About the Contributors

Each contributor listed below practices within ARNOLD & PORTER'S WHITE COLLAR DEFENSE & INVESTIGATIONS PRACTICE GROUP*

MARCUS A. ASNER *(Co-Chair, White Collar Defense & Investigations Practice)* is a former Assistant U.S. Attorney for the Southern District of New York (SDNY), where he was Chief of the Major Crimes and Computer Hacking/Intellectual Property (now known as Complex Frauds) unit for two years, and served in the Public Corruption unit. He has extensive experience handling investigations and prosecutions involving alleged violations of the Foreign Corrupt Practices Act (FCPA), and cases involving cross-border disputes and investigations, allegations of money laundering, art fraud, healthcare fraud, securities fraud, cybercrime, data breaches, tax fraud, public corruption, and environmental crime.

AMY JEFFRESS *(Co-Chair, White Collar Defense & Investigations Practice)* served as the Justice Department (DOJ) Attaché to the U.S. Embassy in London; as Counselor to the Attorney General; and as a federal prosecutor and Chief of the National Security Section in the U.S. Attorney's Office for the District of Columbia. Ms. Jeffress represents clients in criminal defense, national security, government contracts, and compliance matters. She conducts internal investigations and advises companies and individuals on a range of white collar criminal matters, including export enforcement, FCPA, classified information, the Foreign Agents Registration Act (FARA), and mutual legal assistance and other international law enforcement issues, including extradition and INTERPOL notices.

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* At Arnold & Porter, we are client-driven and industry-focused. Our lawyers practice in more than forty areas across the litigation, regulatory, and transactional spectrum to help clients with complex challenges stay ahead of the global market, anticipate opportunities, and address issues that impact the very value of their businesses. Our global reach, experience, and deep knowledge allow us to work across geographic, cultural, technological, and ideological borders, to offer clients forward-looking, results-oriented solutions that resolve their U.S., international, and cross-border legal needs. Additional information is available on the firm's website.

John P. Barker is a former official of the U.S. Department of State (DOS) who served as Deputy Assistant Secretary for Nonproliferation Controls and previously as Deputy Assistant Secretary for Export Controls. He advises on national security matters, including export controls and trade sanctions administered by the U.S. Department of State under the International Traffic in Arms Regulations (ITAR), the U.S. Department of Commerce under the Export Administration Regulations (EAR), the Office of Foreign Assets Control (OFAC) at the U.S. Department of the Treasury, and compliance with the FCPA. Mr. Barker helps companies and institutions establish compliance plans and obtain export authorizations, and provides representation in enforcement proceedings. He also represents companies before the Committee on Foreign Investment in the United States (CFIUS) in reviews required under the U.S. Exon-Florio statute.

John P. Bellinger *(Co-Chair, Global Law and Public Policy Group)* held several senior presidential appointments in the U.S. government prior to joining Arnold & Porter, including as the Senate-confirmed Legal Adviser to the DOS and Senior Associate Counsel to the President and Legal Adviser to the National Security Council (NSC) at the White House in the George W. Bush Administration. He represents individuals, corporations, and sovereign governments in litigation in U.S. courts and before international institutions, and has extensive experience in U.S. foreign relations litigation. He also advises clients on public international law matters, as well as national security legal and policy issues.

Daniel Bernstein represents companies and individual clients in internal investigations, government enforcement actions, and complex litigation. Mr. Bernstein counsels organizations on ethics and compliance programs and has extensive experience handling cross-border matters related to the FCPA and other anti-bribery regulations. He has guided clients through investigations by DOJ, U.S. Securities and Exchange Commission (SEC), and other federal, state, and self-regulatory authorities, obtaining declinations and other favorable resolutions.

James W. Cooper has had a sterling roster of high-ranking government positions, including Deputy Chief of the Criminal Division, U.S. Attorney's Office, District of Columbia; Trial Attorney, Public Integrity Section, DOJ; and Counsel to then-Senator Joseph R. Biden, Jr., U.S. Senate Committee on the Judiciary. Mr. Cooper represents his clients in government and internal investigations and criminal and civil litigation at the trial and appellate level on a wide array of issues, violations of the antitrust cartel prohibitions, the Bank Secrecy

Act and anti-money laundering requirements, government fraud, and environmental crime prohibitions.

