutors, only about 10 percent of the DPAs and NPAs have contained express waiver requirements. Most of the remainder, though, have a provision that waiver could be required per the McNulty Memo guidelines. *See* LAWRENCE D. FINDER & RYAN D. MCCONNELL, AM. BAR ASS'N, WHITE COLLAR CONFERENCE, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE-2007 (March 2008).

Forcing companies to waive these venerable privileges deters employees from seeking advice about internal problems they may have uncovered, from taking corrective action, or from implementing compliance programs already in place, lest those communications are turned over to prosecutors in some future investigation. No court could require a company to waive its privileges as part of any sentence if the company were found guilty of an offense, yet such conditions have become standard fare in many DPAs and NPAs.

2. ***Cooperation with Prosecutors***.

Another objectionable feature of many DPAs is the open-ended and ill-defined requirement that the corporation fully cooperate with the prosecution and not protect allegedly culpable employees. In essence, the corporation has been effectively deputized to assist prosecutors in carrying out their investigative duties, which unfairly pits the employer against its employees. This DPA condition has forced companies to discharge or punish certain employees; to refrain from entering into joint defense agreements between the company and targeted employees; and to

deny or limit the amount of defense fees advanced for the employees' defense, even though payment of fees is either contractually required or routinely provided for, as a matter of company policy. Such restrictions have been applied not just to employees who have been indicted, but also to those whom the government merely suspects of wrongdoing.

For example, in August 2005, DOJ and KPMG entered into a DPA regarding tax shelter plans that it had offered to its clients but failed to register with the IRS. The DPA required that KPMG, among other things, shut down its tax practice; pay fines, restitution, and penalties totaling $456 million; and fully cooperate with the investigation. The prosecutor grilled the company before entering into the agreement about whether KPMG intended to advance defense fees of its partners, as its policy and practice had previously allowed. Although there was no express provision in the DPA precluding the company from paying the attorney's fees of its targeted partners, KPMG was pressured to curtail the payment of defense fees to its employees.

As Judge Lewis Kaplan concluded in the criminal case against the indicted employees, "KPMG refused to pay [the employees' defense fees] because the government had the proverbial gun to its head." *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006). The court subsequently dismissed the indictments against 13 of the 16 KPMG employees, finding that their constitutional rights to counsel and due process were violated by the government. 495 F. Supp. 2d 390 (S.D.N.Y. 2007). The *Stein* case is further discussed in Chapter Five.

3. ***Lack of Principled, Predictable, and Uniform Standards***.

DPAs and NPAs have also been roundly criticized because of the inconsistent and unpredictable manner in which the 93 U.S. Attorney's Offices determine whether to decline a prosecution, enter into a DPA, NPA, or file charges. There are no governing standards or guidance to U.S. Attorneys on selecting pretrial diversion. Moreover, as noted, even if pretrial diversion is chosen, the terms of a DPA or NPA can vary widely from case to case. Consider, for example, the following two seemingly similar cases that resulted in grossly disparate agreements in neighboring U.S. Attorney's Offices.

The U.S. Attorney's Office in the Southern District of New York in Manhattan investigated Shell Oil Company for securities fraud relating to the overstatement of its oil and gas reserves by almost 25 percent. In June 2005, the company entered into an NPA where there were no charges filed, no admission of guilt was extracted, and the company agreed to reasonable conditions to cooperate with prosecutors and comply with the law.

Across the river, the U.S. Attorney in Newark, New Jersey, Christopher Christie, investigated Bristol-Myers Squibb (BMS) for a similar securities charge of inflating its sales and earnings. Yet in June 2005, Christie required BMS to enter into a DPA with a long list of onerous terms in sharp contrast to the Shell Oil case. In addition to "codifying" the investigative and remedial steps that BMS had already begun to undertake when it discovered the problem, BMS was further required to admit guilt; cooperate fully with the government; accept an independent monitor for two years; pay a record $300 million in restitution (in addition to approximately $539 million BMS had already agreed to pay to its shareholders); appoint a non-executive Chairman of the Board and another Board member approved by Christie; and endow a chair in business ethics at Seton Hall University

Law School, the alma mater of the U.S. Attorney. *See also* 2006 DPA with Operations Management International, Inc. ($1 million to help endow Chair at U.S. Coast Guard Academy).

Thus, what appeared to be two similar securities violations involving two companies resulted in grossly disparate dispositions. As a pair of leading experts in this area have complained, "[c]ompanies [and their counsel] should not be required to guess blindly at the results of their cooperation in government-steered criminal investigations, nor should their fate rest in the random lot of what prosecutor or office they happen to draw." F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform,*" 93 VA. L. REV. IN BRIEF 107, 116 (June 18, 2007). To remedy this unpredictable practice, Messrs. Warin and Boutros have proposed, along the lines suggested in the Recommendations below, that DOJ establish clear and consistent guidance for all U.S. Attorneys and Main Justice to follow in deciding whether to use pretrial diversion and what the terms should be.

4. ***Lack of Judicial Review***.

As previously discussed, because of the imbalance in the bargaining positions between the government and the corporation, prosecutors are able to use economic duress to exact burdensome and unnecessary conditions in DPAs. To make matters worse, there is no effective judicial review to determine whether the conditions of a DPA or NPA were reasonable ones, were the result of economic duress, or whether DOJ's decision to unilaterally declare a breach and proceed with prosecution was justified.

Nevertheless, many corporations reluctantly prefer to operate under this sword of Damocles rather than risk the adverse collateral consequences to the company, its innocent employees, and its shareholders from a prosecution and possible conviction. If DOJ even threatens to revoke the agreement because it believes the terms of the DPA are not being fully complied with, the corporation will accede to the prosecutor's wishes and conform its response and behavior to forestall a revocation of the agreement, no matter how unreasonable DOJ's position is. For this reason, there has never been a revocation of a DPA or NPA, except in the Stolt-Nielsen case, because DOJ has the unreviewable power to impose its interpretation of the terms of the agreement. On the other hand, if DOJ were to decide to terminate a plea agreement for lack of compliance, a court would review DOJ's claim to determine if the alleged breach were intentional or material. Accordingly, the lack of judicial involvement over whether there was a breach is a serious problem that should be addressed.

5. ***Appointment and Powers of Monitors***.

Another growing criticism of DPAs is the manner of appointing monitors and the power they wield in overseeing the company's compliance with the terms of the DPA. The monitors are usually retired federal judges, former prosecutors, or other experienced persons that are selected by the U.S. Attorney, but appointed by the court.

Company executives and managers are required to file regular reports with the monitor on meeting compliance requirements. The monitor, however, does not report to the court but to the U.S. Attorney instead. Thus, the monitor, who may have little or no experience with the company's operation, has assumed, in effect, certain managerial powers over the company. This arrangement can interfere with corporate governance and can affect both

management's and shareholders' rights. For example, in September 2006, the monitor appointed to oversee the DPA with BMS, former federal judge Frederick B. Lacey, as well as U.S. Attorney Christopher Christie "recommended" to the Board of Directors to fire its CEO and General Counsel, which it did, even though the recommendation had nothing to do with the original securities violation or a finding that DPA had been violated.

