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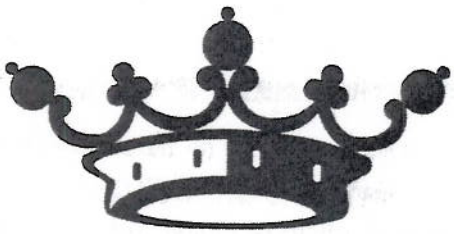
Protecting Corporations Against Management Liability Claims

Leading Lawyers on Analyzing Developments in Employment Regulations, Investigating and Responding to Allegations, and Creating Effective Compliance Strategies



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The Corporate Responsibility Doctrine: Handling Matters When Corporate Executives Are Involved in Criminal or Civil Matters

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Introduction

The notion of a captain going down with the ship is, unfortunately, not a concept that is limited to those who earn their livelihood at sea. Perhaps borrowing from that long-standing element of maritime etiquette, nearly all fifty states and United States federal courts have adopted common law principles that seek to hold individual corporate officers responsible for the alleged wrongdoings in which their companies engage. Somewhat surprisingly, such principles do not limit liability to those scenarios where the corporate officer has knowledge of, or participated in, the wrongful conduct at issue. Rather, the responsible corporate officer doctrine allows executive-level company employees to be held civilly or criminally liable for nearly any wrongful conduct that occurs within the company on their watch. As one may expect, that doctrine poses serious questions and problems for companies and their corporate officers, thereby requiring a thorough understanding of its applications and implications. This is particularly true in the present business environment, in which a number of corporations and their executives—with or without justification—have been labeled by some as "bad guys" who must be punished both in civil and criminal actions in the face of a widespread economic downturn and continued financial challenges. The purpose of this chapter is to provide background on the responsible corporate officer doctrine and to outline steps for addressing claims in which it has come into play.

Recent Trends in Corporate and Executive Liability

The challenges posed and considerations raised by the application of the responsible corporate officer doctrine have perhaps been most apparent in those fields that conduct business with, or that are heavily regulated by, the federal government. Nowhere has this been more apparent than in the biotechnology field, where the federal government has initiated several civil and criminal actions against major pharmaceutical and medical device manufacturers and the corporate officers and C-level executives of those companies. The government almost universally premises such actions on allegations that the defendants have engaged in the unlawful promotion of their pharmaceuticals or medical devices by recommending such products for uses that have not received approval from the US Food and Drug Administration,[1]

[1] *See generally,* U.S. FOOD & DRUG ADMIN. (FDA), http://www.fda.gov/.

or that certain personnel hid critical information regarding adverse events related to their products from the government, physicians, or patients. The government also typically alleges that the corporate officers who have been individually named as defendants in such actions had a duty imposed by law to take the necessary steps to prevent such allegedly unlawful promotion of their companies' products or their companies' failure to disclose information, or to take prompt action to correct it.

As can be expected, this type of scenario poses significant concern related to the handling of any criminal or civil action for companies and their corporate officers. On one end of the spectrum, the threat of being individually named to civil or criminal actions may frustrate the ability of a corporate officer to effectively perform the functions of an executive position. Such issues can create conflicts between the interests of the company and the officers, breed mistrust within an organization, call into question the corporate officer's ability to lead or the decisions he or she is required to make nearly every day, and require the expenditure of substantial time and resources. These problems are all in addition to the obvious implications and negative repercussions a finding of criminal or civil liability may have for a corporate officer's career. Further, where the federal government is concerned, a finding of criminal or civil liability may result in a corporate officer being banned, or "debarred," from doing further business in matters where the federal government is either a customer or is otherwise heavily involved.

Perhaps most importantly from the perspective of legal counsel, there is significant concern over the potential such criminal or civil actions have for driving a wedge between a company and its corporate officers, even when both the officers and the company are confident they have acted appropriately. While corporate officers are ultimately responsible for the welfare of their respective companies, and are no doubt responsible for directing various functions and operations, a corporate officer simply cannot oversee all company personnel all of the time, and therefore cannot prevent against every business activity that may result in criminal or civil liability. Such circumstances have the ability to compromise the relative interests of a company and its corporate officers in handling a given action, and the means and manner by which the officers represent those interests. This is because this scenario inevitably gives rise to situations where the respective interests of the company and its corporate officers are not

aligned—and in fact may be at odds in their efforts to address the allegations, disprove liability, engage in settlement, or engage in day-to-day operations when the allegations involve current products or services. Critically, when both a company and its officers are named as defendants in a civil or criminal action, there may be obvious differences of opinions as to who is ultimately responsible for the conduct at issue—and therefore who should be held criminally or civilly liable, if anyone—leading to potential problems at the time of trial when both defendants want to clarify what they allege actually happened.

