

MAYER • BROWN

Environmental Crimes: Increased Enforcement in 2011

Anthony Alexis
Partners, Washington, D.C.

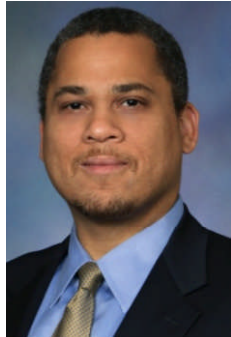
Richard F. Bulger
Partners, Chicago

Michael Volkov
Partners, Washington, D.C.

April 13, 2011

Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

Mayer Brown Speakers



Anthony M. Alexis

Partner, Washington, DC

T: +1 202 263 3450

E: aalexis@mayerbrown.com

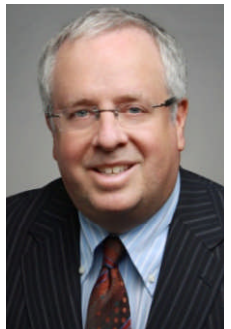


Richard F. Bulger

Partner, Chicago

T: +1 312 701 7318

E: rbulger@mayerbrown.com



Michael Volkov

Partner, Washington, DC

T: +1 202 263 3288

E: mvolkov@mayerbrown.com

Overview

- 1. FY 2010 Enforcement Results*
- 2. What Can We Expect in FY 2011?*
- 3. Legal Risks to Companies and Individuals*
- 4. What Can You Do To Avoid a Criminal Investigation?*

FY 2010: Criminal Enforcement Overview

Criminal Defendants' Penalties

Individuals' Total Jail Sentences: 72 years

Fines And Restitution Total: \$41 million

Courts Ordered Environmental Projects: \$18 million

346

New environmental crime cases opened

11% decrease from 387 in 2009, but the second highest number of new cases since FY 2005

289

Criminal charges brought

45% increase over FY 2009 and the highest number since FY 2005

251

Included charges against at least one individual defendant

(as opposed to a business or corporation)

198

Defendants either pled guilty or were convicted at trial

Environmental Crime Statutes

- ◆ Oil Spills
- ◆ Clean Water
- ◆ Clean Air
- ◆ Hazardous Waste
- ◆ Drinking Water
- ◆ Pesticides and Toxic Substances



Most criminal cases involve Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act (Hazardous Waste)

EPA Criminal Offices, Agents and Cases

- ◆ 200 Special Agents
- ◆ 40 Offices in US: 10 primary locations
- ◆ EPA Special Agents have authority to carry firearms, investigate federal crimes and obtain and execute search and arrest warrants
- ◆ Initiate investigations from EPA leads, state and local agencies, and individuals
- ◆ Evaluate at least 1500 leads each year
- ◆ Work closely with state and local law enforcement



EPA Resources

Agents On-Board:

- ◆ EPA had 206 special agents on-board and assigned to environmental criminal investigative duties
- ◆ Highest level of criminal enforcement staff for the last 3 years
- ◆ EPA plans to hire 50 more agents in the middle of the year



EPA Targeting

Targeting Methodology: EPA will focus efforts on the most important environmental and public health benefits and help deter illegal corporate and individual behavior. EPA will tier its cases primarily focusing on three categories:

- ◆ Human health and environmental impacts (e.g., death, serious injury, human exposure, remediation)
- ◆ Release and discharge characteristics (e.g., hazardous or toxic pollutants, continuing violations)
- ◆ Subject characteristics (e.g., national corporation, repeat violator)



What Can We Expect in FY 2011?

- ◆ Obama Administration wants to **increase** environmental crime prosecutions.
- ◆ **More** EPA criminal investigators, means **more** criminal cases.
- ◆ Cases involving death, bodily injury, or serious harm will always be prosecuted.
- ◆ Increased cases will focus on second and third tier cases: hazardous waste disposal and storage, repeat offenders.
- ◆ DOJ has indicated desire to increase false statement and obstruction of justice charges.
- ◆ Individual prosecutions will continue, and possibly increase, given DOJ emphasis on deterrence.



What about the Impact of the BP Gulf Oil Spill Case?

- ◆ BP gulf oil spill case is a major priority for the Obama Justice Department
- ◆ Recent announcement that supervision of the case was transferred from the Environmental and Natural Resources Division to the Criminal Division may reflect reduction in ENRD resources dedicated to the case.
- ◆ Transfer of case may reflect Justice Department's greater confidence in Criminal Division to investigate and prosecute the oil spill case.
- ◆ If large number of EPA investigators are dedicated to BP oil spill case, EPA may continue its efforts to leverage training and assistance to state prosecutions.