The issue of how monitors are selected came to a head in September 2007 when Christie entered into four related DPAs and one NPA with five medical supply companies charged with anti-competitive practices. In a no-bid contract, the U.S. Attorney selected five monitors to be paid by each of the companies subject to the agreements. One of the monitors selected by Christie to oversee Zimmer Holdings DPA was his former boss, Attorney General John Ashcroft, and Ashcroft's consulting firm. This agreement provided that Zimmer would pay as much as $52 million in fees to Ashcroft's firm over a period of just 18 months. While Ashcroft may indeed be a suitable monitor, the selection drew widespread publicity and raised issues of cronyism because there is no judicial oversight in the appointment process.

Congressional Response. On December 17, 2007, U.S. Rep. Bill Pascrell, Jr. (D-NJ) proposed a Statement of Principles that DOJ should use in crafting DPAs. This was a direct response to the lack of standards governing the terms of DPAs and appointment of monitors, especially with respect to the DPAs by the U.S. Attorney for New Jersey with Bristol-Myers Squibb and the five medical supply companies. In brief, Congressman Pascrell's proposal would require written guidelines for DPAs; restore judicial oversight on the terms of the DPA and selection of the monitor; require the Executive Office of the United States Attorneys to screen and select monitors; and provide full disclosure of the terms of all DPAs.

On January 22, 2008, U.S. Rep. Frank Pallone, Jr. (D-NJ) went a step further and proposed legislation (H.R. 5086) that would require the Attorney General to issue guidelines with respect to DPAs, thereby limiting the discretion of prosecutors. In particular, the features of the bill would require (1) DOJ to consider the potential harm of a DPA on innocent employees and shareholders; (2) judicial approval of the DPA; (3) appointment of federal monitors by a federal judge or magistrate and payment of the monitor according to a pre-approved fee schedule; and (4) judicial determination as to whether any of the terms of the DPA have been breached. In addition, congressional requests have been made to DOJ for more details about the no-bid contracts for the monitors. While there are separation of powers problems with some of these suggestions, there is widespread criticism of DOJ's practice in this area.

Responding to some of this criticism, on March 7, 2008, DOJ issued new guidelines on the selection, scope of duties, and duration of monitors. Memorandum from Craig S. Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008). Under this new policy, the Deputy Attorney General would approve the appointment of monitors. This change in policy came just a few days before congressional oversight hearings were held on DPAs by the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (March 11, 2008).

Conclusion. Prosecutors have sharply increased the use of pretrial diversion over the last five years against corporations. Although

DPAs and NPAs have prevented negative externalities that would otherwise ensue from prosecution, the terms imposed have raised serious questions about overreaching by federal prosecutors, which imposes additional costs on the corporation, its employees, and others. While DOJ has long exercised its authority under RICO to have monitors or receivers appointed to oversee labor unions whose leaders have been found guilty of racketeering, no similar authority exists for DOJ's close supervision of corporations that have entered into DPAs.

As Professor Brandon Garrett of the University of Virginia Law School concluded from his review of NPAs and DPAs "[f]ederal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, [sought] to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined." Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007). With recent congressional interest in this subject, and DOJ's new policy on the appointment of monitors, a long overdue examination of the DPA practice has only begun.

RECOMMENDATIONS

1. DOJ should establish an advisory committee under the Federal Advisory Committee Act (FACA) consisting of prosecutors, corporate and defense counsel, and other interested parties to develop a transparent and consistent policy setting forth clear and uniform guidance for the use of pretrial diversion that will be considered by all U.S. Attorney's Offices and Main Justice in determining whether they will decline prosecution, or propose either a DPA or NPA. The Deputy Attorney General should review proposed decisions to use pretrial diversion to ensure consistency and curtail abuse. Corporations and defense counsel need predictability and guidance in making major decisions that could have enormous impact on the company, its employees, shareholders, and the economy.

2. DOJ should not limit the use of NPAs and DPAs to corporations but should also use them for individuals accused of regulatory offenses if DOJ rejects the use of administrative and civil remedies, and does not decline prosecution altogether.

3. DOJ should develop guidance that directs prosecutors to exercise their charging discretion regarding corporations in the following manner:

   A. Decline prosecution altogether if civil or administrative remedies are sufficient to remedy the violation, provide restitution, and deter future wrongdoing.

   B. If wrongdoing exists at the upper level management, but is isolated, an NPA should be used for the corporation when non-criminal remedies are not appropriate, but only if the company cooperates.

   C. If wrongdoing was widespread throughout the company, and remedial measures are likely to be effective, a DPA should be offered to the company with appropriate conditions that do not unduly interfere with corporate governance.

   D. If wrongdoing is widespread and the corporation is a repeat offender, only then should criminal prosecution be considered.

4. DPAs and NPAs should provide for pre-indictment review if DOJ claims that the corporation breached any of the terms or conditions.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007).

LAWRENCE D. FINDER & RYAN D. MCCONNELL, AM. BAR ASS'N, WHILE COLLAR CONFERENCE, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE-2007 (March 2008).

Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies,* 51 ST. LOUIS L.J. 1 (2006).

Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 107 (June 18, 2007).

F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121 (1997).

Candace M. Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through The Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007).

Websites:

HHS Listing of Corporate Integrity Agreements, *http://oighhs.gov/fraud/cia/index.*

Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines? Before the House Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary (March 11, 2008) (written testimony available at *http://judiciary. house.gov/oversight.aspx?ID=425.).*

TIMELINE: DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

1974:	Speedy Trial Act of 1974 provides for deferred prosecution agreements, approved by the court. 18 U.S.C. § 3161(h)(2).
1986:	Department of Defense (DOD) develops Corporation Integrity Agreements (CIAs) that provide for leniency for companies that self-report violations.
May 1992:	First DOJ Non-Prosecution Agreement (NPA) with a corporation entered into with Salomon Brothers.
Aug. 1993:	DOJ's Antitrust Division develops Corporate Leniency Policy providing immunity from prosecution if company is first to report an antitrust violation.
Dec. 1993:	First Deferred Prosecution Agreement (DPA) with a corporation entered into with Armour of America.
1996:	Health and Human Services (HHS) develops CIAs.
1997:	DOJ establishes general guidance for U.S. Attorneys using pretrial diversion, but guidance not geared for corporations.
Mar. 2002:	Arthur Andersen indicted in Enron scandal.
July 2002:	Corporate Fraud Task Force established by President Bush.
1992-2002:	18 NPAs and DPAs were made with DOJ over 10-year period.
2003-2007:	85 NPAs and DPAs were made with DOJ over 5-year period.
Jan. 2003:	Memorandum of Larry Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations.*
Jan. 2003:	Stolt-Nielsen, S.A. receives immunity agreement from DOJ's Antitrust Division.
Mar. 2004:	DOJ revokes Stolt-Nielsen immunity agreement; Stolt-Nielsen sues DOJ.
June 2005:	Shell Oil NPA for securities violation; mild conditions imposed by U.S. Attorney for the Southern District of New York. However, Bristol-Myers Squibb DPA for similar violation imposed by U.S. Attorney for New Jersey results in large fines and strict conditions, including the endowment of a chair in business ethics at Seton Hall University Law School, the alma mater of the U.S. Attorney.

Aug. 2005: KPMG DPA requires penalties of $456 million and full cooperation; KPMG limits advancement of defense fees to targeted employees.

Mar. 2006: Third Circuit rules that Stolt-Nielsen cannot seek pre-indictment review of immunity termination by DOJ. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d. Cir. 2006).

June 2006: Judge Kaplan rebukes DOJ for pressuring KPMG to withhold defense fees to targeted partners. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

July 2006: Operations Management International, Inc. DPA requires $1 million to help endow a Chair of Environmental Studies at the U.S. Coast Guard Academy.