Unfortunately, there are no simple work-arounds or quick fixes that allow companies and their corporate officers to avoid the problems raised during criminal or civil actions (whether in the investigation stage or after actions are actually filed) in which both are named (or may be named) as defendants. The purpose of this chapter is to provide insights into the scope of activities that may invoke the responsible corporate officer doctrine. This chapter also addresses the key issues for companies and executives to consider, and strategies for mitigating against the impact when the responsible corporate officer doctrine has either been properly applied or improperly alleged.

History and Application of the Responsible Corporate Officer Doctrine

The responsible corporate officer doctrine allows for the imposition of criminal or civil liability on a corporate executive who, by reason of his or her position with a company, was charged with either preventing or correcting the company's unlawful conduct. The United States Supreme Court first expressed the underpinnings of the responsible corporate officer doctrine in *United States v. Dotterweich.*[2] In that case, a criminal action was brought against the president and general manager of a drug company for alleged violations of the Food, Drug, and Cosmetic Act.[3] The defendant executive defended against such action in part on the grounds that he could not be held liable for his company's criminal violations. However, the Supreme Court ultimately rejected those contentions, stating that all who had a "responsible share" in the criminal conduct at issue could be held liable for corporate violations of the law.[4]

[2] *United States v. Dotterweich,* 320 U.S. 277 (1943).
[3] Food Drug and Cosmetic Act, 21 U.S.C. §§ 301-99 (2012); *Dotterweich*, 320 U.S. 277.
[4] *Id.* at 284.

The Supreme Court again addressed and further explained the doctrine in the seminal case *United States v. Park.*[5] In that case, the Court explained the concept of a "responsible share," as the phrase is used in applying the responsible corporate officer doctrine to individual company defendants *even when they were not personally involved in the violation at issue.*[6] Specifically, the Court stated that a corporate officer may be liable for such violations where he or she had "by reason of his [or her] position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he [or she] failed to do so."[7] Pursuant to this doctrine, the corporate officer need not even have brought the violation about through his or her own "wrongful action." The *Park* Court also pointed out that one need not be a corporate officer for the responsible corporate officer doctrine to apply. Rather, the defendant needs only to have such a relationship with the corporation "that it is appropriate to hold him [or her] criminally liable for failing to prevent the charged violations . . ." and the person need only have "authority with respect to the conditions that formed the basis of the alleged violations."[8]

With the responsible corporate officer doctrine firmly entrenched in our national jurisprudence, courts have continued to apply it in a variety of contexts, though nearly all are limited to those statutory schemes that are intended to protect the public welfare, and impose civil or criminal penalties regardless of whether there is knowledge that such conduct is wrongful (referred to as "strict liability" violations). Examples of the types of criminal and civil matters upon which responsible corporate officers have been the subject of legal action include, but are not limited to, violations of the Food, Drug, and Cosmetic Act, the Clean Water Act, the Controlled Substances Act, and the Public Health Service Act, as well as claims based on securities fraud, consumer fraud, and antitrust violations.[9] Individual plaintiffs and law enforcement entities have also used recent actions to attempt to expand the responsible corporate officer doctrine into such areas as employment law, and to statutory violations where the plaintiff is not required to

[5] *United States v. Park*, 421 U.S. 658 (1975).
[6] *Park*, 421 U.S. at 669.
[7] *Id.* at 674.
[8] *Id.*at 673.
[9] Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-99; Controlled Substances Act, Pub. L. No. 91-873, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971); Public Health Service Act, 42 U.S.C. §§ 201-39.

demonstrate the defendant's knowledge of the alleged wrongful conduct. While those efforts to expand on the responsible corporate officer doctrine application have met with mixed-to-negative results, such attempts to expand its application into other areas of the law, coupled with the growing list of statutory violations to which the legal principle has been applied, suggests that plaintiffs, law enforcement entities, and courts are becoming more comfortable and liberal with its application.

