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The New Reality: What Does the Future Hold for Criminal Enforcement of EHS Violations?

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FOREWORD

Deputy Attorney General Sally Quillian Yates released two memos in late 2015 that surfaced pressing questions about corporate accountability and the prosecution of worker safety violations. The first memo, dated Sept. 9, 2015, outlined a Department of Justice push for the prosecution of individual executives, not just corporations, in incidents of corporate wrongdoing. The second, dated Dec. 17, 2015, traced the difficulties in prosecuting cases under the Occupational Safety and Health Act (OSH Act).

Under the OSH Act, employers that willfully violate a standard causing the death of an employee, give advance notice of an OSHA inspection or falsify documents are subject only to misdemeanor violations punishable by, at most, a small fine and short imprisonment. The December 2015 memo encourages prosecutors to ''make enforcement meaningful by charging other serious offenses that often occur in association with OSH Act violations – including false statements, obstruction of justice, witness tampering, conspiracy and environmental and endangerment crimes.'' Taken together, the two memos could mean significant changes in how corporations respond to occupational safety and health incidents, and they signal a potential crackdown on individual accountability through criminal enforcement actions.

Part 1 of this report includes a compilation of Bloomberg BNA practitioner insight articles. In *Twenty Questions Raised by the Justice Department's Yates Memorandum*, Robert R. Stauffer and William C. Pericak, partners in the White Collar Defense and Investigations practice at Jenner & Block LLP, answer 20 questions raised by the September 2015 Yates memorandum and opine about whether corporations will change how they interact with prosecutors, how they conduct internal investigations and how they relate to employees. The authors conclude that while the memo may not result in a sea change in how companies react to investigations, there will likely be some implications for the future.

In *White Collar Crime Reset Is Long Overdue*, Rena Steinzor, a professor at the University of Maryland Carey School of Law, asserts that the reinstatement of aggressive enforcement of white collar crime is essential for restoring America's confidence in the justice system. Steinzor provides a historical perspective leading up to the Yates memorandums and she rebuts the notion that the DOJ will pursue innocent targets as part of its enforcement effort.

Finally, in *The State of Workplace Safety and Environmental Criminal Enforcement in 2015*, Steven P. Solow, Anne M. Carpenter and Katherine V. Barajas of Katten Muchin Rosenman LLP, outline the potential changes in store for corporations as they move through investigations and the challenges the government may face in implementing the worker-safety initiative. The authors also include a case roundup of 2015 workplace safety cases and an interview with Assistant

Secretary of Labor for Occupational Safety and Health David Michaels, who provides an overview of why the administration sought to work with the Department of Justice on enforcement and how future success will be measured. Solow is a partner for Katten Muchin Rosenman LLP, where he serves as co-chair of the firm's National Environmental and Workplace Safety Practice Group and co-chair of the D.C. office's White Collar Criminal and Civil Litigation and Compliance Practice. Carpenter and Barajas are associates in the Environmental and Workplace Safety practice of Katten Muchin Rosenman LLP.

Part 2 of this report includes two news articles by Bloomberg BNA reporter Stephen Lee that appeared in Bloomberg BNA's Occupational Safety and Health Reporter. These news articles help provide context for the impact that the Yates memorandums have on interested stakeholders.

The two Yates memorandums, mentioned in this report are *Individual Accountability for Corporate Wrongdoing* (available at https://www.justice.gov/dag/file/769036/download) and *Prosecutions of Worker Safety Violations* (available at https://www.justice.gov/enrd/file/800431/download). Subscribers also may be interested in the *Memorandum Of Understanding Between The U.S. Departments Of Labor And Justice On Criminal Prosecutions Of Worker Safety Laws* available at https://www.justice.gov/enrd/file/800526/download.

The State of Workplace Safety and Environmental Criminal Enforcement in 2015

*by Steven P. Solow, Anne M. Carpenter and Katherine V. Barajas**

Two Yates Memos and a Shift in Environmental and Workplace Safety Criminal Prosecutions

September and December of 2015 may be the most significant dates in the investigation and prosecution of corporate crimes related to the environment and workplace safety in the past twenty years. On September 9, 2015, Deputy Attorney General (''DAG'') Sally Quillian Yates released a memorandum to all criminal and civil branches of the U.S. Department of Justice (''DOJ'') setting out ''six key steps to strengthen [DOJ's] pursuit of individual corporate wrongdoing.''[1] On December 17, 2015, DAG Yates sent out another memorandum directing all 93 United States Attorneys' Offices to participate in a national initiative to increase the use of criminal enforcement in cases involving workplace safety.[2]

The September guidance follows public criticism regarding the dearth of individual convictions associated with the financial crisis. Its focus on individuals appears to be an outgrowth of these enforcement efforts, and the memorandum is a reaffirmation of the legal principle that corporate liability is premised on the acts of employees.[3] Overall, the memorandum mostly formalizes or reiterates existing practices in many U.S. attorneys' offices.[4] Specifically, in the area of environmental crime, prosecutors have long focused on investigating individuals alongside corporations and have required cooperation from corporate entities with respect to investigation of their employees. But when taken with the December memorandum's focus on prosecuting crimes related to workplace safety (where corporate prosecutions have been limited, and individual prosecutions have been exceedingly rare[5]), the two initiatives may present a meaningful shift in the focus of federal criminal regulatory enforcement. Taken together, these efforts should command the attention of the regulated community.

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* This article appeared in Bloomberg BNA's *Occupational Safety and Health Reporter* (46 OSHR 371, 4/14/16).

[1] Memorandum from Sally Quillian Yates, Deputy Attorney Gen. on Individual Accountability for Corporate Wrongdoing to Assistant Attorneys Gen., United States Attorneys (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download [hereinafter ''September 2015 Yates Memorandum'']. On November 16, 2015, the United States Attorney's Manual was revised to reflect the changes called for in the September guidance. *See* USAM 9-28.000, USAM 4-3.000, USAM 1-12.000.

[2] Memorandum from Sally Quillian Yates, Deputy Attorney Gen. on Prosecutions of Worker Safety Violations to United States Attorneys (Dec. 17, 2015), https://www.justice.gov/enrd/file/800431/download [hereinafter ''December 2015 Yates Memorandum''].

[3] Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 9, 2015, http://src.bna.com/dGz (quoting Sally Q. Yates for the statement: ''Corporations can only commit crimes through flesh-and-blood people.'').

[4] Memorandum from Eric Holder, Deputy Attorney Gen. on Bringing Criminal Charges Against Corporations to Component Heads, United States Attorneys (June 16, 1999) (''The Department is committed to prosecuting both the culpable individuals and, when appropriate, the corporation on whose behalf they acted.''); September 2015 Yates Memorandum, at 4 (''Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.'').

[5] Despite the rarity of such prosecutions, several of the cases discussed in this article involve an individual prosecution in connection with a major workplace safety incident.

The September memorandum sets out a clear ''all or nothing'' approach on obtaining credit for cooperation with a government investigation. It requires corporations to disclose ''complete factual information'' regarding individual wrongdoers to be eligible for any cooperation credit.[6] While it is not new to say that cooperation means ''full cooperation'' and ''full disclosure,'' the messaging of the new guidance may create new tension between corporate and individual subjects. Even though the guidance appears aimed at executive-level personnel, lower level employees who previously cooperated in internal investigations may be more reluctant to do so now that DOJ requires employers to, in effect, turn over employees suspected of wrongdoing.[7] The memorandum further directs that corporate resolutions should not release individuals from criminal or civil liability without the express approval of the relevant United States attorney or assistant attorney general, and that declinations of individual prosecutions must include a documentation of rationale, and be similarly approved.[8]

The September memorandum also encourages increased and early coordination between attorneys in civil and criminal enforcement.[9] This follows what appears to be a trend in the increasing entwinement between the civil and criminal sides of ''parallel proceedings.'' While courts have ruled that the mere fact of coordination between civil and criminal investigators is permissible, they have also held that investigators may not affirmatively misrepresent that an investigation is solely civil and will not result in criminal prosecution.[10] In addition to this prohibition against using civil investigations as stalking horses for criminal enforcement, prosecutors are prevented under FED. RULE. EVID. 6(e) from sharing evidence gathered during grand jury investigations with investigators or attorneys in a related civil investigation unless they satisfy the express exception in Rule 6(e)(3).