Sept. 2006: The monitor overseeing the DPA with BMS and the New Jersey U.S. Attorney recommends that BMS fire its CEO and General Counsel, which it did, even though there was no finding of breach of the 2005 DPA.

Dec. 2006: McNulty Memo issued, curbing prosecutors' requests for waiver of privileges and withholding of defense fees to targeted employees.

Mar. 2007: DOJ resolves criminal indictments against Reliant Energy Services, Inc. and four executives with DPAs due to weakness of government's charges that the company and executives were manipulating California's energy market.

Sept. 2007: U.S. Attorney for New Jersey enters into separate DPAs with five medical supply companies, including Zimmer Holdings, and in a no-bid contract, appoints former Attorney General Ashcroft as a monitor who could receive up to $52 million in fees.

Nov. 2007: Court dismisses indictment against Stolt-Nielsen, ruling that company complied with terms of the NPA. *United States v. Stolt-Nielsen*, S.A., 524 F. Supp. 2d 609 (E.D. Pa. 2007). DOJ declines to appeal.

Dec. 2007: U.S. Rep. Bill Pascrell, Jr. (D-NJ) proposes written guidelines by DOJ for entering into DPAs and judicial oversight over appointment of monitors.

Jan. 2008: U.S. Rep. Frank Pallone, Jr. (D-NJ) introduces legislation (H.R. 5086) that would require the Attorney General to issue guidelines with respect to DPAs and judicial oversight over compliance with the DPA and appointment of monitors.

Mar. 2008: DOJ issues new guidelines regarding the selection and approval of monitors by the Deputy Attorney General. House Judiciary Subcommittee holds hearings on the issue.

Chapter Seven

U.S. Sentencing Guidelines

Chapter Seven

U.S. SENTENCING GUIDELINES

"There is no question that post-Enron, post-WorldCom, corporate defendants and white-collar defendants . . . have been treated much more harshly. It has reached the point of absurdity."

Barry Boss, Esq., Cozen O'Connor (2007)

Background. In 1984, Congress enacted the Sentencing Reform Act (SRA) to implement two major objectives. *First*, Congress wanted to establish "truth in sentencing" by abolishing parole and instituting, instead, a determinant sentencing scheme. Defendants would no longer be eligible for parole after serving only one-third of their time; instead, the sentence imposed would be, for the most part, the sentence actually served. *Second*, Congress wanted to strip judges of their broad sentencing discretion and require them to impose uniform sentences by using mandatory Sentencing Guidelines to reduce perceived unwarranted sentencing disparities for similar crimes.

Thus, contrary to popular belief, the SRA was *not* a "get tough on crime" law. Rather, Congress wanted more sentencing uniformity and wanted defendants to serve their full prison sentence. Unfortunately, as this chapter will discuss, the Commission misunderstood Congress's mandate and ran amok. The Commission arbitrarily set sentences for offenses well above what they should have been, and all but discarded probation as a sentencing option. The result was unduly severe sentences for tens of thousands of defendants, including many white-collar defendants, resulting in a huge cost to society and the taxpayers. Because approximately 95 percent of all defendants plead guilty, the sentence imposed is the critical feature of the criminal justice system.

The SRA also specified different methods for computing fines imposed on individuals and corporations. While individuals would continue to be subject to maximum fines as provided by the underlying statute in question, corporations, on the other hand, would now be subject to much larger fines of $500,000 or twice the gain or loss per felony count under the Alternative Fines Act.

On November 1, 1987, the new Sentencing Guidelines went into effect, but only for individuals. The Commission deferred promulgating Organizational Guidelines for corporations and other entities to allow for further study and deliberation. Four years later, *Guidelines Manual*, Chapter Eight-Sentencing of Organizations, went into effect on November 1, 1991. During the interim period, corporations were sentenced to probation and fined at the discretion of the sentencing judge under the governing substantive statute. On the

other hand, the mandatory Guidelines for individuals required that sentences imposed by district court judges fall within a small fixed range for various categories of offenses and offenders characteristics.

Thus, a Guideline sentence for a particular offense was determined by computing a culpability score, which in turn, translated into a Guideline sentence that a judge was required to impose, with limited discretion to depart from that sentence. The score was based on the nature of the crime committed, including aggravating and mitigating factors or offense characteristics, and the criminal history of the offender. Sentencing factors that were usually considered by judges in the pre-Guideline era, such as the age, health, socio-economic background, and other personal characteristics of the defendant, could no longer be considered.

A culpability score greater than 10 for a first offender required incarceration for at least six months, which sharply increased in duration as the culpability score increased. For example, a score of 16, which is easily obtained in many white-collar cases and environmental cases, translates into a Guideline sentence of 21-27 months in prison. Scores of 12 or below allowed judges to impose a "split sentence," dividing the time to be served between incarceration and home detention or a half-way house. Probation was available for the rare defendant whose score was 8 or below. As will be discussed, sentences imposed under the Guidelines for many offense categories are generally *twice* the length of pre-Guideline sentences served, and even more so for environmental offenses and white-collar offenses.

Harsh Guideline Sentences for Minor Environmental Offenses. Even though Congress directed the Sentencing Commission to devise Guideline sentences that would reflect the *average sentence* actually served in pre-Guideline days, and provide for probation for first-time offenders in non-violent, non-serious offenses, the sentences dictated by the Guidelines deviated significantly from pre-Guideline practice. The sentences imposed were generally regarded by defendants and even many judges to be unduly harsh and inflexible. This was particularly true with respect to sentences imposed for environmental infractions under Part 2Q of the Guidelines.

For example, felony prosecutions of minor wetland violations involving the placement of clean fill on private property deemed to be "wetlands," without a federal permit, required prison sentences of two or more years, even though such infractions were typically handled either administratively or civilly before the Guidelines. *See, e.g.*, *United States v. Pozsgai*, 897 F.2d 524 (3d Cir. 1990) (27-month sentence for placing clean fill on private property, the longest prison sentence for an environmental offense at the time); *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994) (24-month sentence imposed on father and son for placing 11 piles of clean building sand on their quarter-acre lot allegedly containing wetlands). In another wetland case, previously discussed in Chapter Three, federal prosecutors urged an incredulous court to send the property owner to prison for over two years for simply moving "dirt or sand from one end of [his] property to the other end [that does] not impact the public in any way whatsoever." *United States v. Rapanos*, No. 03-20023, (E.D. Mich.). Sentencing Transcript at 16 (March 15, 2005).

Two other previously discussed cases further illustrate the Guidelines' severity. In *United States v. McNab*, three seafood importers were sentenced to prison for a record 97 months, or a full *eight years,* as first offenders for a minor regulatory offense under

the Lacey Act of importing frozen seafood in plastic bags rather than cardboard boxes. 331 F.3d 1228 (11th Cir. 2004). In *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), the owner of a chemical facility, the plant manager, and the temporary CEO were charged long after the plant was shut down for "knowing endangerment" under the CWA. They were all convicted and were sentenced as first offenders under the Guidelines to prison terms of nine, six, and four *years* respectively, even though there was no showing that the wastewater caused any serious harm to any employee.

Even misdemeanor violations of certain environmental statutes — where the maximum statutory prison sentence for the worst offender is one year in prison — were subject to harsh treatment. In many cases, the Guidelines actually called for even *longer* sentences than allowed by the underlying statute, thereby capping the sentence at the statutory maximum of one year. The one-year *maximum* sentence thus became a mandatory *minimum* sentence for a first offender for a minor regulatory infraction. *See* Benjamin S. Sharp & Leonard H. Shen, *The (Mis)Application of Sentencing Guidelines To Environmental Crimes*, *in* BNA TOXICS L. REP. 189 (July 11, 1990). Before the Guidelines, first offenders found guilty of misdemeanor offenses often received reasonable sentences consisting of a fine, probation, and/or community service.