In sum, the responsible corporate officer doctrine is here to stay, and is limited only by the willingness of parties and courts to curtail its application. Nor is there much that corporate officers or the companies they represent can do to eradicate such a long-standing legal doctrine. Accordingly, in addition to seeking clarity from government regulatory and enforcement authorities and trusted counsel of the obligations that statutes, regulations, and common law imposes on respective industries, companies must create a strategy for dealing with claims directed both at them and their corporate officers.

Penalties Associated with Liability Under the Corporate Responsibility Doctrine

As referenced above, the responsible corporate officer doctrine opens up individual corporate officer defendants to both criminal and civil liability for the actions of the companies they represent. The nature and scope of that liability varies with the type of offense for which the corporate officer is ultimately found liable. However, in most scenarios, the liability imposed is not as severe as criminal or civil liability in circumstances where the corporate officer defendant has directly engaged in the wrongful conduct at issue or has knowingly permitted it to occur. Nonetheless, both the penalties that may be imposed, and the practical consequences thereof, are nonetheless very significant and potentially disastrous for both the corporate officer defendant and his or her company.

Examples of the types of criminal and civil liability that may be imposed under the responsible corporate officer doctrine are perhaps best illustrated in those cases involving alleged violations of the Clean Water Act and the Food, Drug and Cosmetic Act. For example, in *United States v. Iverson*[10], the Ninth Circuit

[10] *United States v. Iverson,* 162 F.3d 1015 (9th Cir. 1998).

Court of Appeals upheld a finding that the defendant corporate officer was properly convicted of violations of the Clean Water Act. In affirming that conviction, the defendant corporate officer was sentenced to a year in custody, three years of supervised release, and a $75,000 fine. As to potential civil damages, in *United States v. Hodges X-Ray, Inc.*,[11] the individually named corporate defendants were found to be liable for violations of the Food, Drug and Cosmetic Act. While certain elements of that decision were ultimately overturned on appeal, the liability of the named corporate officer was affirmed, and he was subjected to a civil penalty of $20,500.

More recently, in 2011, three executives of the medical device manufacturer Synthes were sentenced to prison time—two received prison sentences of nine months, while a third received a sentence of five months—following unapproved clinical trials in violation of the Food, Drug and Cosmetic Act that had resulted in patient deaths.[12] Also in 2011, former CEO of KV Pharmaceuticals was personally required to pay a fine of $1.9 million for his firm's distribution of a product in dosages not approved by the FDA. He was also required to resign from his company, as his liability for the alleged wrongful conduct also resulted in him being barred from doing business with the federal government through Medicare or Medicaid. While the ultimate punishments imposed in recent cases are not inconsistent with previous prosecutions, the frequency of such prosecutions and threat of prosecutions have increased.

In sum, even despite a corporate officer's lack of knowledge regarding the conduct giving rise to liability, he or she may be subjected to significant fines, potential jail time, and being barred from involvement with federal programs for the conduct of the company where it is determined that a duty was owed to prevent or quickly correct the allegedly violative conduct.

Proposed Strategies for Dealing with Corporate Responsibility Doctrine Claims

While companies must tailor the specific procedures, policies, and protocols that they implement to address claims against them and their corporate

[11] *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985).
[12] *See* 21 U.S.C. §§ 301-99.

officers to both the business model and the type of criminal and civil claims that they may ultimately face, they must address several considerations when handling such matters. These issues should focus solely on what a company and its corporate officers will do in responding to an action asserted against them. This chapter does not address how to avoid liability under the responsible corporate officer doctrine, as both the type and scope of those claims vary greatly not only with the various underlying legal actions on which they may be premised, but also the different types of businesses that may ultimately be involved in allegedly committing such violations. However, once someone has alleged such a claim, there are certain universal issues that the company should address in preparing its defense.