Lee M. Cortes, Jr. is the former Executive Assistant United States Attorney for the District of New Jersey, the third highest-ranking position in that office. As a member of the Office's senior leadership team, Mr. Cortes was responsible for all criminal, civil, civil rights, and appellate matters, and directly oversaw the Office's most significant white collar enforcement actions. During his fourteen-year tenure as a federal prosecutor, Mr. Cortes also served as the Chief of the Health Care Fraud Unit, in which he oversaw criminal and civil investigations of healthcare fraud and violations of the Anti-Kickback Statute (AKS) and False Claims Act (FCA). With more than two decades of experience as a trial and investigations attorney, Mr. Cortes has handled and supervised a broad range of white collar matters, including those involving healthcare fraud, cybercrime, securities fraud, public corruption, FCPA violations, mortgage and bank fraud, tax evasion, money laundering, identity theft, national security, and civil rights violations. Mr. Cortes focuses his practice on white collar defense, government and internal investigations, trial work, crisis management and strategic response, FCA investigations and defense, and commercial litigation.

Sean Curran represents companies and individuals in complex cross-border investigations, before various UK prosecutorial and regulatory agencies, including the Serious Fraud Office (SFO), Crown Prosecution Service (CPS), Financial Conduct Authority (FCA), Financial Reporting Council (FRC), European Anti-Fraud Office (OLAF), as well as DOJ. Mr. Curran leverages his significant trial experience across varied forums to defend executives against allegations of fraud, bribery, and corruption, and routinely handles post-conviction matters relating to confiscation, company fines, and enforcement under the provisions of the Proceeds of Crime Act 2002.

Deborah A. Curtis, former Deputy General Counsel for Litigation and Investigations at the CIA and top national security prosecutor, represents clients in complex government and internal investigations and critical national security matters. Her senior government leadership experience spans several agencies, including the CIA, the Commerce Department's Bureau of Industry and Security (BIS), and DOJ. An accomplished trial lawyer, Ms. Curtis is most often recognized for her expertise and creativity in solving seemingly insurmountable classified disputes, including in some of the most prominent national security investigations and litigations in recent history. Prior to joining the firm, she oversaw all litigation and investigations as an advisor to senior CIA leadership and led all national security

corporate and individual prosecutions for export control and sanctions violations.

John M. Fietkiewicz is a former Counsel to the U.S. Attorney for the District of New Jersey, where he handled all aspects of federal white collar investigations and prosecutions from the grand jury stage through trial, or other resolution. He has also served as Deputy Chief and Senior Litigation Counsel during his tenure at the U.S. Attorney's Office. With over three decades of experience, Mr. Fietkiewicz has handled, both personally and as a supervisor, white collar matters involving securities fraud, corporate fraud, healthcare fraud, official corruption, bank fraud, tax fraud, cybercrime, the FCPA, defense contracting, environmental crimes, civil rights, and money laundering, as well as blue collar cases involving narcotics distribution, property crimes, and violent crimes.

Paul J. Fishman *(Head, Crisis Management & Strategic Response Practice)* is a former U.S. Attorney for the District of New Jersey, where he was responsible for all criminal and civil matters involving the federal government, including healthcare fraud, cybercrime, national security, securities, corporate, and bank fraud, and the FCPA. At Arnold & Porter, Mr. Fishman counsels academic institutions, public and private companies, healthcare systems, and non-profit corporations, as well as their executives, audit committees, and boards of directors, on complex and sensitive issues. He has significant experience handing internal and government investigations, white collar criminal defense, commercial litigation, corporate compliance and governance, and appellate advocacy.

Andre Geverola is the former Director of Criminal Litigation in the Antitrust Division of DOJ, where he supervised all criminal antitrust litigation matters across the country and helped formulate critical policies and practices concerning leniency, deferred prosecutions, and litigation. Earlier in his career, Mr. Geverola served as a trial attorney and Assistant Chief in the Antitrust Division's Chicago office. He leads Arnold & Porter's antitrust cartel investigations practice and focuses on antitrust and government investigations.

Judge Joseph Greenaway brings to his clients a unique breadth and depth of experience, having recently joined the firm as a former judge on both the U.S. Court of Appeals for the Third Circuit and the U.S. District Court of New Jersey. He represents Fortune 500 companies and individuals in FCA investigations, complex commercial litigation and appeals, and arbitrations and is often called upon by clients to provide high-level case strategy. Recognized for his scholarship and his public service, Judge Greenaway's accolades include the

Columbia University Medal of Excellence, the William J. Brennan, Jr. Award from the Association of the Federal Bar of New Jersey, the Garden State Bar Association's Distinguished Jurist Award, Columbia College's John Jay Award, and the Thurgood Marshall College Fund Award of Excellence.