Because the Guidelines produced such severe sentences, both the EPA and federal prosecutors eagerly exploited them, knowing that judges would be required to mete out harsh and unfair sentences for minor regulatory offenses that would likely have been handled administratively or civilly in the pre-Guideline era. Consequently, many defendants were forced to plead guilty to charges, and even serve some time in prison, rather than face many more months and years in prison under a Guideline sentence imposed after trial and conviction. Indeed, the gross disparity in many cases between a Guideline sentence imposed as part of a plea deal and a sentence imposed if found guilty after trial led many observers to conclude that a person was being severely punished for exercising his Sixth Amendment right to stand trial.

This disparity in sentencing was due to the common practice of "charge bargaining" and the more controversial "fact bargaining." In the former, the prosecutor would agree to drop certain charges if the person pled guilty; in the latter, the prosecutor would represent to the court that certain "facts" of the offense applied, such that a specific lower sentence under the Guidelines would be imposed rather than the higher one if the person were found guilty by a jury. Those who were innocent of the crimes charged would be forced into plea bargains rather than risk being found guilty and receiving a draconian sentence. Thus, the prosecutors essentially selected the sentence that they wanted, rather than allowing the court to use the sentencing discretion it had exercised in the pre-Guideline days.

Pre- and Post-Sarbanes-Oxley. In 2001, the Commission considered a comprehensive revision to the Guidelines relating to economic offenses in its Economic Crime Package. There was a major revision to the definition of "loss" to approximate the monetary harm resulting from an offense, and thus, to increase the fines and penalties depending upon the size of the loss. In 2002, following the wake of the Enron scandal, Congress enacted the Sarbanes-Oxley Act. Section 805(a)(5) requires the Sentencing Commission to amend its Guidelines to ensure that they are sufficient to punish and deter corporate wrongdoing with respect to fraud and obstruction of justice. The Commission responded with harsh individual Guidelines that essentially doubled or nearly

tripled the sentences for individuals convicted of fraud or obstruction. As for organizations, the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, which was established before Sarbanes-Oxley, continued to develop a comprehensive compliance program for corporations, which the Commission adopted in 2004.

The impact of Sarbanes-Oxley was severe. For example, Jamie Olis of Dynegy Corporation was originally sentenced in 2004 to prison for 25 years under the Guidelines for his role in securities fraud case in which he did not benefit monetarily. On appeal, the Fifth Circuit reversed, based on a re-computation of the loss due to the fraud. *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). The district court resentenced Olis on September 22, 2006, and imposed a more reasonable six-year term, principally because the harsh Guidelines were no longer mandatory under the Supreme Court's 2005 *United States v. Booker* decision. 543 U.S. 220 (2005). Nevertheless, the six-year term, roughly equivalent to a pre-Guideline sentence of 18 years, is severe for this particular offense and offender.

Other draconian sentences were imposed during this time period. John Rigas, the 80-year old former chair of Adelphi, was sentenced to prison for 15 years. Bernard Ebbers, the 64-year-old ex-chair of WorldCom, received a 25-year prison term, prompting the Second Circuit to note that this sentence was "longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 100, 129 (2d Cir. 2006). Jeff Skilling, ex-CEO of Enron, was sentenced to a 24-year prison term. To be sure, serious fraud cases should be criminally prosecuted and appropriate punishments imposed, but as Barry Boss, a leading white-collar defense attorney concluded, "[t]here is no question that post-Enron, post-WorldCom, corporate defendants and white-collar defendants . . . have been treated much more harshly. It has reached the point of absurdity." Cristin Schmitz, *Appeals Court Shows White-Collar Criminals No Mercy*, INSIDE COUNSEL (Nov. 2007). For an excellent critique of this harsh sentencing practice, see Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. OF CRIM. L. & CRIMINOLOGY 731 (2007).

Misguided Environmental Guidelines. One of the reasons for harsh white collar prison sentences in general, and for environmental offenses in particular, was the Commission's failure to promulgate the Guidelines based on historical sentencing practice, as Congress directed. The Commission was required to consider the length of time *actually served* in prison in pre-Guideline cases, not just the length of the sentence imposed by the court. As noted, before 1987, white collar and other non-violent defendants who were sentenced to prison for more than one year were generally eligible for parole, and would likely receive it, after serving only one-third of the sentence imposed. *See* 18 U.S.C. § 4205(a) (repealed). Thus, if a defendant were sentenced to prison for three years under the pre-Guideline regime, that defendant would be eligible for parole after serving one year in prison.

Because parole was abolished by the SRA, a one-year sentence imposed today under the Guidelines is functionally equivalent to a pre-Guideline sentence of three years. A good rule of thumb is to multiply a Guideline sentence by a factor of three to gauge its severity vis-a-vis pre-Guideline practice. Thus, a Guideline sentence of two years for a minor wetland offense is functionally equivalent to an excessive pre-Guideline sentence of six years. Because such a long prison sentence was never imposed or even contemplated for the worst

polluter, let alone for a minor regulatory offense without environmental damage, the Guideline sentences were simply unreasonable and fatally flawed. Unfortunately, the courts, prosecutors, and even defense attorneys have never fully grasped or appreciated this basic reality of comparing pre- and post-Guideline sentencing schemes. Instead of challenging the reasonableness of the particular Guideline at issue directly, most practitioners tactically argue and litigate "inside the box" or around the edges of the Guidelines, trying to convince the sentencing court to shave a point here or a point there to reduce the culpability score under the Guidelines, sparing their clients, at best, only a few extra months in prison from an otherwise unreasonably long sentence.

If the Commission had properly done its research, it would have quickly discovered that pre-Guideline sentences for environmental offenses were fairly uniform and rarely involved incarceration; rather, suspended sentences, probation, fines, and restitution were the norm. Where incarceration was imposed, the length of the sentence was usually a few weeks or months, which adequately served the principles of punishment and deterrence. *See generally* U.S. ENVTL. PROTECTION AGENCY, OFFICE OF ENFORCEMENT, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS (May 31, 1991) (summarizing disposition of all environmental criminal cases from fiscal years 1983 to 1991). Clearly, the Guideline sentences for environmental offenses do *not* represent the "typical" or "average" pre-Guideline sentence that Congress wanted the Commission to use. More troubling, the Commission has never provided any reasons for the sharp departure from past sentencing practice as it is required to do, thereby making the resultant Part 2Q Environmental Guidelines arbitrary and capricious.

Organizational or Corporate Sentencing Guidelines. As previously noted, on November 1, 1991, the Sentencing Commission established Chapter Eight of the Guidelines for Organizations. Because corporations obviously could not be imprisoned, the focus of the Organizational Guidelines was centered on establishing a range of fines for the offense in question; compensating victims for any harm in the form of restitution; disgorging illegal profits; regulating the terms of probationary sentences; and implementing other applicable penalties such as forfeiture. Notably, the Organizational Guidelines do not contain fine levels for many environmental, food, drug and consumer safety offenses for which corporations may be held vicariously liable. The fines for those offenses are based on the substantive statute in question.