Understanding the Allegations and the Actions at Issue

While it may seem fairly obvious, a key component in assessing how to handle claims based on the responsible corporate officer doctrine is to know and understand the allegations being made. The corporate responsibility doctrine is just one of multiple scenarios in which a corporate officer may be individually named as a defendant in a criminal or civil action. For example, the corporate officer may be found liable for his or her own affirmative conduct, such as when the officer partakes in actions that are in violation of the law, or actively aids and abets in the performance of such conduct. That conduct, though it may have occurred in the performance of the officer's job duties and responsibilities, is not necessarily inextricably intertwined with the business activities of the company, and therefore do not necessarily give rise to the same type of issues that are implicated in claims in which the responsible corporate officer doctrine has been alleged. Critically, the responsible corporate officer doctrine does not require any affirmative conduct on behalf of the corporate officer, or even the corporate officer's knowledge of the wrongful conduct at issue. The legal principle simply imposes liability on the individually named corporate officer defendant in those scenarios where the defendant had a duty to defend against the conduct at issue or was required to promptly correct it. Consequently, for the corporate officer to ultimately be held liable, the company must have engaged in alleged wrongdoing, without the corporate officer engaging in any individual alleged wrongdoing. Accordingly, it is essential to understand the alleged theory of liability, and the specific violations for which the company and

corporate officer are allegedly liable, as these allegations will ultimately influence the strategies for proceeding with the case.

The primary, unique feature of the responsible corporate officer doctrine is that it does not matter that such officer did not participate in or have knowledge of the alleged violation. As referenced above, the criminal and civil action asserted against the corporate officer is predicated solely on the officer's position of control within the company, and it is often the case that such defendants do not even have knowledge of the events upon which the legal claims are ultimately based. This scenario gives rise to the greatest concerns for the relative interests of the company and the corporate officer, as it has the potential to tempt individual defendants into pushing the blame for such alleged violations back to the company defendant, portraying company employees as rogue actors over which no control could be asserted. This is a result that may ultimately prove that, while the corporate officer is not liable, the company certainly is.

Accordingly, when a company receives notice of a potential legal claim against it and its corporate officers, it is of critical importance to assess the relative potential liabilities of the parties and to assess whether the claim asserts the responsible corporate officer doctrine or whether the plaintiff otherwise seeks personal liability on corporate executives. It is also critical to identify the specific violations upon which the plaintiff has based the claim, as the responsible corporate officer doctrine cannot be blindly applied when the underlying statutory violations include a requirement of knowledge on the part of the corporate officer. Once the defendant clearly understands the pertinent allegations against both the company and the individual corporate officer, both parties are in a better position to assess their risk and potential exposure moving forward, and any divergence in defense strategies can be clearly identified, assessed, and addressed at the outset so that such issues do not emerge and catch the parties by surprise during litigation.

Performing Internal and Third Party Investigations

A company facing allegations under the responsible corporate officer doctrine should also consider performing an investigation of the allegations, or, if allegations have not yet been made with specificity, an investigation of

the general situation on which the anticipated allegations will be based. The nature of the alleged improprieties can help to determine the substance and scope of the investigation. In certain situations, a company can perform solely an internal investigation conducted by company employees. Such an investigation can serve to generally identify the scope of the necessary investigation, understand the internal facts, identify and interview the individuals involved, identify key documents, and accordingly assess the nature and potential severity of the issues the company faces. Importantly, such an investigation can also serve to identify necessary actions to rectify any internal improprieties and problems in an effort to curtail liability; compartmentalize those improprieties, problems, and legal issues; and allow the company to move forward with respect to its larger business objectives.

Companies should also consider employing an outside, independent third party to conduct the investigation. This is especially true when company employees have participated in the situation, have a vested interest in not revealing the complete facts, and may not have a clear view considering their involvement. Under those circumstances, an independent third party can act as a useful appraiser to collect facts, ultimately identify the key facts underlying the alleged violations, and aid in solutions to curtail potential liability in ongoing operations.

Involving Outside Counsel in Investigations

A company's involvement of independent counsel during this investigation phase is also important for a variety of legal reasons. In appropriate situations, independent counsel involvement can help structure appropriate communications regarding investigations of the allegedly wrongful conduct to protect those communications from discovery under the attorney work product doctrine or attorney-client privilege to the maximum extent possible. This is not necessarily possible when in-house counsel conducts such investigations, since as employees of the company they are potential witnesses in the underlying criminal or civil action. To that end, a company should consider securing outside counsel as opposed to using any in-house counsel that has been involved in the alleged activities.