Big Cases v. More Cases

- ◆ Environmental Crimes section is still reeling from loss in W.R. Grace case in 2009 resulting in the acquittal of Grace and 3 executives after a lengthy trial.
- ◆ Prosecutors appear to be focusing on more targeted cases where liability is stronger.
- ◆ DOJ will continue to emphasize individual prosecutions as a strong deterrent.



Legal Risks to Companies and Individuals

- ◆ Environmental crimes divide felonies and misdemeanors by “knowing” or “negligent” standard (Clean Water Act, Clean Air Act, Oil Pollution Act, Resource Conservation and Recovery Act).
- ◆ Individual officers can be held accountable under *respondeat superior* and “responsible corporate actor” doctrines (Clean Water Act and Clean Air Act).
- ◆ Related crimes of false statements, obstruction of justice, perjury, in heavily regulated industries with large amounts of paperwork.



Vicarious Liability – *Respondeat Superior*

Companies are held criminally liable for an unlawful act of one or more of their (high-level or low-level) employees where:

- ◆ The act was committed within the scope of the employee's employment and
- ◆ With an intent, at least in part, to benefit the corporation



Vicarious Liability – *Respondeat Superior*

The “responsible corporate official” doctrine holds that corporate officers and upper management employees may be held criminally liable where the Corporate officer or supervisor:

- ◆ knowingly authorizes or directly participates in the unlawful activity
- ◆ indirectly participates in such activity as a conspirator or aider-abettor
- ◆ has purposely “hid his/her head in the sand” to shelter himself from illegal acts which occur within the scope of his authority (the “willful blindness” theory of criminal liability)



Evidence of Criminal Intent: Easy to Establish

- ◆ Actions taken by officers and/or employees
 - Commit or direct commission of prohibited acts
 - Tampering with monitoring equipment and/or records
- ◆ Supervisors with duty to ensure compliance cannot consciously avoid information which may indicate employee is committing a crime



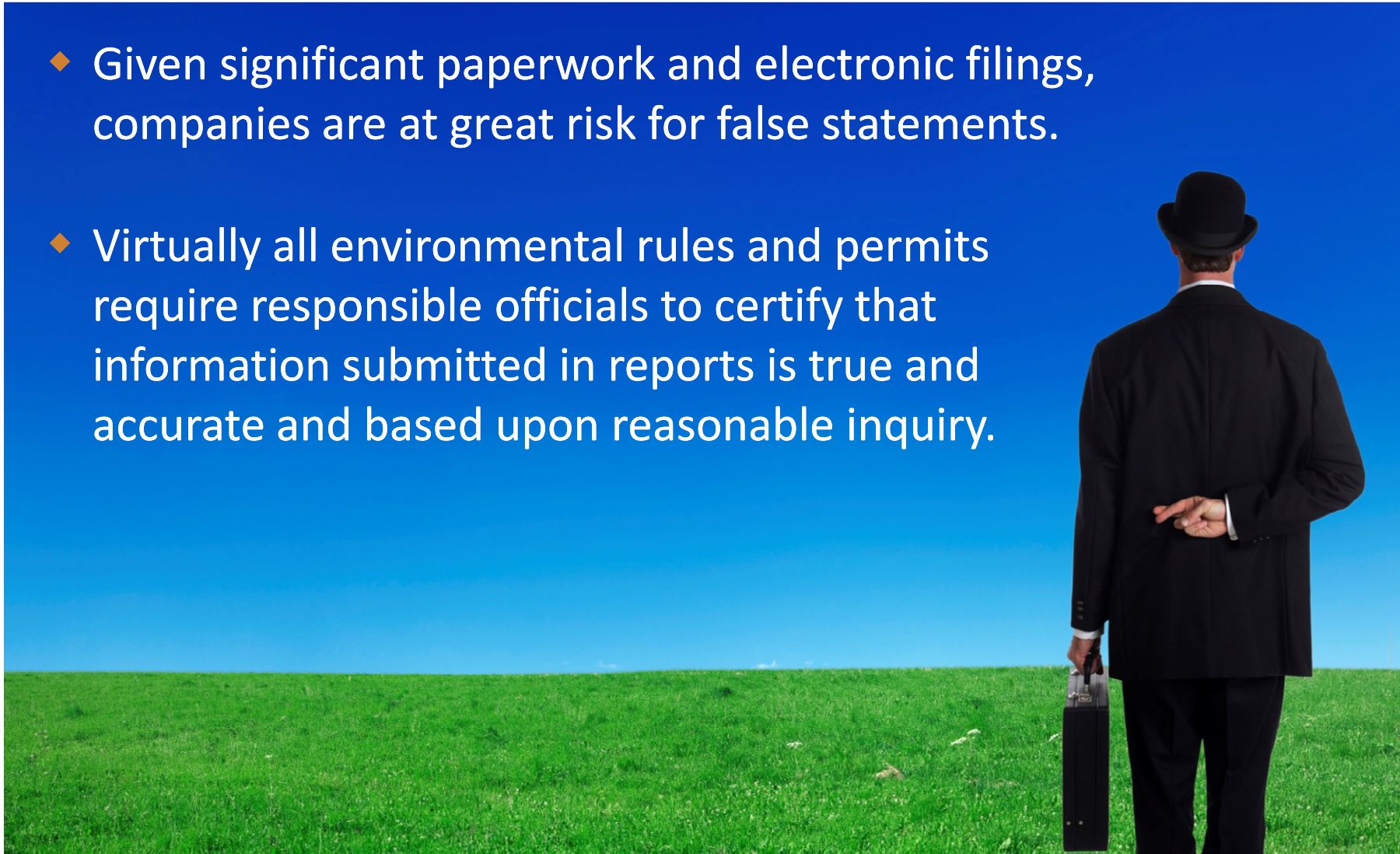
Evidence of Criminal Intent: Easy to Establish