Chapter Eight of the Guidelines established a "carrot and stick approach" to determine the level of fines and other punishment to be imposed on a corporation found guilty of a crime. Thus, the Guidelines provide incentives to companies who have effective policies, practices, and cultures designed to deter and prevent misconduct, and concomitantly, punish more harshly those companies that do not. Chapter Eight has three major subdivisions: Part B- "Remedying the Harm from Criminal Conduct;" (2) Part C- "Fines;" and (3) Part D- "Organizational Probation."

Corporate Fines and Penalties. Part B of Chapter Eight is designed to focus on restitution to the victims of the offense. Part C establishes fine levels for most offenses, excluding some offenses such as environmental and food and drug violations. In short, the fine level for a felony is the greatest of 1) the fine specified in the statute; 2) $500,000; or 3) twice the gross gain received by the company or loss inflicted on victims.

Section 8C2.5 lists the various culpability factors that make up the culpability score, which, in turn, determine the fine level and other punishment to impose. Those six factors are (1) involvement in or tolerance of the criminal activity; (2) prior history; (3) violation of a prior order or probation; (4) obstruction of justice; (5) effective compliance and ethics program; and (6) self-reporting, cooperation, and acceptance of responsibility. U.S.S.G. §§ 8C2.5(b)-(g).

Corporate Probation. Part D of Chapter Eight gave the court broad discretion to impose probation conditions for organizations, including establishing and implementing an effective compliance program. The Sentencing Commission established the following seven criteria that were the minimum required for determining whether a company had an "effective program to prevent and detect violations of law," which would then be taken into account to reduce the company's culpability score, and hence, reduce the penalty imposed on a corporation:

(1) The organization must have established written compliance procedures to reduce criminal conduct, which must be followed by all employees and agents.

(2) High-level personnel must be assigned the responsibility to oversee the compliance program.

(3) The organization must not delegate authority to employees that the company knows, or should know, have a propensity to violate the law.

(4) The company must communicate its compliance program to all employees through effective training programs, publications, and the like.

(5) The company must have monitoring and auditing systems to ensure that compliance is being carried out, as well as provide "whistle-blower" protections to employees.

(6) Proper and adequate disciplinary measures must be taken against employees for failing to detect or prevent an offense.

(7) If an offense occurs, the company must respond to the offense and take remedial measures to prevent similar violations. Companies must fully cooperate in the investigation, including, where necessary, waiving attorney-client privilege (This waiver policy, adopted in 2004, was revoked by the Commission in 2006.).

Widespread Impact of Guideline's Compliance Program. The Sentencing Commission's Chapter Eight compliance program criteria quickly began to serve as a model for the courts, DOJ, regulatory agencies, and even Congress in devising enforcement policies. For example, in *United States v. Lucas Aerospace Communications & Electronics*, 94 Cr. 3492 (E.D.N.Y. 1994), the district court imposed the Guidelines' effective compliance program criteria as a condition of probation. In *In re Caremark, Int'l Inc.*

Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996), the Delaware court ruled that directors could be held liable in shareholder derivative lawsuits for *not* establishing an effective compliance program along the lines outlined in the Sentencing Guidelines.

In December 1995, the EPA issued a policy that similarly tracked the Guidelines' compliance program in determining both the amount of civil penalties and whether to make criminal enforcement referrals to the Department of Justice. HHS followed suit with a similar policy. The 1999 Holder Memo and its progeny, discussed in Chapters Three and Five, expressly refer to the Sentencing Commission's Compliance Program criteria as a consideration for exercising DOJ's charging discretion.

In September 2001, on the tenth anniversary of the Organizational Guidelines, the Commission established a 15-member Ad Hoc Advisory Group on the Organizational Sentencing Guidelines to review the effectiveness of the Guidelines, with emphasis on examining effective corporate compliance programs. While the advisory group was composed of members of the defense bar, Justice Department, academia, and consulting firms, there were remarkably *no* corporate managers, officers, or in-house counsel serving on the advisory group.

Waiver of Attorney-Client Privilege. On October 7, 2003, after a series of hearings and public comment, the Ad Hoc Advisory Group issued its report to the Commission. U.S. SENT'G COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES (Oct. 7, 2003). The Advisory Group recommended that the Commission promulgate a stand-alone Guideline in Chapter Eight defining an "effective program to prevent and detect violations of law," drawing upon guidance reflected in the current Application Notes to Chapter Eight and eliminating ambiguities in the original Guidelines. Notably, the Advisory Group recommended that waiver of the attorney-client privilege may be required in some circumstances to satisfy the requirement of demonstrating "cooperation" with government prosecutors. The Advisory Group also recommended that for smaller organizations, an increase in the culpability score should not be required due to the inability of smaller companies to establish and implement a costly compliance program.

On May 1, 2004, responding to the Advisory Group's recommendations, the Commission issued revised Organizational Guidelines expanding the scope of what it regarded as an "effective compliance and ethics program," which would make a company eligible for penalty mitigation. In particular, the revisions focused on the need for companies to promote an organizational culture that encourages ethical and legal conduct. At the same time, there would be no mitigation points if the company unreasonably delayed reporting the offense or if management participated or condoned the illegal conduct. Those revisions, including the language on attorney-client privilege waiver, became effective on November 1, 2004.

Shortly thereafter, a storm of criticism from the organized bar and corporate community about DOJ's waiver policy spilled over to the Commission's waiver policy. The same organizations and individuals described in Chapter Five who opposed DOJ's waiver policy filed comments with the Commission urging it to revoke its policy. On April 5, 2006, the Commission did just that by unanimous vote.

Recent Corporate Sentencing Data. In FY 2007, 196 organizations were sentenced

under Chapter Eight Organizational Guidelines, of which 84.7 percent pled guilty (11 percent lower than the overall plea rate of 95.8 percent). U.S. SENT'G COMM'N 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 53 (attached hereto).

Of the 196 cases, 62 were for fraud (about one-third), followed by 51 environmental offenses (about one-fourth). Other categories included import/export offenses (11 cases), food and drug offenses (9 cases), and antitrust offenses (7 cases). The number of organizations sentenced in 2007 was about 10 percent smaller than the 217 reported in 2006. 2006 SOURCEBOOK, Table 53. However, it was over a four-fold increase from the 44 organizations sentenced in 2004. 2004 SOURCEBOOK, Table 53.

Fines and/or restitution were imposed in 165 of those 196 cases, with an average fine over $7 million and the median of $131,500. The average restitution was just over $3 million, and the median was $245,000. 2007 SOURCEBOOK, Tables 52, 53 (attached hereto). In 2006, the average fine was $5.8 million and the median was $50,000; the average restitution was almost $2 million, and the median was $362,000. 2006 SOURCEBOOK, Tables 52, 53. Thus, the average and median fines imposed in 2007 were greater than those imposed in 2006.

In sharp contrast, the average organizational fine for all offenses in fiscal year 1995 was $242,892, and the median fine was $30,000. In fiscal year 2001, the average fine skyrocketed to $2,154,929, and the median fine doubled to $60,000. Within four years, the average fine doubled to $4.5 million in fiscal year 2005, considerably more than the inflation rate of approximately 10 percent over those years. The trend is clearly higher fines for organizations.

Only one of the 89 corporate defendants sentenced in 2007, for which the Sentencing Commission provided information, had an effective compliance and ethics program as provided by U.S.S.G. § 8C2.5(f). *See* Table 54 (attached hereto). Remarkably, only one of the 89 organizations had a prior criminal or administrative record, suggesting that the businesses were not recidivists, but law abiding. *Id*.