In securing the services of uninvolved outside counsel to conduct an investigation of the allegedly wrongful conduct, it is important for the company

to note that the entirety of the investigation will likely not be subject to the work product doctrine under every circumstance. A number of courts have determined the work product doctrine protects an attorney's investigations—and in particular his or her impressions and observations therefrom—only when a substantial need has not been shown for such information, or when the requesting party can obtain such information from other potential sources. Despite the potential limitations to the protections the work product doctrine affords, however, it is still beneficial to hire outside counsel to provide additional protections necessary for the purpose of conducting internal investigations.

Analyzing Mandatory and Voluntary Indemnification

A company facing allegations under the responsible corporate officer doctrine should immediately begin to analyze the potential indemnification of company officers and the nature and scope of indemnification. Two main considerations are at issue when analyzing potential indemnification. First, a company should analyze contractual obligations of indemnification. The company's bylaws, operating agreements, or other governing documents may address such indemnification obligations. Employment agreements for executives or other corporate officers may also address such indemnification obligations. When included in negotiated agreements, indemnification provisions may include, among others, details with respect to obligations, mandatory or voluntary indemnification, indemnification in the event of potential criminal matters, use of independent counsel, timing of payment of attorneys' fees and other related costs, and settlement options. The company's analysis of such obligations at the outset can aid in a smoother, more coordinated defense of actions.

Second, a company should analyze whether to indemnify company officers or others as a matter of sound defense strategy. Payment of defense costs for officers or others can lead to goodwill and cooperation, as opposed to the potential resentment generated by an officer being named in a lawsuit in which he or she may not even have had knowledge of the allegedly wrongful conduct. Paying defense costs for officers is not without a downside, however. The core concept of the responsible corporate officer doctrine is that it holds liable those executives who had a duty to act or to prevent alleged wrongdoing but then failed to do so, and shareholders or

other executives may view the payment of attorneys' fees as a reward for the named corporate officer's lack of diligence in performing his or her duties. Ultimately, the company must weigh the relative risks and benefits of paying for the individually named corporate officer's attorneys and determine the best action under the circumstances.

Considering Separate Counsel for the Individually Named Defendant

Given that the interests of the company and the individually named corporate officer may at some point diverge, it is important to consider securing separate counsel for the named corporate officers early on. The importance of this decision cannot be overstated. Attorneys are generally precluded from representing parties whose legal interests in a lawsuit may conflict. The reason for that rule is that legal counsel is privy to confidential information from their clients by virtue of the attorney-client privilege. When an attorney attempts to jointly represent parties with conflicting interests, the attorney may be exposed to information that simultaneously helps one client while hurting the other, rendering the attorney's ability to represent the clients impossible. Such conflicts also may impact the trust and openness between client and counsel.

With that concern in mind, it is important to evaluate at the outset the potential for the interests of the company and the corporate officer to conflict. While joint representation is not uncommon—usually with the benefit of both parties signing a conflict waiver—the eventual emergence of any conflict of interest may result in counsel's exclusion from further representation of either party. It is therefore important to work out the parties' respective representations early in the action, before the parties begin divulging potentially sensitive information that may give rise to a conflict.

Preserving Hard Copy and Electronic Documents

Because the corporation inevitably has ultimate control over its own documents and other evidence related to the alleged criminal or civil action, it is important to ensure that the company takes all possible steps to ensure it preserves all evidence related to the action. While it is not uncommon—and is in fact expected—that a company preserve evidence to respond to requests from either the government or plaintiffs in a given action, when the company and the individually named corporate officer have diverging

interests in the litigation, that duty to preserve documents and evidence extends to the corporate officer, as well. Failure to preserve (or, worse, destroying) evidence can result in additional potential liability through claims of intentional or negligent spoliation of evidence and evidentiary sanctions, including presumption of liability or reversal of burdens of proof imposed against defendants. Further, because the corporate officer no doubt has a deep understanding of the records the corporation keeps and its document retention policies, there can be little doubt that the officer will be acutely aware of any documents or evidence that the company has not preserved or that have gone missing.