Of note, the September memorandum indicates that the government will be seeking monetary remedies in civil cases against individuals to protect the ''public fisc,'' that is to say that there may be efforts to disgorge salaries and bonuses earned as a result of what is claimed to be violative conduct.[11] In the context of environmental enforcement, it remains to be seen whether such an approach would be utilized, but there is precedent for holding individuals civilly liable under the environmental statutes.[12]

The December guidance, however, is likely to be far more significant for regulatory enforcement. First, it is not a new and unformed idea. Instead, it marks the culmination of a more than 10-year effort to expand the scope of criminal en-

[6] September 2015 Yates Memorandum, at 3-4.

[7] Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 9, 2015, *available at* http://src.bna.com/dGz (quoting Sally Q. Yates for the statement: ''We mean it when we say, 'You have got to cough up the individuals.' '').

[8] September 2015 Yates Memorandum, at 5-6.

[9] *Id.* at 4-5.

[10] *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. Apr. 4, 2008).

[11] September 2015 Yates Memorandum, at 2.

[12] *See* generally *United States v. Prod. Plated Plastics, Inc.*, 61 F. 3d 904 (6th Cir. 1995).

forcement related to workplace safety.[13] In the 2006 edition of this review, we noted that ''The Environmental Crimes Section [of the Department of Justice] has made public its intention to partner with the enforcement efforts of the Labor Department's Occupational Safety and Health Administration.''[14] One month after that article appeared, in April 2006, the Environmental Crimes Section (''ECS'') obtained convictions of the Atlantic States Cast Iron Pipe company and four of its officers in connection with claims that they had concealed worker injuries from the Occupational Safety and Health Administration (''OSHA''), made false statements to OSHA, obstructed OSHA investigations and violated the Clean Water Act (''CWA'').[15] The individual defendants faced terms of imprisonment that ranged from 6 to 70 months in federal prison, all of which were upheld on appeal by the Third Circuit.[16]

The Atlantic States case was initiated following public attention to workplace safety issues first identified in a series of New York Times articles and a PBS documentary.[17] The case included use of both the OSH Act, as well as the CWA. The government's lead trial attorney was ECS assistant chief Andrew Goldsmith (now an Associate Deputy Attorney General), who was assisted by then Senior ECS Trial Attorney Deborah Harris (now ECS chief). A little less than a year before the verdict in the Atlantic States case, the New York Times reported that then-ECS chief, David Uhlmann, along with Goldsmith and Harris, were beginning a process to train hundreds of OSHA compliance managers to look for environmental violations.[18] A planned announcement of this effort as an ''initiative'' was apparently cancelled in 2005,[19] or, perhaps, simply delayed for 10 years.

As a sign of the seriousness of the current effort, DOJ has officially transferred to ECS the responsibility for criminal worker safety prosecutions.[20] As noted by Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, and the OSHA lead on the initiative, ECS will be responsible for the prosecution of violations under OSHA, as well as the Mine Safety and Health Administration Act and the Migrant and Seasonal Agricultural Worker Protection Act.[21] Acknowledging the ''expertise in worker safety enforcement'' that ECS has developed over the past decade, DAG Yates stated with force that workplace safety can increase by having prosecutors charge:

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[13] *See below*, Interview with Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety & Health, OSHA.

[14] *See* Steven P. Solow, *The State of Environmental Crime Enforcement: A Survey of Developments in 2014*, Bloomberg Bna, Environment Reporter, at 3 [hereinafter *Environmental Criminal Enforcement in 2014*].

[15] Jury Verdict, *United States v. Atl. States Cast Iron Pipe Co.*, No. 3:03-cr-00852 (D.N.J. Apr. 26, 2006), ECF Nos. 609-14.

[16] *United States v. Atl. States Cast Iron Pipe Co.*, 695 F. 3d 227 (3d Cir. Sept. 17, 2012).

[17] *See, e.g.*, David Barstow & Lowell Bergman, *At a Texas Foundry, An Indifference to Life*, N.Y. Times, Jan. 8, 2003, http://src.bna.com/dGK; *A Dangerous Business* (PBS television broadcast Jan. 9, 2003).

[18] David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. Times, May 2, 2005, http://www.nytimes.com/2005/05/02/politics/02osha.html?_r=0.

[19] *Id.*

[20] December 2015 Yates Memorandum, at 1.

[21] *See below*, Interview with Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety & Health, OSHA.

> . . . other serious offenses that often occur in association with OSH Act violations including false statements, obstruction of justice, witness tampering, conspiracy, and environmental and endangerment crimes. With penalties ranging from five to 20 years of incarceration, plus significant fines, these felony provisions provide additional important tools to deter and punish workplace safety crimes.[22]

In the future, the effect of the two Yates memos may be that individuals will routinely face criminal liability in the wake of workplace accidents. Given the potential for vicarious criminal liability for the actions of employees, employers may begin to offer counsel to employees at the outset of an agency investigation, which may result in fewer employees agreeing to be interviewed. Whether the formal focus on criminal enforcement for workplace accidents will significantly reduce the level of otherwise avoidable incidents remains to be seen. During the past decade, both fatal and nonfatal work injuries have decreased,[23] but the impact on workplace safety will continue to be watched closely.[24]

For more on both the rationale behind and the mechanics of the new initiative, see our interview with Dr. Michaels at the end of this article.

Potential Challenges for the Government in Implementing the Worker Safety Initiative

The historical challenge to workplace safety criminal enforcements has been the absence of felony violations under the OSH Act;[25] to increase the penal punch, prosecutors often charge OSH Act violations with Title 18 or environmental felony offenses, as noted by DAG Yates in her December memorandum. The environmental statutory provision often discussed in this context is Section 112(r) of the Clean Air Act (''CAA''). Section 112(r) was passed as a part of the CAA Amendments of 1990, and the Act's implementing regulations mirror OSHA's previously issued Process Safety Management (''PSM'') regulations.[26]

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[22] December 2015 Yates Memorandum, at 1.

[23] *See* Bureau of Labor Statistics, Census of Fatal Occupational Injuries at 2, *available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0013.pdf (recording a decrease from 4.2 fatal workplace injuries per 100,000 full-time equivalent workers in 2006, to 3.3 fatal workplace injuries per 100,000 full-time equivalent workers in 2014); News release, Bureau of Labor Statistics, Employer-Reported Workplace Injuries And Illnesses—2014 (Oct. 29, 2015), http://www.bls.gov/news.release/pdf/osh.pdf (recording a decrease from 5.0 nonfatal occupational injury and illness incidences per 100 full-time workers in 2003, to 3.2 nonfatal occupational injury and illness incidences per 100 full-time workers in 2014).

[24] *See below*, Interview with Dr. David Michaels, Assistant Secretary for Occupational Health, OSHA (noting that it would be ''fair to say'' that the goal of current worker safety initiative is to provide better outcomes by linking accountability, through criminal enforcement, of those with oversight responsibility for workplace safety in their businesses).

[25] *See* December 2015 Yates Memorandum, at 1 (''The [OSH Act] provides criminal sanctions for three types of conduct impacting worker safety: (1) willfully violating a specific standard, and thus causing the death of an employee; (2) giving advance notice of OSHA inspection activity; and (3) falsification of documents filed or required to be maintained under the OSH Act. Each of these is a misdemeanor punishable by a fine of no more than $10,000 and/or imprisonment for no more than 6 months. Perhaps because these penal ties have never been increased, there are only a handful of reported criminal prosecutions under the OSH Act each year (e.g., three in 2013).''); *see also* David M. Uhlmann, *Prosecution Deferred, Justice Denied*, N.Y. Times, Dec. 13, 2013, at A23, http://src.bna.com/dGZ.