Key Rulings on Sentencing Guidelines. On January 12, 2005, the Supreme Court issued its landmark decision in *Booker v. United States*, 543 U.S. 220 (2005). The Supreme Court ruled that the federal Sentencing Guidelines violate a person's Sixth Amendment right to a jury trial when judges base a sentence on the Guidelines' aggravating factors, where they are not found by a jury beyond a reasonable doubt. The Court remedied this violation by striking down the provision of the Sentencing Reform Act that made the Guideline sentences mandatory for federal judges. Henceforth, the Guidelines would be advisory only, although judges would be required to consider them as one of several sentencing factors, as required by Congress.

Under 18 U.S.C. § 3553(a) Congress mandated that sentencing courts "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment]," namely, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general] deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" (emphasis added). In addition, § 3553(a)(6) requires courts to "avoid

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." Moreover, § 3553(a)(3) requires courts to consider "the kinds of sentences available," meaning probationary and other non-prison alternatives, such as home confinement, community service, fines, restitution, or a combination thereof. Unfortunately, this latter factor is often overlooked or given little consideration.

The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the so-called "parsimony principle," an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens. The *Booker* decision was expected to curb the power of overzealous prosecutors who effectively controlled what prison sentences would be meted out, and restore sentencing discretion to experienced and impartial judges. The Justice Department, however, continued to instruct U.S. Attorneys to request the imposition of the maximum sentences permitted under the Guidelines in individual cases.

Unfortunately, since *Booker*, most sentencing and appellate courts continued to rely on the Sentencing Guidelines to justify imposing otherwise harsh sentences, merely paying lip service to other sentencing criteria. When district court judges did take their duties seriously and imposed sentences below the Guideline range, they often found these sentences reversed on appeal at the urging of the Justice Department as being unreasonably lenient under the advisory Guidelines.

Case Study: United States v. Thurston. A perfect illustration of the fundamental flaws of the Sentencing Guidelines is the white-collar case of *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004). Two company executives were each charged with one count of conspiracy under 18 U.S.C. § 371 with respect to their company's Medicare billing practice for laboratory blood testing. DOJ offered the company President, whom the district court determined to be the prime architect of the challenged practice, a plea bargain, which he accepted. He was allowed to plead nolo contendere, was not required to furnish the government with any assistance, and received a reasonable sentence of three years of probation, which the government did not challenge.

The government offered a similar plea deal to Thurston, who rejected the offer because he believed he was innocent, and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing procedures were a lawful industry practice. There was no allegation or finding that Mr. Thurston financially benefitted personally from the company's billing practice, unlike the allegations of fraud and personal enrichment made in the Enron-type cases. Nevertheless, a jury found him guilty of one count of conspiracy as charged. The maximum sentence allowed by law is five years or 60 months. 18 U.S.C. § 371.

Although the government had readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess over 60 months had to be trimmed to fit the statutory maximum. The bizarre and draconian Guideline sentence, therefore, required that a first offender such as Thurston be sentenced to the statutory maximum as a mandatory minimum. The

district court departed from the Guidelines, and imposed a reasonable split six-month term — three-months to be served in prison and three months to be served by home detention — followed by 21 more months of supervised release. The court did so in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant — the very rationale for the Guidelines — and because of Thurston's civic and charitable history. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55. Incredibly, DOJ argued on appeal that when Congress enacted the SRA and required courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," it meant to reduce disparity in sentencing nationwide; gross disparity in sentences between two similar defendants in the very same case, however, somehow does not frustrate Congress's goal of reducing sentencing disparity.

The First Circuit reversed Thurston's sentence, finding that the then-mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was impermissible." *Id*. at 78. Mr. Thurston would have to return to prison and serve the maximum five years. Instead, Thurston sought review in the Supreme Court, which summarily vacated the judgment and remanded the case following its *Booker* decision. 543 U.S. 1097 (2005).

On remand, a different sentencing judge, held a searching two-day hearing. With the Guidelines no longer mandatory but advisory, the judge imposed the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). This sentence apparently outraged DOJ prosecutors yet again and the government appealed Thurston's sentence to the First Circuit for a second time.

The First Circuit reviewed Thurston's sentence this time for "reasonableness" under the post-*Booker* voluntary Guidelines and reversed Thurston's sentence yet again. The First Circuit held that the sentence was unreasonable, in part, because in the court's view, the Guidelines — which called for a sentence that was much longer than the statutory maximum for a first offender — are an "important consideration" for a sentencing court because they have the "imprimatur" of an allegedly "expert agency." *Thurston (II)*, 456 F.3d 211, 215 (1st Cir. 2006). The court of appeals reversed Mr. Thurston's sentence for a second time. It further held that any sentence imposed on remand that falls below a three-year prison term (an effective pre-Guideline sentence of *9 years*), would be unreasonably lenient and, presumably, would be reversed yet again. *Id*. at 220.

Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years, even though Congress expressly directed that such maximum sentences be reserved for repeat felons who engage in drug dealing or violent crime. *Id*. Thurston was forced to file a second petition to the Supreme Court, which was held pending the Court's decision in *Gall v. United States*. As discussed herein, the Court made it clear in *Gall* that district courts were to have broad discretion in imposing a non-Guideline sentence as long as the sentence was reasonable. On January 7, 2008, the Court granted, vacated, and remanded the *Thurston* case back to the First Circuit yet again. *Thurston v. United States*, 128 S. Ct. 854 (2008). On March 7, 2008, the First Circuit

ordered additional briefs to be filed by the end of April. The outcome of this case will be watched closely to see how lower courts interpret *Gall*. After five tortuous years of litigation, Mr. Thurston, hopefully, will not be required to serve any more time in prison.

Rita v. United States; Gall v. United States. In order to resolve confusion among lower courts as to the weight of the now advisory Guidelines, the Supreme Court issued its second major opinion on the Guidelines on June 21, 2007 in *Rita v. United States*, 127 S.Ct. 2456 (2007). The Court held that a court of appeals *may* regard a Guideline sentence as presumptively reasonable, but was not *required* to do so. District courts, while they must consider the Guidelines as one factor in deciding what sentence to imposing, need not regard them as presumptively reasonable either. Rather, district courts must consider other factors, such as the defendant's background or nature of the offense, as required by the general sentencing statute, to justify imposing a sentence outside the Guideline range.

At the same time, the High Court was considering a companion case, *Claiborne v. United States*, which raised the important issue of whether district courts were required to show "extraordinary reasons" when the sentence imposed substantially departed from the Guideline sentence. Because Mr. Claiborne died before the decision was issued, the case was dismissed as moot. In its place, the Court heard and decided a similar case, *Gall v. United States*, on December 10, 2007. 128 S. Ct. 586. The Court held in *Gall* that contrary to the arguments by DOJ and the rulings by some circuits, district court judges need *not* provide extraordinary reasons the further they depart from a Guideline sentence. As long as the sentence imposed by the district court is a reasonable one, considering all the 18 U.S.C. § 3553(a) factors, the sentence should be upheld. Unfortunately, a sentence imposed within the harsh Guideline range would likely escape close appellate scrutiny. Accordingly, it is vitally important for defense counsel to urge that courts use their broad discretion when fashioning sentences and consider all the sentencing factors, rather than subscribe to the notion that the Guidelines are still paramount.