Kathleen Harris *(Head, London Office)* served as a Senior Civil Servant heading the Fraud Business Group, Head of Policy at the SFO, and Senior Strategic Policy Adviser in the Attorney General's Office, and also held positions in HM Revenue & Customs (HMRC), and the Revenue and Customs Prosecutions Office (RCPO) in the United Kingdom. She has extensive knowledge of and experience in matters involving internal and external investigations and prosecutions under the full range of potential criminal offences and sanctions.

Ryan Hartman leverages his extensive experience in private practice and as a former executive and lawyer at a multinational company to represent his clients in regulatory investigations involving ABAC, trade sanctions, and data privacy matters; complex civil litigation, including securities and M&A cases; and on governance, compliance, risk management, and strategic transactions. He has represented companies spanning the energy, technology, financial services, healthcare, and telecommunications sectors in over 100 lawsuits, arbitrations, government and internal investigations, regulatory proceedings, and disputes, defeating tens of billions of dollars in potential liability.

Daniel M. Hawke served as the Director of the SEC's Philadelphia Regional Office and as the first chief of the Division of Enforcement's Market Abuse Unit. Over the course of his sixteen years in the Enforcement Division, Mr. Hawke led numerous significant SEC enforcement investigations and worked closely with federal criminal law enforcement authorities in many high-profile parallel proceedings. In private practice, he represents public companies, investment advisers, broker-dealers, and other financial institutions in responding to regulatory and enforcement inquiries, conducting internal investigations, and advising on corporate governance, internal control, whistleblower, and compliance issues.

Valarie Hays is an experienced trial lawyer and former Assistant U.S. Attorney for the Northern District of Illinois. Ms. Hays represents companies and individuals in government inquiries and complex commercial litigation in federal and state courts. She also conducts corporate internal investigations and advises clients on the execution of their compliance programs across a broad range of industry sectors, including healthcare, financial services, retail, and oil and gas. Ms. Hays' clients also hire her to conduct sensitive investigations.

Suneeta Hazra, a former prosecutor and experienced trial attorney, brings nearly two decades of government experience to represent individual and corporate clients in internal and government investigations and complex litigation and advise on compliance matters. Ms. Hazra leverages her experience as a former Chief of the Criminal Division for the United States Attorney's Office for the District of Colorado to defend clients being investigated for healthcare and other complex fraud and *qui tam* actions involving the AKS and FCA. She has significant trial experience across numerous state and federal courts as both a prosecutor and in private practice.

David Hibey leverages his extensive experience as a former trial attorney at DOJ to represent clients in a wide range of white collar, government contracts, and complex litigation and investigations. Mr. Hibey has successfully represented his clients in government investigations involving the FCA, antitrust, securities, pharmaceutical, transportation, and procurement matters. He has significant experience representing clients in high-profile congressional investigations and inquiries and in enforcement proceedings before DOJ and SEC. He also represents defense contractors in bid protest matters and conducts all facets of FCA investigations.

Murad Hussain is a trial and appellate attorney who represents clients in government investigations, the FCA and other complex civil litigation, criminal prosecutions, and internal compliance reviews. He defends life sciences innovators, healthcare providers, and government contractors facing allegations of healthcare fraud, procurement fraud, kickbacks and bribery, and regulatory non-compliance. He also advises multinational organizations on FARA compliance and related DOJ inquiries. Across his practice, Mr. Hussain has successfully defended clients in federal criminal jury trials, won dismissals of FCA lawsuits, and secured declinations and no-fault settlements for individuals and entities under investigation by Main Justice, U.S. Attorney's Offices, the U.S. Department of Health Office of Inspector General (HHS-OIG), and state Attorneys General.

Giselle Joffre is a former federal prosecutor for the U.S. Attorney's Office for the District of Massachusetts, who brings substantial experience in handling government investigations of corporations and executives, complex commercial litigation, and sensitive internal investigations. Ms. Joffre has represented corporate executives and corporations facing criminal healthcare fraud and civil FCA investigations and litigation, with a focus on the life sciences sector. On behalf of corporations and as an independent investigator, she has also led investigations into employee claims of sexual harassment, race and gender discrimination, and workplace bullying.