[26] *See* Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7), 61 Fed. Reg. 31,672 (June 20, 1996).

Thus, the CAA 112(r) regulations incorporate the substance of the OSHA PSM program within the framework of EPA's felony criminal enforcement regime.

As discussed in this article last year,[27] the EPA regulations implementing 112(r) are designed to prevent accidental releases of certain flammable and toxic substances.[28] If more than a threshold amount of such substances are present at a facility, the regulations require the development of a Risk Management Program, which must include, among other requirements, a hazard assessment regarding the potential effects of a release, prevention plans with monitoring and training programs, procedures for informing first responders and the public in the event of a release, and a risk management plan (''RMP'') with an overall summary of the regulated substances handled by the facility, the facility's release prevention program and chemical-specific prevention steps, the facility's five-year accidental release history and the facility's emergency response program.[29] In early 2016, EPA proposed amendments to these requirements that would require a third party audit following a reportable incident, the consideration of inherently safer technologies, and increased coordination and information disclosure with local emergency planning committees.[30]

Recent criminal cases under CAA Section 112(r) have mostly focused on two key claims: the failure to have an RMP at a facility required to do so, or the failure to carry out the clear requirements of the Section 112(r) program regulations under 40 C.F.R. Part 68.[31] These cases, however, have not been litigated, and therein lies an issue. Unlike the environmental criminal prosecutions brought during the past 30 years, Section 112(r) cases have not been subject to decades of administrative, civil, and criminal litigation to define critical legal terms.[32] Prosecutors and regulated entities have a sense as to the boundaries where a violation of law could result in criminal liability under traditional environmental provisions. A similar history does not yet exist with respect to criminal enforcement of Section 112(r) cases, which may include efforts to criminally enforce alleged violations of legal standards such as ''recognized and generally accepted good engineering practices'' (''RAGAGEP'').

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[27] *See Environmental Criminal Enforcement in 2014*, Bloomberg Bna, Daily Environment Report, at 4 (May 8, 2015).

[28] CAA Section 112(r)(2)(B) defines these as any ''substance listed under paragraph (3)'' (*i.e.*, CAA Section 112(r)(3)). These listed substances are also set forth in 40 C.F.R. § 68.130, with corresponding thresholds for RMP applicability.

[29] 40 C.F.R. Part 68.

[30] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 81 Fed. Reg. 13,638, 13,640-41. (Mar. 14, 2016).

[31] *See* Plea Agreement, *United States v. Roberts Chem. Co.*, No. 1:14-cr-00094 (D.R.I. June 21, 2014), ECF No. 2 (failure to have an RMP); Plea Agreement, *United States v. Mann Distrib., LLC,* No. 1:15-cr-00029 (D.R.I. Apr. 4, 2015), ECF No. 2 (failure to have an RMP); Plea Agreement, *United States v. Hershey Creamery Co.*, No. 1:08-cr-00353 (M.D. Pa. Sept. 24, 2008), ECF No. 3 (failure to develop and implement the requirements of a risk management program); *compare* Plea Agreement, *United States v. BP Prods. N. Am., Inc.*, No. 4:07-cr-00434 (S.D. Tex. Mar. 12, 2009), ECF No. 126 (the company pleaded guilty to a knowing violation of the CAA Section 112(r) program regulations for failing to establish and implement written procedures to maintain the ongoing integrity of process equipment and to inform contractors of the hazards associated with the process in connection with 2005 explosion at its Texas City Refinery).

[32] *See Environmental Criminal Enforcement in 2014*, Bloomberg Bna, Daily Environment Report, at 2 (May 8, 2015); discussing the civil and criminal cases that established key terms such as a ''point source'' in the CWA and ''waste'' in the Resource Conservation and Recovery Act, and that defined the general intent *mens rea* for knowing violations and the simple negligence *mens rea* for negligence violations).

For example, the CAA Section 112(r) regulations require that ''[i]nspection and testing procedures shall follow [RAGAGEP]''.[33] Extensive OSHA statements and administrative cases suggest that RAGAGEP is not a ''prescriptive standard,'' and is defined by the regulated entity;[34] thus a determination of RAGAGEP may differ between operators or even facilities. Moreover, as discussed in this article last year, the Occupational Safety and Health Review Commission (OSHA's administrative adjudication function), has held that in the context of OSHA, regulators cannot substitute their own post-facto view of RAGAGEP for that of a different approach taken by a defendant.[35]

A different, but related challenge is the inherent nature of CAA Section 112(r) enforcement. A typical CWA criminal case alleges noncompliance with a technical standard set forth in a permit. Establishing that a facility violated its permit limit is generally a binary inquiry, meaning that either the facility did or did not exceed the permit limit or did or did not have a permit to operate. What separates a civil from a criminal enforcement in this context is, among other things, evidence of other so-called indicia of criminality, such as lying, cheating, or fraud. A workplace safety violation is far different. An accident, unlike a permit violation, does not by itself mean that a violation of the law (either criminal or civil) has occurred. Section 112(r) contemplates that accidental releases may occur.[36]

That said, Doug Parker, the former director of EPA's Criminal Investigation Division (''EPA-CID''), has stated that EPA-CID will initiate at least a preliminary criminal investigation into the causes and circumstances of significant environmental or workplace safety incidents.[37] Under the September 2015 memorandum, these criminal investigations are likely to look for potential individual targets.[38] But identifying a single individual whose actions serve as the basis for corporate criminal liability may be difficult.

ECS has shown a willingness to prosecute stand-alone OSH Act cases.[39] There could be a tension between this approach and that laid out by Yates if the gov-

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[33] 40 C.F.R. § § 68.56(d), 68.73(d)(2).

[34] *See, e.g.*, Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6390-91 (Feb. 24, 1992); *Secretary of Labor v. BP Prods. N. Am., Inc.*, No. 10-0637, 2013 WL 9850777, at *16-17 (OSHRC Aug. 12, 2013).

[35] *See Environmental Criminal Enforcement in 2014*, Bloomberg Bna, Daily Environment Report, at 2 (May 8, 2015).

[36] 42 U.S.C. § 7412(r)(1) (stating that ''owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as [the OSHA General Duty Clause] to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to *minimize the consequences of accidental releases which do occur*.'') (emphasis added).

[37] Doug Parker, *Environmental Enforcement*, Panel at the American Bar Association's Twenty-Ninth Annual White Collar Crime Conference (Mar. 4, 2015).

[38] Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. Times, Sept. 9, 2015, http://src.bna.com/dGz (quoting Sally Q. Yates for the statement: ''Corporations can only commit crimes through flesh-and-blood people.'').

[39] *See* Information at 3, *United States v. Tyson Foods, Inc.*, No. 4:09-mj-04001 (W.D. Ark. Jan. 6, 2009), ECF No. 1.

ernment cannot find instances of behavior, such as false statements or obstruction with respect to the accident or the investigation into the accident.[40]

The Prosecutor's Worker Safety Enforcement Toolbox: Corporate Collective Knowledge

The government may turn to the theory of corporate collective knowledge, a legal concept that has been used for criminal enforcement of workplace prosecutions where it is difficult to identify a culpable individual.[41] Under this approach, the government seeks to aggregate knowledge from multiple individuals to form a collective *mens rea* attributable to a corporate entity.[42] Under a theory of corporate collective knowledge, a company could be found guilty of a knowing criminal violation even if no individual employee could be found guilty.[43]

The application of the theory in criminal matters to prove a specific intent *mens rea*, such as willful, is currently rare.[44] However, the government's reliance on this approach surfaced in the prosecution of Pacific Gas & Electric (''PG&E'') in the U.S. District Court for the Northern District of California.[45] PG&E was indicted on one count of obstruction of justice and 27 counts of violation of the Pipeline Safety Act (''PSA'') in connection with a September 2010 rupture on a PG&E gas transmission pipeline in a residential California neighborhood, which led to a fire that killed eight people and injured 58 others.[46]

In a motion to dismiss the indictment, PG&E argued that the government erroneously instructed the grand jury that it could use a standard of corporate collective

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[40] *See infra* discussion of *United States v. Kaluza* where the government was ultimately left to prosecute only a stand-alone CWA misdemeanor and the defendant was acquitted.

