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The Florida DEP's Compliance-Assistance Program In Action

(Assisting CVS Pharmacy In Penalty Avoidance
While Generating Jobs For Florida)

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On December 21, 2015 Governor Scott announced¹ that CVS Health (CVS) will be opening a 112,000 square foot facility early this year in Orange County, a move that is expected to bring 500 new jobs to Florida. According to the announcement, “[t]he new facility will support the company’s existing specialty pharmacies by providing customers with disease education; pharmacy and medication counseling; benefits verification; medication dispensing; and coordination of care with multiple healthcare providers.” The deal was a joint effort that was worked out by Enterprise Florida (the State of Florida’s private-public organization dedicated to expanding business in Florida), the Florida, Department of Economic Opportunity, the Orlando Economic Development Commission, and Orange County.

Governor Scott And CVS

Any mention of a deal with a health care provider in Florida at this point in time carries with it a question of whether or not Rick Scott’s history of involvement in the health care industry spurred the activity. Whether or not his prior history had anything to do with the CVS expansion in Florida is unclear. It is well known that he was the CEO of Columbia/HCA, a company that was fined over \$1.5 billion for Medicare fraud. When elected as Florida’s governor in 2010 he was the CEO of Solantic (another health care provider) and he put his interest in Solantic into a blind trust in order to avoid the appearance of any impropriety.² Solantic is now known as CareSpot (CareSpot) Express Healthcare³ and it is partly owned by a private equity underwriter known as Welsh, Carson, Anderson & Stowe (WCAS).⁴

WCAS has investment interests in more than just CareSpot. It is also a shareholder of Universal American Corporation (UAC), which has a director named Thomas A. Scully, who is also a director of Solantic.⁵ Scully is also the former director of the federal Medicare Program,

¹ See, *Gov. Scott Announces CVS Health Will Create 500 Jobs in Orlando* on the Governor’s website at <http://www.flgov.com/2015/12/21/gov-scott-announces-cvs-health-will-create-500-jobs-in-orlando/>

² <http://peureport.blogspot.com/2011/03/gov-rick-scotts-peu-day.html>

³ See, <http://www.modernhealthcare.com/article/20120515/NEWS/305159968>, <http://www.carespot.com/about-us> and <http://www.welshcarson.com/portfolio-companies/healthcare-current>

⁴ <http://peureport.blogspot.com/2011/03/gov-rick-scotts-peu-day.html> and <http://www.fiercehealthcare.com/story/solantic-urgent-care-clinics-snap-100m-investment/2007-07-31>

⁵ <http://www.4-traders.com/UNIVERSAL-AMERICAN-CORPOR-7908721/company/> and <http://quotes.wsj.com/UAM/company-people/executive-profile/41549169> and <http://www.welshcarson.com/portfolio-companies/healthcare-current>

former President George W. Bush.⁶ UAC is a health insurer that also provides managed care products and services.⁷ On December 31, 2010 it merged with CVS to the extent that CVS purchased UAC's Medicare Part D Business.⁸ The merger included Minute Clinic⁹ a subsidiary of CVS in Florida.¹⁰ And Minute Clinic is a Solantic competitor inasmuch as both companies provide healthcare in the state. Nevertheless, both companies have WCAS as a common investor.

The corporate structures do not give us much insight into whether the Governor would see CVS as a direct competitor or whether the two enjoy a relationship that is closer than meets the eye. One thing that we do know, however, is that according to its website, CVS gave \$25,000 to the Republican Party of Florida on July 30, 2014 and this was the highest of all of its contributions to the various states.¹¹ Interestingly, this contribution to the Republican Party of Florida is not listed on Florida's Department of State website.¹² According to its website, CVS also gave \$7,500 to the Republican Party of Florida on November 15, 2013, but this contribution is likewise not listed on the Department of State webpage.

