

The Responsible Corporate Officer Doctrine: Finding Executives Guilty of Crimes for What They Don't Know

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When most people think of criminal defendants, they envision a person who has intentionally broken the law. What many people don't know, however, is that corporate officers can be subject to individual criminal prosecution in instances where they knew, or should have known, about criminal activity in the company.

Under the responsible corporate officer (RCO) doctrine, individual corporate officers can be found guilty of violating a variety of federal laws, such as the Federal Food, Drug and Cosmetic Act (FDCA), without exhibiting any unlawful intent, negligence, knowledge of the violation or direct participation in the wrongdoing. Instead, under the RCO doctrine, the government only needs to prove that the executive did these three things:

- Held a position of responsibility and authority in the corporation
- Had the ability to prevent the violation
- Failed to prevent the violation.

Sticking one's head in the sand has never been so dangerous.

History of the RCO Doctrine

The RCO doctrine originated in *United States v. Dotterweich*. Joseph Dotterweich was the president and general manager of a pharmaceutical corporation. Both he and the corporation were charged with purchasing drugs, repackaging them and shipping them in an adulterated and misbranded form, in violation of the FDCA.

Because a corporation can act only through its agents, the Supreme Court concluded in 1943 that Congress could not have intended corporations to be the only "persons" subject to prosecution under the FDCA. Rather, the Court held that all individuals who have "a responsible share in the furtherance of the transaction which the state outlaws" may be subject to liability.

Dotterweich was found guilty, despite the fact that he had no knowledge of the criminal activity and was not directly involved in the illegal scheme. Indeed, Dotterweich was convicted based solely on the fact that he had "share[d] responsibility in the business process [that resulted] in unlawful

distribution” and in his position had a “responsible relation to a public danger.” the Court said.

The RCO doctrine was powerfully reaffirmed 30 years later in *United States v. Park*. In that case, the Government charged corporate president John Park with FDCA violations related to unsanitary conditions and rodent infestation at a food-storage warehouse. Park had delegated “normal operating duties” to “dependable subordinates,” but had retained broad supervisory powers.

The Court held that an individual corporate officer may be found guilty of the criminal act if he had the power to prevent the act, had he known about the activity. Despite the fact that Park was not personally involved in causing the unsanitary conditions, he was found guilty because he had a “responsible relation” to the situation and therefore had the power to prevent or correct the violation. Reaffirming *Dotterweich*, the Court held that the class of employees with such authority was indefinable, and whether an employee had such authority must be determined on a case-by-case basis.

Collateral Consequences of Criminal Conviction

Penalties for an officer convicted under the RCO doctrine are severe. In addition to possible imprisonment, criminal fines and restitution, there may be significant collateral consequences.

In particular, individuals who are convicted of health-related crimes may be excluded from participating in any federal health-care programs. Not only is the individual himself excluded, but any entity employing him as an officer, director, agent or managing employee is also subject to the exclusion. If the individual works at a hospital that accepts Medicaid or Medicare funds, the hospital would be banned from receiving these funds as long as it employs the executive.

In *Friedman v. Sebelius*, three senior executives were convicted under the RCO doctrine of misbranding a drug with intent to defraud.. The court held that it was proper to exclude those executives, and any hospitals or entities that currently employed them, from participation in all federal health-care programs for a period of 12 years. This renders the executive unemployable, as few health-care programs would be able or willing to forgo federal funding.

Current Enforcement Policies

All indications are that the Government is seeking to expand the use of the RCO doctrine in the realm of health-care criminal prosecution. The FDA commissioner has expressed the agency’s desire to “increase the appropriate use of misdemeanor prosecutions. . . . to hold corporate officers responsible.” Similarly, the Assistant Attorney General has confirmed a “renewed focus on individual wrongdoers” and a desire to “pursue individuals responsible for illegal conduct just as vigorously as

we do companies.”

The commissioner’s statements are consistent with new guidelines issued by the FDA in January 2011. They indicate that the RCO doctrine is a valuable enforcement tool, permitting a responsible corporate officer to “be held liable for a first-time misdemeanor (and possible subsequent felony) under the [FDCA] without proof that the corporate official acted with intent or even negligence, and even if such corporate official did not have any actual knowledge of, or participation in, the specific offense.”

Conclusion

The threat of criminal liability for corporate officers is real and the penalties for executives found guilty are severe. Given the Government’s stepped-up efforts, corporate officers are likely to face increasing risk of liability, not only for their actions, but also for what they don’t know. Now, more than ever, executives must be certain that their companies have a strong compliance plan and a culture that implements it. Any suspicious employee action or questionable practice should be investigated immediately, with the assistance of outside counsel. What you don’t know can, in fact, hurt you.

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