[41] Information at 3, *United States v. Tyson Foods, Inc.*, No. 4:09-mj-04001 (W.D. Ark. Jan. 6, 2009), ECF No. 1. The application of the corporate collective knowledge theory was not litigated in this matter; Tyson Foods pleaded guilty to the 29 U.S.C. § 666(e) count set forth in the Information, which was supported by the theory. The Information alleged that the company's ''corporate safety and regional management'' was aware of hazards presented by hydrogen sulfide (''H2S'') gas at a company facility, but failed to implement sufficient steps required by the OSH Act implementing regulations to limit employee exposure to H2S and to provide training and information on H2S hazards. *Id.*

[42] *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987) (the oft-cited case for the collective knowledge theory, in which the First Circuit approved ''collective knowledge'' jury instruction that stated the corporate defendant's ''knowledge is the totality of what all of the employees know within the scope of their employment.'' The application of the corporate collective knowledge theory was not litigated in this matter; Tyson Foods pleaded guilty to the 29 U.S.C. § 666(e) count set forth in the Information, which was supported by the theory. The Information alleged that the company's ''corporate safety and regional management'' was aware of hazards presented by hydrogen sulfide (''H2S'') gas at a company facility, but failed to implement sufficient steps required by the OSH Act implementing regulations to limit employee exposure to H2S and to provide training and information on H2S hazards. *Id.*).

[43] *Id.*

[44] *See, e.g.*, *United States v. Sci. Applications Int'l Corp.* 626 F.3d 1257, 1273-76 (D.C. Cir. 2010) (explaining that in *Bank of New England* the First Circuit ''allowed the jury to infer corporate knowledge of facts through the accumulation of individual knowledge,'' but that ''proof of the 'proscribed intent' in the case 'depended on the wrongful intent of specific employees.' ''); *see also Massachusetts v. Life Care Ctrs. Of Am., Inc.*, 926 N.E.2d 206, 212-13 (Mass. May 19, 2010); *McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1243-44 (11th Cir. June 6, 2013). Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 227 (1997) (finding ''no federal court has ever employed *Bank of New England*'s collective knowledge rule to uphold a conviction in a criminal case'').

[45] Defendant's Motion to Dismiss for Erroneous Legal Instructions to the Grand Jury: Counts 2-28 and the Alternative Fines Sentencing Allegation, at 7-11, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. Sept. 7, 2015), ECF No. 127.

[46] *See* Superseding Indictment, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. July 30,), ECF No. 22.

knowledge to establish the willful *mens rea* required for a violation of the PSA.[47] While the company posited that the theory could be used to prove ''at most'' knowledge, it cited a list of cases that rejected a so-called ''collective intent'' theory, which explained that specific intent (such as willfulness) must be possessed by a least one individual in order to impute that intent to a corporation.[48]

The court denied the motion to dismiss.[49] In doing so, the court relied on a 1974 case out of the U.S. District Court for the Western District of Virginia, which applied a theory of corporate collective knowledge to establish a knowing and willful statutory violation of federal interstate motor carrier regulations.[50] The regulation in question prohibited a motor carrier from allowing a driver to operate a vehicle while the driver was impaired or likely to become impaired due to any cause (including fatigue or illness).[51] The Western District of Virginia found that knowledge of driver impairment could be imputed to the company based on ''knowledge acquired by employees in the scope of their employment.''[52] More specifically, the court found that the company had sufficient information available through its various employees regarding the impairment to support the imputation of knowledge, and that a ''corporate defendant is deemed to have had knowledge of a regulatory violation if the means were present by which the company could have detected the infractions.''[53] Given such knowledge, the Court found that the company's ''hands-off'' approach to compliance with the regulation was sufficient to establish ''willfulness.''[54]

In keeping with this opinion, the court in PG&E adopted the reasoning that ''where a corporation has a legal duty to prevent violations, and the knowledge of that corporation's employees collectively demonstrates a failure to discharge that duty, the corporation can be said to have 'willfully' disregarded that duty.''[55] In connection with the legal duties imposed by the PSA, the court found that this

[47] Defendant's Motion to Dismiss for Erroneous Legal Instructions to the Grand Jury: Counts 2-28 and the Alternative Fines Sentencing Allegation, at 7, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. Sept. 7, 2015), ECF No. 127.

[48] *Id.* at 8-9.

[49] Order Denying Defendant's Motion to Dismiss for Erroneous Legal Instructions, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. Dec. 23, 2015), ECF No. 219.

[50] *Id.* at 8 (citing *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974)) (explaining that Section 322(a) of the Interstate Commerce Act imposes criminal penalties for the knowing and willful violation of any of the regulations imposed by the Highway Administration).

[51] *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974).

[52] *Id.*

[53] *Id.* at 739 (citing *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958); *United States v. Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971)).

[54] *Id.* at 741 (''The Company had an affirmative responsibility not to 'require or permit' drivers to operate their vehicles while impaired. Cognizant of the situation-for, as previously noted, the Company is held responsible for the knowledge acquired by its various employees-it adopted a more or less 'hands-off' attitude towards compliance with the regulation and, in effect, left adherence almost entirely the responsibility of its drivers. Consequently, the court determines that the Government has established beyond a reasonable doubt that the Company did 'willfully' disregard its duty . . .'').

[55] Order Denying Defendant's Motion to Dismiss for Erroneous Legal Instructions, at 8, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. Dec. 23, 2015), ECF No. 219.

rationale was sufficient to support the collective knowledge instruction provided to the grand jury, and to deny the motion to dismiss the indictment.[56]

The reasoning in the PG&E case is especially notable given that it coincided with the announcement of the Worker Safety Initiative. Notably, a criminal violation of 29 U.S.C. § 666(e) of the OSH Act requires a willful state of mind.[57] Using a collective knowledge theory, the government might argue that knowledge held by various low-level employees regarding the violation of a specific safety standard could be imputed to the corporation; the government might argue this knowledge coupled with evidence of a ''hands-off'' approach to compliance with the standard might arguably lead to a determination that the violation was ''willful.''[58]

It remains to be seen whether the P&GE Court's aggregation of both knowledge and intent from various employees will be successful to prove criminal workplace safety violations given that precedent premises corporate liability on discrete and intentional individual acts of disregard, or plain indifference, to safety regulations.[59]

Lessons From the Prosecution of an Individual Corporate Executive: Don Blankenship

In December 2015, former Massey Energy CEO Don Blankenship was convicted by a jury of one misdemeanor count of conspiracy to willfully violate health and safety standards under the Mine Safety and Health Act in connection with his management of the company's Upper Big Branch (UBB) Mine, where an explosion in April 2010 killed 29 workers.[60] Blankenship was found not guilty of one felony count of false statements under 18 U.S.C. § 1001 and one felony count of willfully violating 15 U.S.C. § 78ff[61] and 18 U.S.C. § 2 (aiding and abetting) in connection with public disclosures and SEC filings that allegedly misled investors regarding compliance at the UBB Mine.[62]

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[56] In the words of the court, ''a grand jury indictment will not be dismissed unless the record shows that the conduct of the prosecuting attorney was flagrant to the point that the grand jury was 'deceived' in some significant way,'' such that the prosecutor ''significantly infringe[d] upon the ability of the grand jury to exercise independent judgment.'' *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982) (citation omitted).

[57] ''Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.''

[58] *But see Chao v. Occupational Safety & Health Review Comm'n*, 401 F. 3d 355, 367 (5th Cir. Feb. 21, 2005) (''A willful violation is one committed voluntarily, with either intentional disregard of, or plain indifference to, OSH Act requirements.'') (citation omitted).

[59] *See United States v. Ladish Malting Co.*, 135 F.3d 484, 488, 493 (7th Cir. 1998); *United States v. Dye Const. Co.*, 510 F.2d 78, 81, 82 (10th Cir. 1975).