KAITLIN KONKEL focuses on cross-border white collar and national security matters. Ms. Konkel represents clients in government and congressional investigations, post-indictment criminal proceedings, and complex civil litigation, including appeals and amicus curiae submissions. She also advises clients on FARA, foreign-official and diplomatic immunity, INTERPOL Red Notices, international extradition, and other international law enforcement issues.

MICHAEL KROUSE is a former Assistant U.S. Attorney in the Southern District of New York, where he led investigations and prosecutions involving allegations of financial fraud, public corruption, healthcare fraud, terrorism, sanctions evasion, and money laundering, as well as alleged violations of the FCPA. Mr. Krouse represents individuals and companies in government investigations, white collar criminal and regulatory defense matters, internal investigations, and complex commercial litigation. Prior to his tenure at the Southern District of New York, Mr. Krouse was in private practice, clerked for two federal judges, and served as a Judge Advocate in the U.S. Marine Corps.

TIRZAH LOLLAR *(Co-Chair, False Claims Act Investigations & Defense Practice)* focuses on white collar defense and government investigations, including trial work. She has defended clients in government investigations and other proceedings related to the FCA, government contracts and procurement fraud, the FCPA, and similar global anticorruption legislation, tax fraud, and antitrust offenses. Ms. Lollar regularly represents clients before significant enforcement authorities, including DOJ, SEC, and the Defense Criminal Investigative Service.

TAL MACHNES represents clients on white collar and national security matters, with a focus on U.S. export controls and trade sanctions administered by OFAC. Ms. Machnes handles a broad range of government and internal investigations, licensing and delisting matters, and both civil and criminal sanctions enforcement proceedings, including before DOJ. She counsels clients across a wide array of industries on complex regulatory issues in these and other areas, including rapidly changing developments involving Russia/Ukraine, Iran, Cuba, and other U.S. national security priorities.

CRAIG MARGOLIS *(Co-Chair, False Claims Act Investigations & Defense Practice)* is a former Assistant U.S. Attorney for the Eastern District of Pennsylvania, where he prosecuted Medicare/Medicaid and private payor healthcare fraud and abuse, identity theft, tax fraud, labor organization embezzlement, and environmental crime, among other areas. Mr. Margolis focuses on government and internal investigations, complex litigation, and compliance, with a particular

emphasis on FCA claims, government contracts procurement fraud, healthcare fraud, tax and securities fraud, political corruption, and the FCPA across a wide range of industries.

Manvin S. Mayell is a former Assistant U.S. Attorney for the Southern District of New York, where he prosecuted federal FCA cases, including those brought by relators alleging healthcare fraud and fraud in the financial markets. He is a recipient of the Director's Award for Superior Performance as an Assistant U.S. Attorney. Mr. Mayell has conducted numerous internal investigations involving the healthcare, defense contracting, and financial industries and has litigated numerous FCA cases for global corporations, including those in the healthcare and defense contracting areas.

Aaron F. Miner has extensive experience handling white collar and regulatory litigation concerning securities and financial transactions for public companies, major financial institutions, and individuals. Mr. Miner has led trial and appellate teams in state and federal courts across the country and has coordinated complex internal investigations on behalf of companies, boards, and special committees in connection with stockholder demands, DOJ, SEC, and other regulatory and law enforcement investigations.

John N. Nassikas, a former Assistant U.S. Attorney for the Eastern District of Virginia, represents companies and individuals in internal investigations and government enforcement proceedings before DOJ, CPSC, SEC, and Congress, and in parallel litigation. Mr. Nassikas advises his clients on matters relating to consumer protection, financial, healthcare, and government contracts fraud, global anti-corruption, and antitrust. He has extensive experience representing clients in widely publicized, high-stakes congressional investigations and inquiries.

Jane Norberg served as the Chief of the Office of the Whistleblower of the SEC and leverages her vast experience on SEC rules and processes and whistleblower issues to help her clients navigate the critical intersection of enforcement, regulation, and compliance. She represents public and private companies, financial institutions, individuals, and investment advisors on sensitive whistleblower and other complex matters, including internal and government investigations. Ms. Norberg previously has served as a Special Agent in the U.S. Secret Service.

Evelina J. Norwinski served as an Assistant Federal Public Defender in Washington, D.C. She regularly counsels clients on corporate and regulatory compliance, internal investigations, and ethics issues, and represents clients in a range of criminal and civil

matters in federal and state courts and in administrative proceedings. Ms. Norwinski has particular experience helping her clients develop and implement strategies to address counterfeit or contraband versions of products, including collaborative engagement with law enforcement agencies, litigation strategies, and longer-term regulatory or legislative strategies.