CVS And The Use Of Hazardous Materials

The expansion of CVS Health carries with it additional concerns from an environmental perspective. Although a pharmacy may not be the first place one thinks about when the topic of hazardous waste is raised, the fact is that because of their chemical makeup some pharmaceuticals are considered to be hazardous waste if not handled properly. Chemotherapy drugs as well as more common drugs such as Warfarin fit into this category. Therefore, their handling and disposal is regulated under the Resource Conservation and Recovery Act (RCRA) of 1976.¹³ In addition, CVS and other retail outlets have long provided photograph development

⁶ *See, Lies, Bribes and Hidden Costs*, Salon, http://www.salon.com/2004/04/06/medicare_6/

⁷ <http://www.businesswire.com/news/home/20071003006182/en/Universal-American-Offer-2008-Part-Drug-Coverage>

⁸ <http://cvshealth.com/content/cvs-caremark-purchase-universal-americans-medicare-part-d-business>

⁹ <http://www.businesswire.com/news/home/20080213005277/en/CVS-Caremark-Universal-American-Medicare-Part-Strategic>

¹⁰ <http://www.bizjournals.com/jacksonville/stories/2006/06/26/story7.html>

¹¹ [https://www.cvshealth.com/sites/default/files/Political%20Activities%20and%](https://www.cvshealth.com/sites/default/files/Political%20Activities%20and%20)

¹² <http://dos.elections.myflorida.com/cgi-bin/contrib.exe>

¹³ For a discussion of RCRA and its requirements please see our report on hazardous waste regulation in Florida at http://www.peer.org/assets/docs/fl/1_21_16_Hazardous_Waste_Enforcement_report.pdf

services and until recently these services have involved the use of chemicals that are regulated as hazardous wastes.¹⁴

The fact that these materials are regulated by RCRA means that every CVS store that uses them must follow RCRA requirements. This means, for example, that the materials must be housed in containers that are marked as hazardous waste containers that show when the contents were added to them, they must be inspected regularly and retained for a limited time period, the employees must be trained in how to handle them, emergency protocols must be established and followed and local emergency authorities must be advised that the facility handles such materials. Each facility is subject to enforcement just like any other hazardous waste facility if the requirements are not met.

The CVS Track Record

According to records supplied by CVS to the FDEP and available on the FDEP's Oculus site,¹⁵ the company currently has 645 stores located in Florida.¹⁶ Of the CVS stores on this list, along with 9 other stores that we found that were not on the list, we reviewed records relating to roughly 130 and found that the overwhelming majority had never been inspected until 2006 at the earliest and some had never been inspected at all. And of those that had been inspected we found many discrepancies in the approach taken by the Department's inspectors in the handling of these cases. To begin with, there were 118 inspections (116 different stores, 1 store being inspected 3 times) conducted and in only 3 of the cases were the stores in compliance. Of the 115 remaining cases the Department took enforcement in only 2.

The most egregious case of the 2 in which the Department took enforcement was against a distribution center in Orlando. In 2004 this facility, which at the time was still owned by Eckerd's, was penalized \$105,200.00 (a downward departure from the original \$204,321.00 amount) for numerous RCRA violations found in 2003. The facility was found to be making improper waste determinations. In addition, it was operating without a permit, hadn't properly trained its personnel and was not conducting proper hazardous waste inspections. The facility was again inspected in 2010 at which time 10 violations were found, after which a letter was sent

¹⁴ Newer digital development methods that CVS is converting to in many of its stores makes the use of hazardous waste unnecessary.

¹⁵ <http://depedms.dep.state.fl.us/Oculus/servlet/login>

¹⁶ A listing of those stores may be found in Appendix A, attached hereto. There were, however, 9 CVS stores that we found that are not on this list, making the accuracy of the list somewhat suspect.

to the facility on February 15, 2011 advising the facility that the Department had set the penalties at \$27,499.00. This amount was subsequently reduced to \$19,530.00, which included the Department's costs. But the FDEP allowed the facility to offset \$15,224.00 of the penalty with a P2 (pollution prevention) project. The settlement was memorialized in a short-form consent order on October 6, 2011.