[60] Jury Verdict, *United States v. Blankenship*, No. 5:14-cr-00244 (S.D.W. Va. Dec. 10, 2015), ECF No. 529 (convicted of one misdemeanor count of conspiracy to willfully violate MSHA under 30 U.S.C. § 820(d) and 18 U.S.C. § 371).

[61] Providing criminal liability for willful violations of securities regulations, or for false or misleading statements in any document required under the regulations.

[62] Indictment, at 15-31, *United States v. Blankenship*, No. 5:14-cr-00244 (S.D.W. Va. Nov. 13,), ECF No. 1.

On April 6, Blankenship was sentenced to 12 months in prison, 1 year of supervised release and a $250,000 fine, which represents the maximum fine and prison term available.[63]

The Blankenship enforcement is important in a number of ways. First, as far as we can determine, it reflects the first time a high-level executive was convicted of criminal counts in connection with a workplace safety statute, specifically the MSHA. The prosecution argued that Blankenship knew of, and condoned, violations at the UBB Mine in favor of increased coal production, evidenced by his receipt of daily safety law violation reports for Massey mines (which identified UBB citations for violations of the MSHA); his involvement in decisions not to hire additional employees to staff safety-related jobs at the UBB Mine; and handwritten notes to UBB Mine executives regarding daily mine operation.[64] The conviction suggests, in part, that corporations may face increased scrutiny as to how they utilize data to identify and prevent the occurrence (or reoccurrence) of HSE violations.

Second, while Blankenship was found not guilty on the two felony counts, the charges appear to be unprecedented with respect to statements Blankenship approved following the explosion. After the incident, Blankenship reviewed and approved the following statement for use in a Massey press release and a Shareholder Statement (Form 8-K) filed by Massey with the SEC:

> We do not condone any violation of MSHA regulations, and we strive to be in compliance with all regulations at all times.[65]

It is common in the wake of serious workplace or environmental incidents to see corporate statements similar to the above. In *Blankenship*, the prosecution alleged that the above statement was rendered false in light of the facts known by the executive regarding compliance at the UBB Mine.[66] Blankenship argued that the statements were mere ''business puffery'' and the terms ''strive'' and ''condone'' were not factual statements that could be proven true or false.[67] In response, the government relied, in part, on the 2015 holding by the U.S. Supreme Court in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, which found civil liability under federal securities law[68] for opinions made in required filings where: 1) the speaker does not sincerely believe the statement or

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[63] Sentencing at 2, *United States v. Blankenship*, No. 5:14-cr-00244 (Apr. 6, 2016), ECF No. 585.

[64] *Id.* A report on the incident that was released by U.S. Department of Labor Mine Safety and Health Administration found that ''[t]he physical conditions that led to the explosion were the result of a series of basic safety violations at UBB and were entirely preventable. PCC/Massey disregarded the resulting hazards. . . . The investigation also revealed multiple examples of systematic, intentional, and aggressive efforts by PCC/Massey to avoid compliance with safety and health standards, and to thwart detection of that non-compliance by federal and state regulators.'' Norman G. Page et al., United States Dep't of Labor, Mine Safety and Health Admin., Fatal Underground Mine Explosion 2 (2010), http://arlweb.msha.gov/Fatals/2010/UBB/PerformanceCoalUBB.asp.

[65] Indictment at 31-32, *United States v. Blankenship*, No. 5:14-cr-00244 (S.D.W. Va. Nov. 13,), ECF No. 1,

[66] *Id.*

[67] *See* Memorandum In Support Of Defense Motion No. 14, Motion To Dismiss Count Four Due To Its Failure To Allege Materially False, Misleading or Fraudulent Statements of Fact, at 1, *United States v. Blankenship*, No. 5:14-cr-00244 (S.D.W. Va. Feb. 6, 2015), ECF No. 102.

[68] 15 U.S.C. Section 77K provides for a civil cause of action with respect to statements that ''contain an untrue statement of a material fact'' *or* statements that ''omit to state a material fact . . . necessary to make the statements therein not misleading.''

a supporting fact is true, or 2) omitted facts are known to the speaker that contradict the statement.[69]

Ultimately, the jury did not find Blankenship guilty of making false or misleading statements with respect to the corporate statement noted above. But this does not mean that a different jury could not find criminal liability on similar facts. In the wake of workplace safety or environmental incidents, corporate executives (and their corporate counsel) must scrupulously evaluate statements of fact or opinion regarding corporate regulatory compliance.

The Possible Impact of Scalia's Passing on the Future of *Chevron* Deference

With Justice Antonin Scalia's passing, the potential for monumental change at the intersection of administrative and criminal law may have also passed. Over time, Justice Scalia had become a vocal critic of the application of *Chevron* deference to dual civil-criminal regulatory statutes. He had recently invited a challenge to such application in the court, overtly hinting that he wished to curtail the rule's reach.[70]

Since the Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[71] administrative agencies have enjoyed deference from courts when it comes to interpreting the laws they administer. As it is now commonly known, that case's eponymous rule—*Chevron* deference—holds that courts should defer to an executive agency's reasonable interpretation of ambiguities in a statute, which the agency has been authorized to administer by Congress, and for which it has developed a technical expertise.[72] For just about as long as *Chevron* deference has existed, U.S. courts of appeal have applied it to laws with dual civil and criminal consequences, thereby giving authority to administrative agencies to interpret statutes that may then be enforced criminally.[73]

While Scalia embraced effectuating congressional intent with respect to according deference in statutory interpretation to the relevant agency in civil matters,[74] he began to question the scope of its application in criminal matters, which im-

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[69] *See* United States' Supplemental Response To Defendant's Pretrial Motions 13 & 14, at 1, *United States v. Blankenship*, No. 5:14-cr-00244 (S.D.W. Va. Mar. 30, 2015), ECF No. 182 (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, No. 13-435 (Mar. 25, 2015)).

[70] *See Whitman v. United States*, 135 S. Ct. 352 () (statement of Scalia, J., respecting the denial of certiorari).

[71] 467 U.S. 837 (1984).

[72] *Id.* (The rationale for *Chevron* deference stems from four beliefs about the administrative state: (1) Congress charges agencies with authority to interpret and enforce certain laws, and thus, the courts should defer to the executive branch where Congress gave it explicit or implicit authority to carry out the law; (2) appropriate deference gives greater accountability to the political process and, therefore, maintains fidelity with the founding fathers' decision to commit law-writing and administering to the political branches; (3) agencies develop expertise and are charged with administering complicated programs that likewise warrant deference from the courts; and (4) as a practical matter, Congress must delegate certain law-making functions to agencies in order to keep pace with the fast-changing developments of modern society.)

[73] *See Whitman*, 135 S. Ct. at 353 (collecting cases).

[74] *See* Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514-17, 521 (discussing the various underpinnings for *Chevron* deference and ultimately favoring the idea that courts should defer to agencies where Congress directs the courts to do so, but also explaining that *Chevron* ''will endure . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs'').

plicate other constitutional concerns. His concerns gained momentum during the past several years, and in *Whitman*, Scalia and Justice Clarence Thomas made clear they would welcome the opportunity to reconsider such a broad grant of deference.[75] As part of a denial of certiorari in *Whitman v. United States*, a common and normally unremarkable action by the court, Scalia took the unusual step of penning a statement respecting the denial, which articulated his concerns with *Chevron* deference.[76]

In *Whitman*, the operative statutory provision was Section 10(b) of the Securities Exchange Act of 1934, which calls for both civil and criminal enforcement. The U.S. Court of Appeals for the Second Circuit had affirmed the defendant's criminal conviction for a 10(b) violation after deferring to an interpretation of the statute from the Securities and Exchange Commission, which is charged with administering the statute.[77]

In his statement to the *Whitman* denial of certiorari, Justice Scalia, joined by Justice Thomas, queried, ''Does a court owe deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement?''[78] This was not the issue on appeal, and so the writ was denied for different, unexplained reasons, but Scalia threw down the gauntlet, stating that ''when a petition properly presenting the question comes before us, I will be receptive to granting it.''[79]