Meredith Osborn, former Chief Trial Deputy at the City Attorney's Office for San Francisco, is an accomplished litigator and trial lawyer with extensive civil and criminal litigation experience. During the course of her career, Ms. Osborn has served as first chair in four jury trials and one bench trial as a prosecutor and defense counsel, tried seven cases in state and federal court, written thirty appellate briefs, and argued thirteen cases before the Ninth Circuit Court of Appeals. Prior to her position as Chief Trial Deputy, she served as Assistant U.S. Attorney for the U.S. Attorney's Office for the Northern District of California and as Enforcement Attorney for the Consumer Financial Protection Bureau (CFPB).

Paula Ramer represents major pharmaceutical and medical device companies in criminal and civil government investigations involving allegations of healthcare fraud, including off-label promotion, AKS violations, FCA violations, and other issues related to sales, marketing, and pricing practices. Ms. Ramer also conducts internal investigations and litigates cases brought under the federal FCA and state laws, including state false claims acts and deceptive trade practices statutes. She also has developed fraud and abuse training for clients and advises companies on their compliance programs.

Soo-Mi Rhee (*Anti-Corruption Practice Lead*) is a trusted advisor to major corporations facing high-stakes criminal and regulatory investigations. Ms. Rhee has extensive experience in major anti-corruption, compliance, national security, export controls, and sanctions matters. She regularly represents clients in FCPA enforcement proceedings before DOJ, SEC, OFAC, and other government agencies, and counsels clients regarding foreign investment restrictions administered by CFIUS.

Michael A. Rogoff *(Co-Chair, False Claims Act Investigations & Defense Practice)* is a former Assistant U.S. Attorney for the Southern District of New York and recipient of the Director's Award for Superior Performance. Recently named "Government Investigations Attorney of the Year" by *LMG Life Sciences*, Mr. Rogoff represents numerous companies, directors, and senior executives in internal investigations, regulatory proceedings, and grand jury investigations and litigations involving securities and accounting fraud, antitrust violations, and healthcare fraud.

Debra E. Schreck represents clients in complex investigations and litigation matters across a wide range of industries. She has extensive experience representing major pharmaceutical and medical device companies in criminal and civil investigations involving allegations of healthcare fraud, including violations of the Food, Drug, and Cosmetic Act, the AKS, and the FCA. She also defends clients in federal and state white collar litigation, including actions brought under the *qui tam* provisions of the federal FCA and state statutes. Ms. Schreck also advises clients in connection with large-scale internal investigations, internal training, and regulatory and compliance issues.

Christian D. H. Schultz, former Assistant Chief Litigation Counsel in the SEC's Division of Enforcement, leverages his trial skills and deep knowledge of SEC rules and processes to represent public and private companies, financial institutions and accounting firms, and individuals in regulatory investigations, complex financial and securities litigation, SEC and PCAOB enforcement actions, and white collar matters. During his ten years at the SEC, Mr. Schultz investigated potential violations of the federal securities laws and represented the SEC in enforcement actions in federal court and administrative proceedings.

Christian D. Sheehan represents clients across a range of industries with internal and government investigations and litigation. Mr. Sheehan focuses his practice on FCA defense and has represented clients in high-stakes FCA matters involving government contracts and procurement, disaster recovery work, pharmaceutical pricing and sales, and the AKS. He has successfully represented clients at every phase of an FCA matter. He has extensive experience representing his clients in parallel administrative proceedings, including before the Armed Services Board of Contract Appeals. Mr. Sheehan also has significant experience litigating issues relating to attorney-client privilege and work product protection in the context of internal investigations.

Sara L. Shudofsky, who served as Chief of the Civil Division of the U.S. Attorney's Office for the Southern District of New York, focuses on financial, healthcare, and contract fraud investigations, including under the FCA and the AKS; environmental litigation; challenges to the design and construction of buildings under the Americans with Disabilities Act and the Fair Housing Act; and general defense litigation. During her earlier, sixteen-year tenure in the Civil Division, Ms. Shudofsky served as Chief of the Civil Rights Unit, Deputy Chief of the Civil Division, and Chief Appellate Attorney.