Again, companies are faced with the inevitable conflicts between the interests of the company and those of the involved corporate officer defendants. Accordingly, those responsible for the preservation of documents should be actors independent of the situation. The company must preserve documents not only through queries of involved actors, but also through involvement of information technology specialists who can perform broad searches of available company electronic records.

Coordinating Defense Strategies

Given the potential for conflicts of interest in a case brought under the responsible corporate officer doctrine, if separate counsel are representing the parties, the company and the individually named corporate officer defendants should make an effort to coordinate their defenses in the underlying criminal or civil action as much as possible. Such coordination usually takes the form of a joint defense to the conduct underlying the alleged action, and allows the company and corporate officer defendant to avoid a scenario where they are at odds due to their differing interests, to assert appropriate objections in tandem, and to assert defenses in unison. This type of coordination also helps the company and officer avoid a situation in which they inadvertently assist the government entity or plaintiff in identifying the evidence necessary to make its case, as the by-product of co-defendants at odds in the underlying action inevitably provides a roadmap of the weaknesses in their potential defenses.

For each of those reasons, counsel for the company defendant and the individually named corporate officer defendant should discuss the possibility

of coordinating legal defenses as early as possible after receiving notice of a criminal or civil action. This early conference among counsel should also include a discussion of the areas when the parties' respective interests may diverge so the parties can avoid those issues when possible, or deal with them directly. The attorney-client privilege and the work product doctrine also generally protect such discussions, as the communications between co-defendants in many states are subject to the joint defense privilege. Thus, to the extent the party asserting the underlying criminal or civil action against the company and its corporate officers wishes to obtain discovery of any communications between those parties regarding the pending litigation, such parties may properly refuse to answer on the ground that such communications are privileged.

Identifying Conflicts

It is obviously important to consider and address the inherent conflicts between the named corporate officer's personal interests and the interests of the company. A corporate officer who is embroiled in a criminal investigation or civil litigation and who remains in his or her position of authority within the company faces inherent conflicts in handling work-related matters. This may affect the corporate officer's interaction with those whom he or she oversees, as well as the officer's interaction with the company's board, shareholders, or investors. Some corporate officers take the position that they "*are* the company," and that what is in an officer's best interest is in the best interest of the company. While such thinking may be true as a practical matter, and may in fact result in the company's present or future economic success, it is not necessarily true as a matter of law, which treats the corporate officer and the company as distinct and separate entities. Frank discussions with trusted counsel are often necessary in helping company executives understand their roles, responsibilities, and duties as a matter of law within the company, as well as the duties and obligations that the company has to its company executives.

In addition, it is important to remember that such conflicts also arise in all phases of litigation, and that the parties must maintain a watchful eye to evaluate whether potential conflicts may arise. The allegations that initiate a criminal or civil action against a company and any corporate defendants do not necessarily remain the same after the action's inception, and both state

and federal courts have routinely permitted parties that have asserted an action to amend their allegations and identify new parties in the case. The plaintiff may assert the allegations that ultimately cause a corporate officer to be included as an individually named defendant at almost any time, meaning that the potential for a conflict of interest between the company and its corporate officer may accordingly arise at any time. Under these circumstances, either the company or its corporate officer may have the incentive of "hanging the other party out to dry" through interactions with investigating authorities and settlement negotiations. The specific company's nature and complexity should inform the company's and practitioner's best handling of these situations. Needless to say, every effort should be made to minimize potential conflicts and the damage they may ultimately cause to both parties in the handling of the underlying action.