Justice Scalia's challenge in *Whitman* echoed earlier concerns he raised in 1990 in *Crandon v. United States*.[80] In a concurrence to the *Crandon* opinion, Justice Scalia wrote:

> a criminal statute[] is not administered by any agency but by the courts. . . . The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.[81]

Although *Crandon* dealt with a purely criminal statue, Justice Scalia's reasoning identified the conflict that often arises between an agency's expansive interpretation of an ambiguous law, which may work to the detriment of a defendant, and the rule of lenity, which requires courts to resolve ambiguities in criminal statutes to the benefit of the defendant.[82]

In *Whitman*, Justice Scalia returned to an articulation of his concerns, creating a roadmap for potential challenges to *Chevron* deference by clarifying the dangers of deference in the criminal sphere. Justice Scalia explained that not only does

[75] *See Whitman*, 135 S. Ct. at 354.
[76] *Id.*
[77] *Id.* at 353.
[78] *Id.*
[79] *Id.* at 354.
[80] 494 U.S. 152, 177 (1990).
[81] *Id.* at 178.
[82] *Id.* at 171, 175, 177-78.

deference in this situation ignore the rule of lenity, but it would allow for ''federal administrators . . . [to] create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain.''[83] Only Congress may decide what constitutes a crime.[84] Allowing otherwise, Justice Scalia wrote, would ''replac[e] the doctrine of lenity with a doctrine of severity.''[85]

Justice Scalia's passing leaves many things unclear. It was not evident how many other members of the Court agreed with Justice Scalia that *Chevron* deference should not apply to dual civil-criminal statutes. Furthermore, without knowing who will replace Justice Scalia, predicting how his replacement might vote in this regard is all but impossible. But, when the appropriate case and petitioner make their way through the courts, Justice Scalia's framework for curtailing the application of *Chevron* may make an appearance.

BP Individual Prosecutions

A recurring topic in this article has been the state of the prosecutions in connection with Deepwater Horizon, which were finally brought to a close earlier this year, almost six years after the explosion.[86] The Department of Justice elected to have the criminal investigation undertaken by a task force of prosecutors, rather than under the control of ECS.[87] Putting aside the corporate plea agreements, five individuals were charged with violations stemming from the incident or conduct in response to the incident: Anthony Badalamenti, the former Cementing Technology Director for Halliburton Energy Services, Inc.,[88] Kurt Mix, a former engineer for BP Exploration & Production, [89] and David Rainey, the Deputy Incident Commander for BP's response to the incident[90] were all charged with crimes in connection with *the response* to the government's investigation, as opposed to charges related to the explosion itself. The only two charged in connection with the spill itself were Robert Kaluza and Donald Vidrine, well site leaders for the Macondo well.

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[83] *Whitman*, 135 S. Ct. at 353.

[84] *Id.* (''Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to presume that Congress gave agencies—power to resolve ambiguities in criminal legislation.'' (citations omitted)).

[85] *Id.* (quoting *Crandon*, 494 U.S. at 178 (Scalia, J., concurring)). Similarly, Judge Jeffrey Sutton of the Sixth Circuit, a former Scalia law clerk, has recently picked up and expanded upon his former boss's argument in two separate concurrences. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. Jan. 15, 2016) (Sutton, J., concurring and dissenting); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. Nov. 27, 2013) (Sutton, J., concurring). Judge Sutton posited that allowing agencies to create criminal laws through interpretations frustrates the fair-notice objective behind the rule of lenity. *Id.* at 731-32. The face of the statute should communicate exactly what conduct is prohibited, and administrative interpretations, in their many forms and distributions, may be less obvious or available to the public than the statutes. *See id.* Moreover, a lack of sufficient warning could be exacerbated with the changing opinions of changing administrations.

[86] *See Environmental Criminal Enforcement in 2014*, Bloomberg Bna, Daily Environment Report, at 8–9 (May 8, 2015); Steven P. Solow and Anne M. Carpenter, *The State of Environmental Criminal Enforcement: A Survey of Developments in 2013*, Bloomberg BNA Daily Environment Report, at 9–11 (Apr. 11, 2014); Steven P. Solow and Anne M. Carpenter, *The State of Environmental Criminal Enforcement: A Survey of Developments in 2012*, Bloomberg Bna, Daily Environment Report, at 1-2, *see* 13.

[87] Dep't of Justice, Env't & Nat. Res. Div., FY 2014 Performance Budget Congressional Submission 6 (2013).

[88] Information, *United States v. Badalamenti*, No. 2:13-cr-00204 (E.D. La. Sept. 19, 2013), ECF No. 1.

[89] Indictment, *United States v. Mix*, No. 2:12-cr-00171 (E.D. La. May 2, 2012), ECF No. 7.

[90] Indictment, *United States v. Rainey*, No. 2:12-cr-00291 (E.D. La. Nov. 14, 2012), ECF No. 1.

Thus far, Badalamenti, Mix, and Vidrine have each pleaded guilty to a single misdemeanor charge.[91] None of these defendants will serve any prison time.[92] On April 6, 2016, Donald Vidrine was sentenced to 10 months of probation, 100 hours of community service, and $50,000 in restitution for negligent violation of the CWA.[93] Rainey was acquitted on all counts[94] and Kaluza was acquitted February 25, 2016 of the only remaining charge in the government's case.[95] The charges filed against Kaluza and Vidrine initially included 11 counts of involuntary manslaughter, 11 counts of seaman's manslaughter and one count of negligent violation of the Clean Water Act.[96] As noted by Shaun Clarke, co-counsel for Kaluza, his client was charged ''with crimes that could have ended his life in prison.'' However, the seaman's manslaughter charges were subsequently dismissed for lack of jurisdiction under the Outer Continental Shelf Lands Act[97] and the government moved to dismiss the involuntary manslaughter counts in early December 2015 because they no longer believed that they could ''meet the legal standard for instituting the involuntary manslaughter charges.''[98]

At the time of Kaluza's trial, the government's remaining charge was for negligent violation of the Clean Water Act.[99] As noted above, the applicable standard is simple negligence and the jury concluded that Kaluza was not negligent, *i.e.* that a similarly situated rational person would act the same under the circumstances. Notably, the length of time between the incident and the trial in this matter may have adversely affected the government's case, which was tried in one of the areas hardest hit by the impacts of the Deepwater Horizon oil spill. Coming almost six years after the incident occurred (as a result of a stay pending the government's appeal of the dismissal of the seaman's manslaughter counts, which was ultimately affirmed by the Fifth Circuit), Kaluza was acquitted, but the duration of the prosecution undoubtedly took its toll.

Further, an earlier edition of this review addressed the difficulties the government might have in prosecuting the individuals that could have lost their own lives in the incident.[100] This assessment is echoed in our discussion above regarding the difficulty that may arise in assigning individual culpability following an accident. As noted by David Gerger, co-counsel for Kaluza, following Kaluza's acquittal, ''not every tragedy is a crime.''

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[91] Plea Agreement, *United States v. Badalamenti*, No. 2:13-cr-00204 (E.D. La. Oct. 15, 2013), ECF No. 17; Plea Agreement, *United States v. Mix*, No. 2:12-cr-00171 (E.D. La. Nov. 6, 2015), ECF No. 902; Plea Agreement, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Dec. 2, 2015), ECF No. 248.

[92] Judgment, *United States v. Badalamenti*, No. 2:13-cr-00204 (E.D. La. Jan. 21, 2014), ECF No. 25; Judgment, *United States v. Mix*, No. 2:12-cr-00171 (E.D. La. Nov. 6, 2015), ECF No. 907; Plea Agreement, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Dec. 2, 2015), ECF No. 248.

[93] Judgment, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Apr. 6, 2016), ECF No. 452.

[94] Judgment, *United States v. Rainey*, No. 2:12-cr-00291 (E.D. La. June 5, 2015), ECF No. 504.

[95] Judgment, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Feb. 25, 2016), ECF No. 434.

[96] Indictment, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Nov. 14, 2012), ECF No. 3.