Craig A. Stewart is the former Chief Counsel to the U.S. Attorney for the Southern District of New York, the third highest-ranking position in that office, in which he advised the U.S. Attorney on complex significant matters. Mr. Stewart also served as an Assistant U.S. Attorney in both the Civil and Criminal Divisions for eleven years, during which he held a number of supervisory positions, including Chief Appellate Attorney, Deputy Chief of the Criminal Division, and Chief of the Narcotics Unit. Mr. Stewart focuses his practice on representing companies and individuals in investigations by federal and state prosecutors as well as defending his clients in civil and appellate litigation.

John Tan leads Arnold & Porter's Asia-wide investigations and anti-corruption practice and brings a cross-disciplinary and cross-cultural perspective to his work. He counsels companies on FCPA and compliance investigations, responds to government inquiries, and develops compliance programs. Resident in Shanghai, Mr. Tan previously served as the China Regional Compliance Director for Pfizer. He is fluent in Mandarin.

Kevin M. Toomey *(Head, Financial Services Practice)* represents banks and nonbank financial services companies, along with their boards of directors, executives, and senior management, in a wide range of enforcement, regulatory, compliance, and governance matters before federal and state banking agencies, DOJ, CFPB, Financial Crimes Enforcement Network (FinCEN), and OFAC. Mr. Toomey regularly represents clients in investigative proceedings, including navigating internal and government investigations, and advises clients on issues relating to the Bank Secrecy Act and anti-money laundering requirements, consumer protection, and state and federal banking laws and regulations.

Baruch Weiss is a former Assistant U.S. Attorney for the Southern District of New York. He served later as the Assistant General Counsel for Enforcement at the Department of Treasury, where, among other things, he supervised lawyers for the OFAC. Mr. Weiss also served as Acting Deputy General Counsel, supervising the agency's 1,400 attorneys, and Associate General Counsel at the Department of Homeland Security, where he was responsible for criminal, immigration, customs, transportation security, and other matters. Mr. Weiss focuses his practice on white collar, national security, and complex civil litigation, which includes representing clients in criminal and SEC securities fraud investigations; homeland and national security investigations; OFAC enforcement, delisting, and licensing matters; anti-kickback investigations of the pharmaceutical industry; public corruption matters; FCPA investigations; administrative and criminal

immigration enforcement actions against employers; and criminal tax evasion cases.

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- Alexis Archer
- Junghyun Baek
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- Kirby Mayo
- Aidan Mulry
- William Omorogieva
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- Elliot Rosenwald
- Avivi Tamuz
- Kerry Walsh

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Introduction

Emerging Trends in Corporate White Collar Criminal Enforcement—An Overview

A generation ago, corporations—even in regulated industries—allocated scant resources to legal compliance. There were few treatises or seminars to guide an attorney whose corporate client suspected wrongdoing by an officer or employee. There were no U.S. Department of Justice policy statements or amnesty programs from which to judge the risks and benefits of voluntary disclosure of a company's violation of law. The Organizational Sentencing Guidelines lay in the future, an unheralded and unforeseen revolution in organizational sentencing philosophy.

As a general rule in those days, organizations got off lightly in criminal cases. From the corporation's perspective, a corporate guilty plea was a bargaining chip to exchange for dropping or reducing charges against the corporation's officers or employees. After all, in the 1980s, antitrust fines were a fraction of the up to $100 million penalty now prescribed by statute for corporations, the Foreign Corrupt Practices Act was not robustly enforced, the modern False Claims Act (FCA) was only just taking shape with its 1986 amendments, and, of course, Sarbanes-Oxley was decades away.

Today, the landscape is dramatically different. In such areas as securities fraud, antitrust, healthcare fraud, cybercrime, and environmental law, corporate exposure to criminal and civil liability has increased by leaps and bounds. Highly publicized and far-reaching scandals—from the Enron and Worldcom collapses of the early 2000s, to the financial crisis of 2008 and its expansive fallout, to the opioid epidemic, to recent cryptocurrency blowups—generated substantial pressure on Congress, the U.S. Department of Justice (DOJ), the U.S. Sentencing Commission, state and local prosecutors, and judges to impose heavier corporate penalties. Corporations have paid billions annually to resolve FCA cases and find themselves in the crosshairs of the DOJ and U.S. Securities and Exchange Commission (SEC) regarding foreign subsidiaries' allegedly corrupt payments to foreign officials. Looking forward, one legacy of the COVID-19 pandemic has been to multiply the FCA investigations and lawsuits (and related criminal prosecutions) that challenge the representations made by companies seeking pandemic relief funds and how those companies

put that money to use. As the digital world continues to evolve, companies' cybersecurity protocols and use of artificial intelligence also will be under the microscope. And regardless of how federal enforcement trends ebb and flow, state attorneys general—and the private lawyers they often retain on a contingency-fee basis—continue to launch investigations, lawsuits, and prosecutions under state consumer protection, antitrust, and other quasi-criminal laws.