Conclusion. While Congress has considered several proposals since the *Booker* decision to reinstate the Guidelines in a constitutional manner, there has been no concerted effort to do so, and none is likely in the near future. However, this may change depending upon how courts apply the now advisory Guidelines and the public's reaction to them. In the meantime, federal prosecutors can be expected to continue demanding that sentencing judges impose the highest Guideline sentence in a particular case, and many judges will likely continue to follow the Guidelines, even though they are only advisory.

RECOMMENDATIONS

1. The Sentencing Commission should abolish or substantially revise Part 2Q of the Sentencing Guidelines covering environmental offenses. At a minimum, any revision should ensure that first offenders convicted of minor regulatory violations should be eligible for probation.

2. The offense level characteristics that are added to the base offense levels for various offenses should be eliminated to the extent they constitute "double-counting" of the score already built into the base offense level score.

3. The Commission should revise its Guidelines governing fraud and money laundering to ensure that increased sentences based on economic loss or gain are properly computed based on net gain rather than gross profits.

4. Defense counsel should vigorously argue that the Sentencing Guidelines are only advisory, and, in any event, are flawed because they do not fully consider actual sentences served in the pre-Guideline era, and thus, should be given little or no weight by the sentencing authority.

5. Courts should not regard a Guideline sentence as presumptively reasonable but should instead exercise their independent sentencing discretion and consider other sentencing factors as specified in 18 U.S.C. § 3553(a), including the parsimony principle. In particular, district court judges should multiply any prison sentence they intend to impose by a factor of three to determine what that sentence would have been in the pre-Guideline era when parole was available, in order to gauge the relative severity of the sentence.

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TIMELINE: U.S. SENTENCING GUIDELINES

Sept. 1984:	Congress enacts Sentencing Reform Act that establishes Sentencing Commission, abolishes parole and eliminates judicial discretion in sentencing by mandating uniform sentences under the Guidelines' Sentencing Table based on a culpability score. A dual system is established for imposing fines for individuals and organizations.
Nov. 1, 1987:	Sentencing Guidelines go into effect for individuals only. Commission studies organizational sentencing proposals. Part 2Q of the Guidelines governing environmental offenses for individuals effectively precludes or sharply limits probation as a sentencing alternative, contrary to pre-Guideline sentencing practice.
July 13, 1989:	*United States v. Pozsgai*, 897 F.2d 524 (3d Cir. 1990). Court imposes 27-month prison sentence on property owner for placing clean, non-hazardous fill on his own property deemed to be a wetland without a permit. At the time, it was longest prison sentence ever imposed for an environmental offense.
Nov. 1, 1991:	Sentencing Guidelines for Organizations go into effect. U.S. SENTENCING GUIDELINES, CHAPTER EIGHT-SENTENCING ORGANIZATIONS. Part B provides for restitution; Part C establishes fine levels, and Part D provides for probation conditions. The Organizational Guidelines provide that corporations will be eligible for more lenient sentences if they establish an effective compliance program that, at a minimum, meets seven criteria, including auditing, monitoring and cooperation with authorities.
Feb. 1992:	Commission establishes Advisory Working Group on Environmental Sanctions for organizations. Working Group's secret proceedings challenged in *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996). Final report issued in November 1993, but Commission does not adopt them.
Sept. 1996:	*In re Caremark, Int'l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). Court rules that directors who do not ensure that a compliance program exists along the lines suggested by the Guidelines measure can be held personally liable to shareholders in derivative action.
1997-1999:	HHS adopts "model compliance plans" for health care providers similar to EPA policy that adopts the Guidelines' incentives to develop corporate compliance programs.

June 1999:	Holder Memo issued by the DOJ allows prosecutors to consider a corporation's compliance program under the Guidelines in making a charging decision.
Sept. 19, 2001:	Commission establishes 15-member Ad Hoc Advisory Group on the Organizational Sentencing Guidelines to examine effectiveness of corporate compliance programs. The group is composed of members of the defense bar, the Justice Department, academia, and corporate consulting firms; notably, no corporate employee or in-house counsel is a members of the group.
Sept. 2002:	Section 805(a)(5) of Sarbanes-Oxley directs Sentencing Commission to amend Guidelines in wake of Enron scandals to ensure that they are "sufficient to deter and punish organizational criminal misconduct."
Jan. 20, 2003:	Thompson Memo issued by DOJ reiterates Holder Memo criteria that cooperation, compliance programs and remedial actions would be taken into account in exercising prosecutorial decisions, including the waiver of attorney-client privilege.
Oct. 7, 2003:	Ad Hoc Advisory Group on Organizational Sentencing released its final report to the Sentencing Commission recommending ways to improve internal programs to "prevent and detect violations of law."
May 1, 2004:	Commission issues revised Guidelines that require companies to have an "effective compliance and ethics program" to receive penalty mitigation. Program must promote an organizational culture that encourages ethical and legal conduct.
Nov. 1, 2004	Revised Organizational Guidelines go into effect. To qualify for a reduced sentenced, cooperation must be "timely and thorough," including "disclosure of all pertinent information known by the organization," namely, information otherwise protected by the attorney-client and work product privileges.
Jan. 12, 2005:	*United States v. Booker*, 543 U.S. 220 (2005). Supreme Court strikes down the mandatory feature of the Guidelines. Henceforth, the Guidelines, while they must be considered by the sentencing judge along with other sentencing factors, would only be advisory.
March 3, 2005:	Letter submitted by coalition of business groups, including the Washington Legal Foundation, to Sentencing Commission urging Commission to reverse or modify its privilege waiver amendment

embodied in its Chapter Eight compliance program,

June 28, 2005: U.S. Sentencing Commission announces review of its waiver policy in determining level of corporate cooperation and solicits public comments.

Aug. 15, 2005: ABA, business groups, and former DOJ officials led by former Attorney General Dick Thornburgh urges Sentencing Commission to reverse or modify its waiver policy.

April 5, 2006: U.S. Sentencing Commission unanimously approves removal of privilege waiver language from guideline commentary. Revised policy becomes effective November 1, 2006.

June 21, 2007: *Rita v. United States*, 127 S. Ct. 2456 (2007). Court rules that sentences imposed under advisory guidelines *may be* presumed to be reasonable by courts of appeals, but that no such presumption is required. Sentencing judges need not regard the Guidelines as presumptively reasonable.

Dec. 10, 2007: *Gall v. United States*, 128 S. Ct. 586 (2007). Court rules that district court judges need not provide "extraordinary reasons" to justify a sentence that substantially departs from a Guideline sentence.