Conclusion

In conclusion, when executives and companies are faced with civil and criminal actions, the foregoing issues are ones that the company and its counsel should universally consider, evaluate, and address. This is particularly true of companies and corporate officers that work in areas that are heavily regulated by the federal government (such as companies regulated by the FDA, the EPA, and the like) or which have the federal government as a client (and are therefore potentially a target of False Claims Act claims). Whether it is justified or not, we live in a time when corporations and their officers are generally distrusted by the public. Such distrust has given rise to an enforcement environment wherein the federal government and its surrogates have stepped up their efforts to enforce the laws like the Clean Water Act and the Food, Drug and Cosmetic Act, which they believe are necessary for protecting the public's interest. This has inevitably resulted in an increase in the potential that an action may be brought that involves allegations based on the responsible corporate officer doctrine, meaning that both companies and their corporate officers should be prepared that they may eventually find themselves in the federal government's investigations and prosecutions. Lawyers and executives are well advised to track additions and revisions to relevant federal and state law and associated regulations, to heed the latest guidance documents from the relevant federal governing bodies, and to follow investigations, prosecutions, and settlements in their respective industries to the extent

possible. Executives should seek and lawyers can provide regular updates to management on the foregoing important areas.

While effort and attention should always be directed at preventing that conduct that gives rise to potential liability through compliance programs in the first place, the very real possibility that company personnel may engage in conduct that could implicate the responsible corporate officer doctrine requires that both the parties and their counsel directly address the situation by taking into account the issues raised above. In the absence of such handling, both the company and its corporate officer are not only at risk of being found liable for the conduct alleged against them, but also of losing their ability to conduct their business affairs at all.

Key Takeaways

- Encourage your clients to perform an investigation of the allegations or the general situation on which the anticipated allegations will be based. The nature of the alleged improprieties can help to determine the substance and scope of the investigation. The company can perform solely an internal investigation conducted by company employees, or if such employees are potentially implicated in the allegations, an outside, independent third party that can act as a useful appraiser.
- Stress the importance of the company considering securing separate counsel for the named corporate officers early on, given that the interests of the company and the individually named corporate officer may at some point diverge. If the company desires joint representation, evaluate the potential for the interests of the company and the corporate officer to conflict, as the eventual emergence of any conflict of interest may result in your exclusion from further representation of either party.
- Counsel your clients in the importance of preserving all evidence related to the action. When the company and the individually named corporate officer have diverging interests in the litigation, the company's duty to preserve documents and evidence extends to the corporate officer, as well. Accordingly, those responsible for the preservation of documents should be actors independent of the situation. Direct the company to preserve documents not only

through queries of involved actors, but also through involvement of information technology specialists who can perform broad searches of available company electronic records.

- If you are one of two or more separate counsel representing the parties, make an effort to coordinate your defenses with the other parties. This will allow the company and corporate officer defendant to avoid a scenario where they are at odds due to their differing interests, to assert appropriate objections in tandem, and to assert defenses in unison. It will also help the parties avoid a situation in which they inadvertently assist the plaintiff in identifying the evidence necessary to make its case, as the by-product of co-defendants at odds in the underlying action inevitably provides a roadmap of the weaknesses in their potential defenses.
- Remember that the allegations that initiate a criminal or civil action against a company and any corporate defendants do not necessarily remain the same after the action's inception, and both state and federal courts have routinely permitted parties that have asserted an action to amend their allegations and identify new parties in the case. Maintain a watchful eye to evaluate whether potential conflicts may arise. Allow the specific company's nature and complexity to inform the manner in which you handle these situations.

Kai Peters is a partner at Gordon & Rees LLP specializing in acting as outside counsel for businesses of all sizes and complexities on a broad range of their corporate, commercial, and litigation matters and in representing businesses in simple and complex litigation. He has significant experience in litigation, including business disputes, breach of contract, mass torts, class actions, drug and medical device matters, and product liability cases. Mr. Peters also advises corporate clients in the area of avoidance of potential liability and litigation, from training and organization of sales representatives to the form and content of internal and external documents. He acts as national counsel for major pharmaceutical and medical device corporations and high-tech companies on a variety of litigation matters.

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Edward Fitzgerald's practice centers on representing businesses and individuals in a broad range of litigation matters, including business torts, breach of contract, product liability, and professional liability, and emphasizes the representation of manufacturers, distributors, and retail sellers of regulated consumer products in complex litigation, mass torts, and class actions. He has significant experience in the initial phases of litigation, major document organization and review, motion practice, discovery and depositions, dispositive motions, alternative dispute resolution including mediation, evaluation of cases with experts, and trial work-up. Additionally, Mr. Fitzgerald consults with and advises businesses and individuals regarding regulatory compliance matters, handling of and responding to government investigations, and avoidance of liability.