[97] Order, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Dec. 10, 2013), ECF No. 118.

[98] Janet McConnaughey and Michael Kunzelman, *Manslaughter Charges Dropped for BP Supervisors in Oil Spill*, Associated Press, Dec. 3, 2015, http://bigstory.ap.org/article/2887cc597e844ceda4dd90a92e95dcac/manslaughter-charges-dropped-bp-supervisors-oil-spill.

[99] Judgment, *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. Feb. 25, 2016), ECF No. 434.

[100] Steven P. Solow and Anne M. Carpenter, *The State of Environmental Criminal Enforcement: A Survey of Developments in 2012*, Bloomberg Bna, Daily Environment Report, at 3-4 (Mar. 15, 2013).

Workplace Safety Cases, 2015

The cases listed below are in various stages of disposition and the information provided in each case summary reflects the status of the matter at the close of the 2015 calendar year.

1. **United States v. Mix**, No. 2:12-cr-00171-SRD-SS (E.D. La. *sentence entered* Nov. 6, 2015); **United States v. Kaluza**, No. 2:12-cr-00265-SRD-MBN (E.D. La. *guilty plea entered* Dec. 2, 2015); **United States v. Rainey,** No. 2:12-cr-00291-KDE-DEK (E.D. La. *acquittal entered* June 5, 2015).

   - Kurt Mix, a former engineer for BP, was convicted of obstruction of justice for deleting text messages with his supervisor regarding the rate of oil released from the Macondo well, which were requested by authorities as part of the investigation into the incident. The district court ordered a new trial in the matter on June 12, 2014, on grounds of juror misconduct.
   - Prior to a new trial, Mix pleaded guilty to one misdemeanor violation of the Computer Frauds and Abuses Act and was sentenced to 6 months of probation and 60 hours of community service.
   - Robert Kaluza and Donald Vidrine were indicted November 14, 2012, for involuntary manslaughter, seaman's manslaughter and Clean Water Act violations in association with their role as Well Site Leaders in the *Deepwater Horizon* disaster in April 2010. Kaluza and Vidrine are alleged to have negligently supervised the testing of the well cementing, including ignoring several signals that the well was not secure.
   - The court dismissed Seaman's Manslaughter charges against both men for lack of jurisdiction, a decision that was upheld by the Fifth Circuit, and the government voluntarily dismissed the involuntary manslaughter counts.
   - Vidrine pleaded guilty to one count of negligent violation of the CWA.
   - David Rainey, Deputy Incident Commander for BP's response to the Macondo well blowout, was indicted November 14, 2012, on charges of obstruction of justice and making false statements regarding estimates of oil flowing from the Macondo well. Rainey is alleged to have manipulated the calculations so that they closely aligned with low estimates of 5,000 BOPD made by NOAA.
   - The court dismissed the obstruction charge on a number of grounds including the fact that Congressional staffers refused to testify. A jury acquitted Rainey of the false statements charge.

2. **United States v. Egan**, No. 1:10-cr-00033 (N.D. Ill. *sentence entered* July 1, 2015).

   - Dennis Michael Egan, the captain of petroleum barge EMC-423, and Egan Marine Corp., the owner and operator of the barge, were con-

victed of negligent manslaughter for a 2005 explosion on board the barge that killed one employee and the negligent discharge of oil for the subsequent spill of oil into the Chicago Sanitary and Ship Canal.

- Egan was sentenced to six months in prison, one year of probation and restitution of $1.4 million to the deceased employee's estate and $5.338 million to the Coast Guard jointly and severally with Egan Marine Corp.
- Egan Marine Corp. was sentenced to three years of probation.

3. **United States v. Black Elk Energy Offshore Operations LLC**, No. 2:15-cr-00197-JTM-KWR (E.D. La. *indictment entered* Nov. 19, 2015).

   - Black Elk Energy Offshore Operations LLC, (''Black Elk'') owner and operator of the oil platform West Delta 32, and Grand Isle Shipyards, Inc., (''GIS'') a construction contractor on the platform, were indicted for three counts of involuntary manslaughter, 8 counts of violation of the Outer Continental Shelf Lands Act (''OCSLA'') and one count of negligent violation of the CWA for an explosion and fire on the platform on November 16, 2012 that killed three contractors of GIS. The explosion occurred when the contractors began welding near a segment of production piping that had not been decontaminated causing the hydrocarbon vapors inside to ignite.
   - Wood Group PSN, Inc., (''Wood Group'') who Black Elk contracted with to operate the platform, and Christopher Srubar, a Wood Group employee responsible for overseeing safety and production on the platform, were indicted on 6 counts of violation of OCSLA and one count of negligent discharge in violation of the CWA.
   - Curtis Dantin, a construction superintendent for GIS who was responsible for supervising the work of the contract employees, was charged with 3 counts of violation of OCSLA and one count of negligent discharge in violation of the CWA.
   - Don Moss, an employee of an engineering firm responsible for coordinating the construction project, was charged with 8 counts of violation of OCSLA and one count of negligent discharge in violation of the CWA.

4. **United States v. Firm Build, Inc.**, No. 1:10-cr-00285-LJO (E.D. Cal. *sentence entered* Jan. 7, 2015); **United States v. Cuellar**, No. 15-10110 (9th Cir. *appeal pending* Mar. 10, 2015).

   - Joseph Cuellar, an administrative manager for Firm Build, Inc., Patrick Bowman, president of the company, and Rudolph Buendia, III, a construction project site supervisor for the company, each pleaded guilty in 2013 to one count of violation of the asbestos work practice standards for their roles in failing to properly dispose of asbestos waste material that was removed by high school students employed by the company.

- Following denial of Cuellar's motion to withdraw his guilty plea, he was sentenced to 27 months in prison, followed by 3 years of probation and $1,801,832.50 in restitution to the employees jointly and severally with co-defendants. Cuellar appealed the denial of the motion to withdraw his guilty plea and the subsequent sentence.
- Bowman was previously sentenced to 27 months in prison and 3 years of probation, and Buendia was previously sentenced to 24 months in prison and 3 years of probation.
- The government previously dismissed charges against the company.

5. **United States v. Weekley**, No. 3:14-cr-00011-TAV-HBG (E.D. Tenn. *sentence entered* Jan. 27, 2015).
   - David W. Weekley, operator of Environmental Consulting and Testing, LLC (''ECT''), devised a scheme to defraud others and obtain money from them by means of false pretenses, representations and promises through his company. He offered to prepare reports of suspected asbestos containing material for businesses engaged in the demolition and/or renovation of buildings that potentially contained the material, but he did not in fact test the samples that he was hired analyze for the presence of asbestos.
   - As a result of his fraudulent business practices, Weekley caused his clients to make false material statements to regulatory agencies that suspected asbestos-containing material had been tested and analyzed, when they had not been.
   - Weekley pleaded guilty to one count and was sentenced to 3 years of probation and a $500 fine.
6. **United States v. Mann Distribution, LLC**, No. 1:15-cr-00029-ML-LDA (D.R.I. *sentence entered* May 6, 2015).
   - Mann Distribution LLC pleaded guilty to knowingly failing to develop a Risk Management Plan as required by the CAA because the company stored more than the relevant quantity of hydrofluoric acid. The violation was discovered during an EPA inspection in June 2009, when the company was found to be storing 46,000 pounds of hydrofluoric acid.
   - The company was sentenced to 3 years of probation and a $200,000 fine.
7. **United States v. Albino**, No. 3:15-cr-00527-CCC (D.N.J. *guilty plea entered* Aug. 19, 2015).
   - Edgardo Albino pleaded guilty to one count of failing to report the release of asbestos to the National Response Center when he learned that material he had instructed employees to remove from a building to the trash area contained asbestos.

8. **United States v. Blankenship**, No. 5:14-cr-00244 (S.D.W. Va. *jury verdict entered* Dec. 3, 2015).