New theories of criminal liability proliferate. Under the "responsible corporate officer" doctrine, for example, prosecutors in some jurisdictions had succeeded in obtaining convictions under regulatory statutes of organizational officials who had no actual knowledge of or causal relationship to violations, but whose positions of responsibility gave them the power to prevent the violations. Over time, a similar doctrine developed in federal criminal antitrust prosecutions and in prosecutions of pharmaceutical executives.[1] Lately, governments also have invoked state nuisance laws against companies alleged to have sold products that resulted in the nation's epidemic of opioid addiction.[2]

In addition to increasing the scope of corporate liability, the trend of white collar criminal law has enhanced the power of prosecutors to punish corporate offenders or—in lieu of criminal punishment in the traditional sense—to impose onerous deferred prosecution agreements. These agreements can require that a company impose remedial measures, pay a monetary penalty, admit wrongdoing, and submit to an independent compliance monitor or examiner. Additionally, federal prosecutors have increasingly required that at the end of a deferred prosecution time period, corporate executives must certify that the company has complied with the terms of the agreement. While the number of deferred prosecution agreements have declined since their height several years ago, and some courts have rejected them, they remain an important tool for prosecutors to invoke against companies, including more severe punishments for "recidivist" companies that violate the agreements' terms. In addition, intrusive supervision of corporate compliance activities by the government is routine for pharmaceutical companies settling healthcare fraud marketing charges.

In the 1980s, corporate criminal fines generally were capped by practice or statute at several hundred thousand dollars or less. Today,

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1. *See, e.g.*, United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990); *see also* discussion *infra*, chapter 12.
2. State of Oklahoma *ex rel*. Hunter v. Purdue Pharma L.P., Case No. CJ-2017-816, Judgment After Non-Jury Trial (Dist. Ct. Okla. Cleveland Cnty. Aug. 26, 2019).

with the use of multiple-count indictments as well as the Criminal Fines Enhancement Act (which bases sentences on the amount of gain to the offender or loss to the victim), a corporation's net worth appears to be the only limit on a prosecutor's ability to seek and impose criminal fines.

But for every stick there is a carrot. Corporations can obtain leniency if they have engaged in vigorous self-policing and, notwithstanding that an employee broke the law, have disclosed the violation and cooperated with the government. The "Principles of Federal Prosecution of Business Organizations" provide the criteria for federal prosecutors' corporate charging decisions and emphasize these very considerations: self-policing and full disclosure with cooperation.[3] Subsequent DOJ pronouncements regarding corporate cooperation and compliance elaborate on these principles,[4] such as Deputy Attorney General Lisa Monaco's October 2021 memorandum that announced the creation of a Corporate Crime Advisory Group and reinstated her predecessor Sally Yates' 2015 guidance "that to qualify for any cooperation credit, corporations must provide to [DOJ] all relevant facts relating to the individuals responsible for the misconduct."[5] And DOJ's Criminal Division has even detailed its viewpoint on what constitutes an effective compliance program with its "Evaluation of Corporate Compliance Programs" document.[6] More recently, DOJ has embraced a department-wide voluntary self-disclosure policy, where a company will presumptively receive a declination of prosecution if it voluntarily and timely discloses misconduct to the government, fully cooperates, and remediates the wrongdoing. Through these actions, the government has effectively drafted corporations into its enforcement efforts. Thus, in addition to devoting its resources to deterring and detecting lawbreakers, the government now spends time and effort seeking to modify the behavior of companies to become *de facto* law enforcers.

The result has been a proliferation of self-policing corporate compliance programs in almost every area of business and commerce. These programs involve ongoing risk assessments, auditing and monitoring efforts (including increasingly sophisticated data-based review

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3. Justice Manual § 9-28.000 *et seq.*
4. *See infra* chapters 1 and 2.
5. Memorandum from Lisa Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies at 1, 3 (Oct. 28, 2021), www.justice.gov/dag/page/file/1445106/download.
6. U.S. Dep't of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (Mar. 2023), www.justice.gov/criminal/criminal-fraud/page/file/937501.

and testing of compliance procedures), due diligence on third parties tailored to their risk profiles, employee "hotlines" to report suspected or actual violations of law or questionable business practices, internal investigations, corporate ombudsmen departments, more vigorous screening of applicants for employment, and severe discipline of employees who violate a company's compliance standards.