The second case involves a CVS store (#628) in Plantation, Florida. In this case the store was inspected in 2007 and found to have 3 main violations. Those were (a) recordkeeping violations, (b) no modified contingency plan, and (c) a failure to train its employees in management and emergency procedures. As a result of these violations the Department calculated penalties of \$8,577.00, but reduced the amount to \$4,000.00 in a signed consent order.

The Increase In Inspections And Their Findings

Whatever the reason, after Governor Scott took office in 2011 there began, as we noted above, an effort by the FDEP to inspect CVS stores (facilities) throughout Florida. For this, the FDEP deserves credit. But the inspections that were conducted revealed a troublesome reality—a significant portion of them were not in compliance. And the Department's response to finding the violations was equally troubling.

What we found in reviewing the inspections was a clear tendency by the Department to avoid even using the term "violations" or to otherwise label the facility as being out of compliance. There were multiple cases in which in which the inspection that was conducted would label some violations as "Areas of Concern" instead of actual violations. Yet, in other inspections at other facilities the same violation would be correctly labeled as a violation. Such was the case at facilities e.g. Stores 3746 (unmarked container listed as AOC and not violation) and 3255 (failure to label container listed as AOC). In four cases every violation was listed as an AOC even though they were all violations (Store 3400—12 AOCs, Store 3626—11 AOCs, Store 3237—9 AOCs and Store 1103—7 AOCs¹⁷). And in one case (Store 2669) the inspection report was changed in order to limit the number of violations. An email exchange on June 24, 2013, described the situation:

Day 50 for this CVS is June 25 (tomorrow). I received the e-mail today from the facility representative. I asked Pam if this sufficient

¹⁷ The Department inspector's title in this instance was given as Environmental Consultant, such is the degree to which the Department is going in order to show the facilities that it is business friendly.

for RTC – and after talking with Vicky, she determined it is sufficient for RTC purposes. I coordinated with Pam to make changes to the report to increase chances of sending it out by Day 50 (normally, I would discuss with you first).

The most sustentative (sic) change is that we are not treating the SRU as a "triple AOC (open, not dated, not labeled)." We are going to mention it in the report body, and not list this as an AOC due to RTC info in the e-mail.

The facility was officially listed as having no violations and only 2 AOCs (the accumulation start date was not listed on a container and the facility failed to file exception reports).¹⁸ A variation on this approach appeared with the inspection of Store 3685 in which two violations were found (failure to make arrangements with local authorities and failure to assign an emergency contact or to have an up to date Modified Contingency Plan) but they were marked as AOCs instead. In addition, the inspector notified the facility¹⁹ that she would change the type of inspection to a Compliance Assistance Site Visit instead of a Compliance Enforcement Inspection since the violations were “minor.”

We also found situations in which violations were described in the narrative of the inspection report (as in Store 2669, above), yet at the end of the report not all violations would be listed and the facility would be marked as in compliance. This was the case with Store 3103 (2 violations in narrative—labeling and manifest—but only 1 listed), Store 2731 (labeling violation in narrative but only 1 listed), Store 2760 (labeling violation in narrative but only 1 listed), Store 3106 (no emergency arrangements made with local authorities according to narrative but no violations listed), Store 3296 (5 violations were only listed in the conclusion and treated as recommendations. No violations were officially listed), Store 3371 (No violations listed, but 4 violations described in inspection narrative), Store 3433 (No violations listed but multiple violations described in inspection narrative).

Generally, in almost all of the cases in which violations were found the final report would state that the facility was “in compliance” even though the inspection found violations and those violations were not corrected until the Department brought them to the facility’s attention. With Store 3486, for example, the FDEP received records after the inspection and the inspection report

¹⁸ RTC means “return to compliance” as used in this context.