- ◆ Conscious avoidance evidence
 - History of violations, including prior criminal activity on part of employees
 - Failure to audit or review employees responsible for compliance tasks
 - Strong circumstantial evidence of knowledge and failure to correct



False Statements (18 USC 1001):

- ◆ Given significant paperwork and electronic filings, companies are at great risk for false statements.
- ◆ Virtually all environmental rules and permits require responsible officials to certify that information submitted in reports is true and accurate and based upon reasonable inquiry.



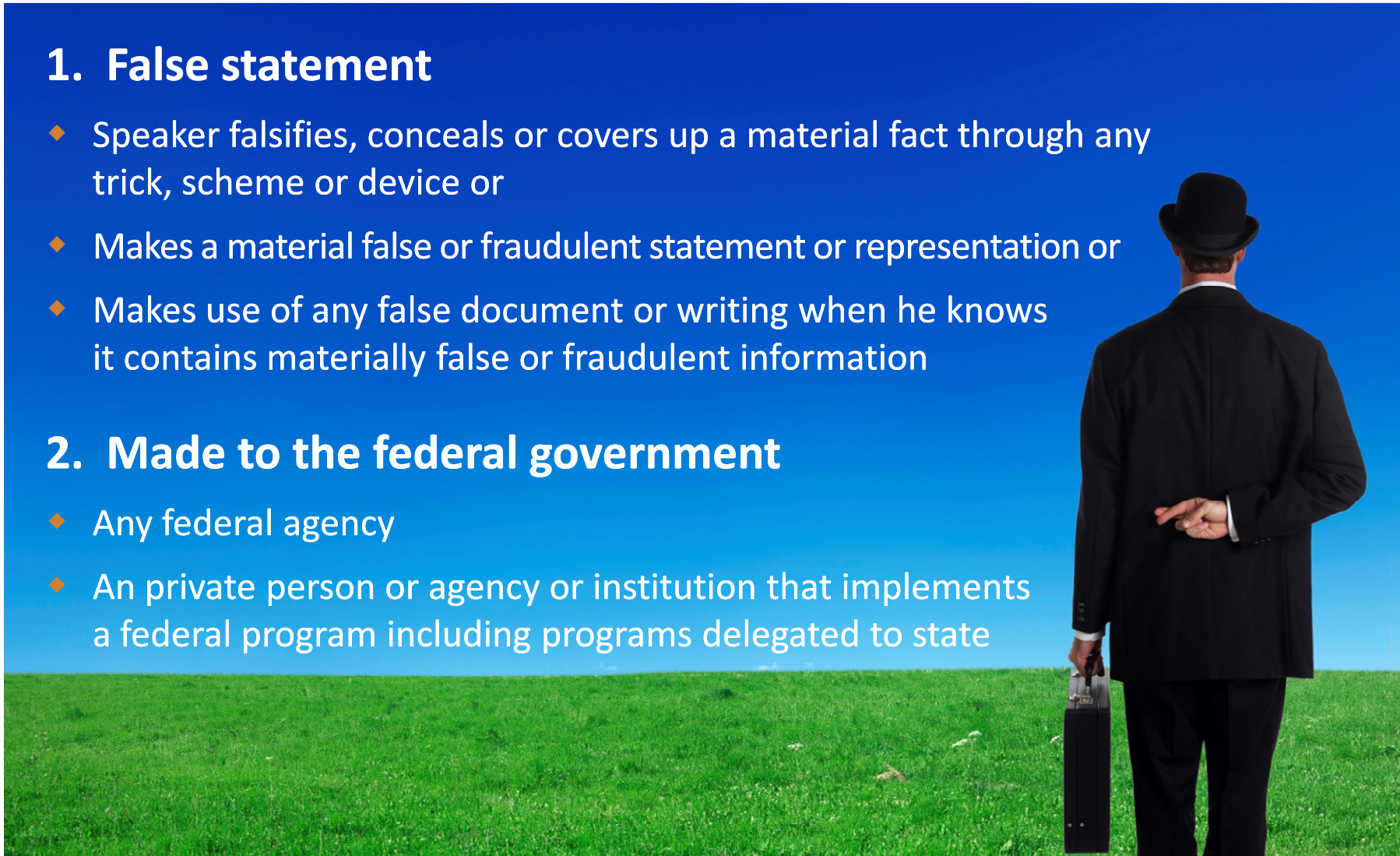
False Statements (18 USC 1001): Elements of the Offense