Table 52

MEAN AND MEDIAN FINE OR RESTITUTION IMPOSED ON SENTENCED ORGANIZATIONS BY PRIMARY OFFENSE CATEGORY[1]
Fiscal Year 2007

PRIMARY OFFENSE	TOTAL		CASES WITH RESTITUTION IMPOSED[2]			CASES WITH FINE IMPOSED			TOTAL FINE OR RESTITUTION IMPOSED		
	Number	Percent	Number	Mean	Median	Number	Mean	Median	Number	Mean	Median
TOTAL	**196**	**100.0**	**62**	**$3,090,742**	**$245,716**	**134**	**$7,329,196**	**$131,500**	**165**	**$7,113,565**	**$180,250**
Administration of Justice: Contempt/Obstruction/Perjury	1	0.5	1	--	--	1	--	--	1	--	--
Antitrust	7	3.6	1	--	--	7	$86,023,571	$200,000	7	$86,048,428	$373,993
Archeological Damage	0	0.0	0	--	--	0	--	--	0	--	--
Public Corruption: Bribery/Gratuity/Extortion	6	3.1	3	$264,135	$225,149	6	$5,358,821	$2,766,630	6	$5,490,889	$2,949,705
Civil/Individual Rights	0	0.0	0	--	--	0	--	--	0	--	--
Contraband	0	0.0	0	--	--	0	--	--	0	--	--
Copyright/Trademark	4	2.0	0	--	--	4	$38,250	$37,500	4	$38,250	$37,500
Drugs	15	7.7	0	--	--	3	$19,333	$12,000	3	$19,333	$12,000
Environmental - Water	32	16.3	7	$13,041	$10,000	30	$2,137,667	$450,000	31	$2,071,654	$400,000
Environmental - Air	6	3.1	3	$2,033,333	$2,000,000	5	$2,065,200	$1,000,000	5	$3,285,200	$1,170,000
Environmental - Hazardous/Toxic Pollutants	1	0.5	1	--	--	1	--	--	1	--	--
Environmental - Wildlife	12	6.1	3	$204,667	$60,000	9	$61,790	$50,000	10	$117,011	$50,000
Import and Export	11	5.6	1	--	--	8	$347,500	$117,500	9	$435,475	$133,000
Firearms/Explosives/Public Safety	3	1.5	0	--	--	2	--	--	2	--	--
Food, Drugs, Agricultural & Consumer Products	9	4.6	3	$6,844,559	$8,245,369	8	$854,938	$40,750	8	$3,421,647	$51,366
Food Stamps	0	0.0	0	--	--	0	--	--	0	--	--
Forgery	0	0.0	0	--	--	0	--	--	0	--	--
Fraud	62	31.6	35	$3,651,118	$332,686	31	$8,019,382	$180,250	58	$6,489,482	$326,922
Gambling	0	0.0	0	--	--	0	--	--	0	--	--
Immigration/Naturalization/Passports	7	3.6	0	--	--	4	$55,375	$60,000	4	$55,375	$60,000
Larceny/Theft/Embezzlement	2	1.0	0	--	--	2	--	--	2	--	--
Motor Vehicles	0	0.0	0	--	--	0	--	--	0	--	--
Money Laundering	7	3.6	0	--	--	3	$150,000	$100,000	3	$150,000	$100,000
Commercial Sex Acts: Pornography/Prostitution	1	0.5	0	--	--	1	--	--	1	--	--
Racketeering	1	0.5	1	--	--	1	--	--	1	--	--
Tax	4	2.0	2	--	--	3	$3,112,957	$2,200,000	4	$8,009,857	$3,569,436
Other	5	2.6	1	--	--	5	$210,000	$100,000	5	$230,000	$100,000

[1]Of the 197 cases sentenced pursuant to Chapter Eight, one was excluded due to missing information on type of economic sanction for cases in which orders were made. Mean and median dollar values include only cases with reported non-zero fine or restitution amounts. Note that the total column includes cases with no fine or restitution. Descriptions of variables used in this table are provided in Appendix A.

[2]In cases of joint and several fines or restitution orders, the full amount of each fine or restitution order is attributed to each offender, which may result in overinflation of the total amount of fines or restitution reported for all offenders.

SOURCE: U.S. Sentencing Commission, 2007 Datafile, USSCFY07.

Table 53

CHAPTER EIGHT ORGANIZATIONAL SENTENCING COMPONENTS[1]
Fiscal Year 2007

SENTENCING COMPONENTS	TOTAL	
Disposition	N	%
Guilty Plea	166	84.7
Nolo Contendere	1	0.5
Bench Trial	2	1.0
Trial By Jury	27	13.8
TOTAL	196	100.0
Probation		
Probation Ordered[2]	147	75.0
Probation Not Ordered	49	25.0
TOTAL	196	100.0
Court Ordered Compliance/Ethics		
Program Ordered	47	24.1
No Program Ordered	148	75.9
TOTAL	195	100.0
Inability to Pay		
Fine Reduced - Organization Unable to Pay[3]	61	33.0
Organization Able to Pay	124	67.0
TOTAL	185	100.0

[1]The total for each factor may add up to less than these overall totals due to missing information for that variable. A description of Chapter Eight culpability factors can be found in USSG §8C2.5. Descriptions of variables used in this table are provided in Appendix A.

[2]The "Probation Ordered" category consists of cases in which at least one month of probation was ordered. The "No Probation Ordered" category consists of cases in which less than one month of probation was ordered, or no probation was ordered.

[3]Cases in this category were unable to pay either a portion of the fine or the entire fine.

SOURCE: U.S. Sentencing Commission, 2007 Datafile, USSCFY07.

Table 54

ORGANIZATIONS SENTENCED UNDER CHAPTER EIGHT: CULPABILITY FACTORS[1]
Fiscal Year 2007

Involvement in or Tolerance of Criminal Activity by Authority - §8C2.5(b)	Number	Percent
Involvement/tolerance in an organization/unit of 5,000+ employees	4	4.5
Involvement/tolerance in an organization/unit of 1,000+ employees	4	4.5
Involvement/tolerance in an organization/unit of 200+ employees	6	6.7
Involvement/tolerance in an organization/unit of 50+ employees	18	20.2
Involvement/tolerance in an organization/unit of ten or more employees	21	23.6
No Involvement/tolerance OR fewer than ten employees	36	40.4
TOTAL	**89**	**100.0**

Prior History - §8C2.5(c)	Number	Percent
One similar criminal/two similar administrative violations within ten years	0	0.0
One similar criminal/two similar administrative violations within five years	1	1.1
Organization had no prior record	88	98.9
TOTAL	**89**	**100.0**

Violation of an Order - §8C2.5(d)	Number	Percent
Organization violated a judicial order or condition of probation for similar conduct	1	1.1
Organization violated condition of probation	0	0.0
Organization did not violate an order or probation	88	98.9
TOTAL	**89**	**100.0**

Obstruction of Justice - §8C2.5(e)	Number	Percent
Organization obstructed justice	5	5.6
Organization did not obstruct justice	84	94.4
TOTAL	**89**	**100.0**

Effective Compliance and Ethics Program - §8C2.5(f)	Number	Percent
Organization did have an effective compliance program	1	1.1
Organization had no compliance program	88	98.9
TOTAL	**89**	**100.0**

Self-Reporting, Cooperation, and Acceptance of Responsibility - §8C2.5(g)	Number	Percent
Reported offense to governmental authorities	4	4.5
Cooperated with investigation	40	44.9
Accepted responsibility	24	27.0
Organization did not self-report, cooperate, or accept responsibility	21	23.6
TOTAL	**89**	**100.0**

[1]Of the 197 cases sentenced pursuant to Chapter Eight, 90 had the fine guidelines applied. The remaining 107 cases had fine guidelines application data missing or inapplicable due to guideline provisions such as a "preliminary determination of inability to pay fine" (§8C2.2). The total for each factor may add up to less than the overall total due to missing information for that specific variable. A description of Chapter Eight culpability factors can be found in USSG §8C2.5. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2007 Datafile, USSCFY07.

A P P E N D I X

WLF REFERENCE RESOURCES

Washington Legal Foundation
Legal Studies Publications and Programs

Chapter One: Mens Rea, Public Welfare Offenses, and the Responsible Corporate Officer Doctrine

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This *Report*, along with WLF's *Timeline: Federal Erosion of Business Civil Liberties,* is a part of our ongoing CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM. For more information on this program or to receive additional copies of this *Report* or the *Timeline*, please contact Paul Kamenar, WLF's Senior Executive Counsel, at (202) 588-0302.

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