¹⁹ Email dated September 10, 2012

thus indicated that the store was in compliance. There were some reports that indicated that the facility was now accumulating over 2.2 pounds of hazardous waste, thus making it a LQG,²⁰ but no indication in the report as to whether or not the facility met the LQG requirements.²¹ In each of those cases the report stated that there were no violations while in some there were AOCs listed.

We also found that in at least one case the Department advised CVS months in advance of its schedule for conducting inspections at its stores. For example, after an inspection at Store 1077 the inspector notified CVS by email on August 23, 2013 that “[she would] be visiting the following stores prior to October 1st; #7980, #4415, #3118, #4472, #5172.”

As the chart in Appendix B indicates, the inspection reports filed by the Department showed 199 violations that were actually called violations and 101 violations that were listed as areas of concern. And as noted above in some cases the narratives to the inspection reports revealed yet additional violations that were neither listed as violations or as areas of concern. Of the 115 facilities in which violations were found only 1 received even a warning letter (a precursor to initiating formal enforcement). One other received a noncompliance letter. The facility that received the warning letter (Store 0628) ultimately negotiated a consent order with the Department. This was the only consent order entered into by the Department with CVS as a result of the inspections at these 115 stores.

Another State Takes A Different Approach

CVS was also dealing with authorities in the State of California during the time that the above inspections at the FDEP were taking place. California, like Florida, found multiple hazardous waste violations in CVS stores throughout the state. Ultimately this prompted the Office of the District Attorney in Ventura County, California²² to file a multi-count complaint against CVS alleging (1) disposal of hazardous waste at a point not authorized, (2) unauthorized transportation of hazardous waste, (3) violation of hazardous waste handling and storage requirements, (4) violations of hazardous materials release response plans and inventory laws and (5) violations of unfair competition laws.²³ The complaint was filed on April 12, 2012 and

²⁰ Large Quantity Generator

²¹ Stores 3631, 4344, 4357, 7980 & 8383

²² In cooperation with the district attorney offices of multiple other California counties

²³ This 5th count alleges that CVS gained an unfair advantage over its competition by virtue of its practices of violating RCRA regulations in California.

assigned Case Number 56-2012-00415450-CU-MC-VTA. The complaint (a copy of which is attached at Appendix C) specifically alleges (See, paragraph 25, Complaint) a host of RCRA violations much like what the FDEP had found during its inspections in Florida. While the violations are not all identical (as is to be expected) they are substantially similar to the violations found in Florida. Essentially it was a pattern of failing to properly handle hazardous waste, failure to keep proper records, failure to properly train and failure to make proper emergency response arrangements with local authorities. California alleged that the multiple violations threatened the public health and safety of the environment.

Court records also reflect that California settled the case with CVS more or less simultaneously with the filing of the complaint. The settlement is attached hereto (Appendix D) and reflects that California demanded, and got, a permanent injunction against CVS requiring all of its 902 stores in California to abide by RCRA requirements together with an assessment of civil penalties and costs totaling \$13,750,000.00.²⁴

The FDEP Approach

The interesting thing about the California litigation is that it was taking place at the same time as most of the FDEP inspections that we reviewed. Consequently, it cannot be said that CVS wasn't aware of the problems that it had with its stores. Indeed, as the CVS documents on Oculus demonstrate, the company was well aware that it needed to bring uniformity to the handling of hazardous wastes throughout Florida. A CVS memo dated July 5, 2007 instructed its stores to adhere to RCRA requirements. According to a description that CVS sent to the FDEP on December 1, 2010, it also conducted a formal course with its employees in order to increase compliance. These events occurred well before most of the inspections²⁵ that we reviewed. In one case involving Store 1103 in Clearwater the FDEP mentioned in its documentation that it was closing its file after learning that the company was reorganizing its environmental policies. This followed an inspection on April 7, 2007 that found 7 violations that it chose to label as AOCs. Yet, the problems that we found with these stores were still occurring well after that

²⁴ \$11,000,000.00 of the total amount was for penalties, \$2,000,000.00 was for environmental projects and the balance was for reimbursement of costs to the state.