1. False statement

- ◆ Speaker falsifies, conceals or covers up a material fact through any trick, scheme or device or
- ◆ Makes a material false or fraudulent statement or representation or
- ◆ Makes use of any false document or writing when he knows it contains materially false or fraudulent information

2. Made to the federal government

- ◆ Any federal agency
- ◆ An private person or agency or institution that implements a federal program including programs delegated to state



Significant Investigations and Prosecutions

Oil Pollution Act and Clean Water Act

- ◆ Fleet Management vessel crashed into the San Francisco Bay Bridge and discharged approximately 53,000 gallons of oil into San Francisco Bay. The company pled guilty to a violation of the Oil Pollution Act, false statement and obstruction of justice, and agreed to pay \$10 million fine. Also, agreed to implement enhanced compliance program.
- ◆ BP Deepwater Horizon spill in Gulf and Enbridge Oil spill near Marshall, Michigan are under criminal investigation.



Significant Investigations and Prosecutions

Clean Water Act

- ◆ Mark Guinn, former manager of barge company, sentenced to 21 months in prison and company was fined to \$5.1 million for dumping toxic dredge into California waters.
- ◆ Davis Wire, a California company, was sentenced to pay restitution for \$1.5 million and a \$25,000 fine for discharge of highly acidic wastewater into the Los Angeles Sewer System.



Significant Investigations and Prosecutions

Hazardous Waste

- ◆ Southern Union Company was sentenced to pay \$18 million for illegally storing mercury at a company-owned site in Pawtucket, Rhode Island, including a \$6 million criminal fine and \$12 million in payments for various community initiatives.
- ◆ Rodney Hoffman and Chris Mills sentenced to 18 months and 12 months, respectively, for illegal storage of sulfuric acid and chromic acid used in the cleaning of tank plating



Significant Investigations and Prosecutions

Clean Air Act

- ◆ “Operation Catch-22,” EPA helped investigate and successfully prosecute illegal smuggling of HCFC-22 (hydrochlorofluorocarbon –22).
- ◆ Kroy Corporation of Miami, Florida was sentenced to 5 years probation, a fine of \$40,000, and forfeiture of \$1.35 million, and President of Kroy was sentenced to 30 months incarceration, all for knowingly importing over 900,000 pounds of HCFC–22.



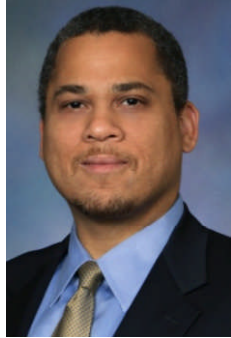
Best Way to Prevent Criminal Investigation:

- ◆ Potential areas for government focus need to be identified in advance to ensure that compliance is targeted to these areas.
- ◆ Internal audits need to be conducted regularly and carefully to develop record of compliance.
- ◆ Sampling techniques and monitoring need to be emphasized in any compliance program.
- ◆ Quick and effective responses need to be documented to any potential problems.
- ◆ Update record-keeping systems in order to avoid potential record-keeping errors which government could use as obstruction evidence or in false statements prosecutions.





Mayer Brown Speakers



Anthony M. Alexis

Partner, Washington, DC

T: +1 202 263 3450

E: aalexis@mayerbrown.com

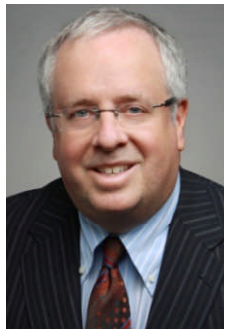


Richard F. Bulger

Partner, Chicago

T: +1 312 701 7318

E: rbulger@mayerbrown.com



Michael Volkov

Partner, Washington, DC

T: +1 202 263 3288

E: mvolkov@mayerbrown.com