   - Donald Blankenship, former CEO of Massey Energy, was indicted for conspiracy to violate MSHA requirements at the Upper Big Branch-South mine, conspiracy to defraud MSHA, false statements and securities fraud for allegedly knowingly allowing ongoing violations of mine safety standards.
   - The indictment follows an explosion at the mine in April 2010 that resulted in multiple fatalities.
   - Blankenship was convicted of the conspiracy charge but acquitted of making false statements and securities fraud.

Q&A with Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health

1. WHAT PROMPTED OSHA TO UNDERTAKE THE JOINT EFFORT TO DEVELOP CRIMINAL ENFORCEMENT CASES WITH THE DEPARTMENT OF JUSTICE?

A: For many years, the Occupational Safety and Health Administration (OSHA) has worked with the Department of Justice (DOJ) to successfully bring criminal prosecutions of health and safety standards. In the early 2000s, DOJ's Environmental Crimes Section began working to combine the resources of the Justice Department with the Environmental Protection Agency (EPA), OSHA and the Federal Bureau of Investigation (FBI). This effort, the Worker Endangerment Initiative, is aimed at educating officials from each agency about collaboration and coordination, as well as cross referrals for cases. The goal of the Initiative is to prosecute companies, and company officials, who systematically violate both worker safety laws and federal environmental laws.

In early 2015, the Departments of Labor and Justice began exploring a joint effort to increase the frequency and effectiveness of criminal prosecutions of worker endangerment violations. In an effort to prevent and deter crimes that put the lives and the health of workers at risk, the Departments of Labor and Justice entered into a Memorandum of Understanding (MOU) intended to promote the effective prosecution of such crimes.

Under the MOU, the Justice Department's Environment and Natural Resources Division and the U.S. Attorney's Offices will work with the Department of Labor's Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Wage and Hour Division (WHD) and the Office of the Solicitor (SOL) to investigate and prosecute worker endangerment violations. The MOU includes statutes from the Occupational Safety and Health Act (OSH Act), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the Mine Safety and Health Act (MINE Act).

The current MOU is a continuation of the longstanding relationship that OSHA has had with the Department of Justice, and our most recent joint effort demonstrates a renewed commitment by both departments to utilize criminal prosecution as an enforcement tool to protect the health and safety of workers.

2. WHAT WILL BE THE MEASURES OF SUCCESS FOR THIS EFFORT?

A: The criminal provision under the OSH Act generally provides for only misdemeanor penalties. Although we continue to urge Congress to amend these provisions to make clear that harming a worker is as serious a crime as harming a donkey or a fish, the MOU encourages prosecutors to consider utilizing Title 18 and environmental offenses, which often occur in conjunction with worker safety crimes, to enhance penalties for worker endangerment.

We also believe the attention given to this initiative, along with the civil penalty increase that Congress recently enacted, will help deter this type of endangerment. We expect that an increased number of employers will proactively take steps to decrease the risk of prosecution, by reviewing and enforcing their

worker-safety policies and procedures for compliance with worker protection and environmental statutes. This collaboration's success will be seen not only in the prosecutions that occur, but also in those that are avoided because employers feel more motivated to ensure that they provide safe and healthful working conditions to their employees.

3. WHAT ARE THE BIGGEST CHALLENGES TO THE GOVERNMENT'S CRIMINAL ENFORCEMENT INITIATIVE?

A: We're focused on the opportunity this provides to make American workplaces safer, and a big part of our effort includes training our Compliance Safety and Health Officers to better identify and document potential violations in the field. These violations could include Title 18 offenses such as false statements, obstruction, witness tampering, falsifying documents, conspiracy, etc. Officers are also trained to identify other worker/environmental protection statutes such as, the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act and the Toxic Substances Control Act.

4. IS THIS INITIATIVE IN RESPONSE TO PARTICULAR TRENDS IN THE WORKER SAFETY ISSUES THAT OSHA ADDRESSES (I.E. INDUSTRIES INVOLVED, CAUSES OF INJURY, NUMBER OF INJURIES/FATALITIES)?

A: The initiative is a continuation of DOL's commitment to reducing workplace fatalities. We know that workplace injuries and illnesses cause an enormous amount of physical, financial and emotional hardship for workers and their families. Safety and security in the workplace are a shared commitment, and underscore the urgent need for employers to provide a safe workplace for their employees. While most employers try to do the right thing, strong sanctions are an effective tool to ensure compliance with the laws that protect workers. This joint effort will help bring more frequent and effective prosecution of these crimes and will send a strong message to employers who fail to provide a safe workplace for their employees.

5. WILL THE COORDINATION WITH DOJ ON CRIMINAL ENFORCEMENT EFFORTS IMPACT HOW OSHA UNDERTAKES INSPECTIONS? IF SO, HOW?

A: The primary responsibility for OSHA investigators to enforce health and safety standards under the OSH Act will not change. However, based on the additional training that OSHA investigators will receive, they will be able to recognize Title 18 offenses of the U.S.C., potential violations of environmental crimes and develop cases that can be referred to other agencies.

6. THE LA COUNTY DA'S OFFICE HAS ANNOUNCED THE CREATION OF A CRIMINAL ENFORCEMENT TASK FORCE RELATED TO WORKPLACE SAFETY. WILL STATE AND LOCAL EFFORTS SUCH AS THIS BE COORDINATED WITH THE FEDERAL PROGRAM?

A: While state and local efforts are not coordinated directly through this MOU, the Department of Labor, including OSHA, has worked with numerous state and local jurisdictions across the country, including local District Attorneys' offices, in successfully prosecuting at the state level. OSHA will continue its relationship with local law enforcement. For example, we recently cooperated with state prosecutors in Georgia on a case arising out of the death of a worker on the set of the movie, ''Midnight Rider.'' The State achieved two convictions and one guilty plea (two for manslaughter) in that case, and the OSHA citations arising

out of the same incident were subsequently upheld by an administrative law judge.

7. THERE HAS BEEN A GENERAL DECLINE IN WORKER INJURIES AND FATALITIES OVER THE PAST 12 YEARS, ACCORDING TO THE BUREAU OF LABOR STATISTICS. WHAT IS THE IMPACT EXPECTED ON THIS TREND WITH A FOCUS ON CRIMINAL ENFORCEMENT?

A: Strong criminal prosecutions can have a significant deterrent effect. By enforcing all worker safety protection statutes, prosecutors can make enforcement meaningful by charging other serious criminal offenses (Title 18) that often occur in association with OSH Act violations. With penalties for these criminal statues ranging from 5 to 20 years in jail, plus significant fines, these felony provisions provide additional important tools to deter employers from knowingly failing to provide their employees with a safe and healthy work environment.

8. ARE THERE OTHER AGENCIES WITH A NATURAL CONNECTION TO WORKER SAFETY ISSUES THAT COULD JOIN IN THIS EFFORT? IF SO, WHICH ONES?

A: Other agencies are part of this effort, and we look forward to working with them on this initiative. Under the new plan, the Justice Department's Environment and Natural Resources Division and the U.S. Attorneys' Offices will work with the Department of Labor's Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Wage and Hour Division (WHD) and the Office of the Solicitor (SOL) to investigate and prosecute worker endangerment violations. OSHA will also continue to coordinate and collaborate with the EPA's Criminal Investigation Division, the Federal Bureau of Investigation and state and local law enforcement authorities.

9. WOULD IT BE FAIR TO SAY THAT THE CURRENT CRIMINAL ENFORCEMENT INITIATIVE BETWEEN DOL AND DOJ IS, AT LEAST IN PART, AN EFFORT TO EXPAND THAT NOTION OF LINKING RESPONSIBILITY WITH ACCOUNTABILITY TO THE AREA OF WORKPLACE SAFETY? PUT ANOTHER WAY, IS PART OF THE GOAL OF THIS CURRENT INITIATIVE TO PROVIDE BETTER OUTCOMES BY LINKING ACCOUNTABILITY, THROUGH CRIMINAL ENFORCEMENT, OF THOSE WITH OVERSIGHT RESPONSIBILITY FOR WORKPLACE SAFETY IN THEIR BUSINESSES?

A: Yes, that would be fair to say.