²⁵ Only two of the inspections predated the July 5, 2007 memo. A total of 8 of the inspections predated the December 1, 2010 submission of course data to the FDEP.

inspection. It cannot be reasonably claimed that CVS wasn't aware of the regulatory requirements. The California litigation and its own documents say otherwise.

The processing of hazardous waste cases in the files that we reviewed typically followed a routine in which the inspector would notify the facility of the violations and (if not already completed) request that they be corrected. The interesting aspect of this process however was that the requests often were made by the FDEP district office directly to Troutman Sanders LLP, the Atlanta law firm that represents CVS in the defense of its environmental cases. On the other hand, the FDEP's own Office of General Counsel (OGC) was hardly ever involved in any aspect of the enforcement case. One gets the impression that the entire process was taking place without the OGC's knowledge.

Conclusion

The Department's approach to this company's multiple violations of hazardous waste regulations seems to reflect an attitude by personnel that their job was not to act as though FDEP is a regulatory agency. Instead, the purpose of conducting inspections seems to have had the limited purpose of documenting each store's status for no other reason than to notify the store of the extent to which it was meeting the RCRA requirements. It was an approach that clearly seems to have been dictated by a senior management team whose main goal apparently was not the enforcement of federal and state laws, but rather, to ensure that CVS would be seen as a compliant organization, which it wasn't.

We also considered the possibility that the FDEP had used a similar approach to that employed by California, i.e. negotiate a global settlement addressing all of the violations that had been found in the company's facilities. If such a settlement existed it was not memorialized in writing, at least according to the FDEP which has denied the existence of any documents that might show such a resolution.²⁶

Overlooked in the FDEP's approach towards this company is something that the California regulators saw all too clearly. When a company rather habitually violates laws such as RCRA it does not do so in a vacuum. The multiple violations significantly raise the risk of harm to the company's employees, the public and to the environment. And in addition, this type of conduct creates a distinct and unfair economic advantage over other companies who exercise

²⁶ The agency confirmed this in a January 25, 2016, response to a public records request submitted by Florida PEER to the FDEP asking for any such documents that would evidence such a settlement.

good faith in attempting to comply with those same laws. The FDEP needs to decide whether or not it will work to uniformly enforce the laws such as RCRA in a manner that does not reward bad behavior, or whether it will continue to look the other way by acting as though it is merely another corporate division of some companies. It cannot do both.

One also cannot help but ask the question of whether or not CVS in December 2015 would still have chosen to expand its Orlando site if the FDEP had chosen to enforce the very statutes that it is supposed to enforce (and through federal grant money and other tax dollars is paid to enforce). The timing of CVS' contributions to the Republican Party of Florida is certainly interesting, inasmuch as they were made during the time when the inspections were occurring. But we have seen no files in Oculus that would suggest a quid pro quo. Perhaps this is to be expected, since the files in Oculus are directly related to inspections made by front line employees who would not be a part of such agreements were they to exist. We hope that the two issues were not connected and urge appropriate authorities to confirm the same.

Last but not least, in our previous report concerning hazardous waste enforcement in Florida we questioned the Department's claim that 96% of its facilities were in compliance.²⁷ This number is highly suspect for the reasons that we discussed therein. But as we have noted above, the Department's policy now appears to be that it will label a facility as being in compliance if the facility cleans up its act after the inspector arrives on the site to conduct the inspection. If that is the case the true percentage of facilities that are "in compliance" is all but impossible to calculate and the Department's claims of amazing results should be seen for what they are—false and misleading.

²⁷ See, report, page 6
http://www.peer.org/assets/docs/fl/1_21_16_Hazardous_Waste_Enforcement_report.pdf