Beyond upholding a company's values, there are tangible benefits to implementing and continuously working to improve such compliance programs:

1. Their existence can be used to persuade prosecutors that criminal charges are inappropriate and unnecessary;

2. They may qualify the company for more lenient treatment in the event of a criminal conviction;

3. They may enable the company to discover misconduct and self-report the misconduct, thus making the company a stronger candidate for a prosecution declination, a substantially reduced fine, and/or the avoidance of a corporate compliance monitor; and

4. Most importantly, they may succeed in preventing or deterring criminal conduct by employees that might otherwise ensnare the company in the legal and public relations morass often reported in the front or business pages of the newspapers.

At the same time, companies have encountered significant difficulties with their compliance programs. For example, as recommended by the Organizational Sentencing Guidelines, corporations have established hotlines for employees to report information on illegal activities. Some employees, however, have used the hotlines to make false charges against rivals. Other employees have reported suspicions of wrongdoing that, upon investigation, proved to be without merit. When some of these employees were laid off, they filed lawsuits claiming they had been retaliated against for reporting questionable activity. Companies need to be constantly vigilant in this area.

Another potential obstacle to effective compliance programs arises from government programs rewarding whistleblowers, thereby creating potential disincentives for employees to use their employer's internal reporting procedures. The FCA, for example, provides bounties of up to 30% of the government's recovery to private parties who bring allegations of fraud to the government. The SEC, Commodity Futures Trading Commission (CFTC), and U.S. Department of the Treasury have similar rules awarding whistleblowers up to 30% of the monetary penalties recovered in a successful judicial or administrative action for violation of federal securities, commodities, and anti-money

laundering laws. Aiming to fill gaps left by these existing programs, DOJ's Criminal Division implemented its own whistleblower program, offering a percentage of forfeiture recoveries if criminal charges result from the whistleblower's information. The potential for large monetary awards may incentivize corporate employees to report information to the government before they use internal reporting procedures. DOJ and the SEC, recognizing the potential harm to corporate compliance programs, included provisions designed to discourage whistleblowers from bypassing internal reporting procedures while at the same time preserving a whistleblower's eligibility for an award. The FCA, however, imposes no such requirement. Both the FCA statute and Dodd-Frank protect whistleblowers from retaliation, and the SEC cautions companies against entering into severance agreements with employees or otherwise giving them instructions that might deter them from contacting the government about alleged improprieties. *See* chapter 6.

The longstanding compliance tool of internal investigations has both benefits and disadvantages. On the positive side, they are an effective means for management to learn quickly the facts about potential illegal conduct by employees and to formulate an appropriate legal strategy. An internal investigation can reassure the public, stockholders, creditors and enforcement agencies that the company is addressing its problems. An internal investigation can identify and recommend internal controls, monitoring procedures, and audit strategies to prevent a similar occurrence.

But the risks of internal investigations must be recognized. Both for the company and the investigator, an internal investigation can be likened to running an obstacle course on a minefield. Some investigations have uncovered wrongdoing that was not originally targeted and proved more controversial than the events that prompted them in the first place. More than one internal investigation has uncovered evidence that later was used to convict the corporation, which had not disclosed the violation voluntarily to government agencies. Indeed, in one famous example, the prosecution's trial exhibits included the "confidential" and "privileged" report of the investigation, questionnaires filled out by employees concerning their knowledge of bribes and slush funds, and notes taken by attorneys during interviews of company employees.[7]

An internal investigation that uncovers criminal violations by corporate employees—not yet known to enforcement agencies—leaves a company with a difficult choice if there is no statute or regulation

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7. *See* United States v. Southland Corp., 760 F.2d 1366, 1371–72, 1375–77 (2d Cir. 1985).

requiring disclosure of the violation. If the company opts for disclosure of an employee's violation of law for which the company can be criminally prosecuted, it will be handing to the prosecutor the evidence of its guilt. But voluntary disclosure may avoid criminal charges, result in a reduced fine, or result in regulatory leniency.

Taken together, these trends have transformed the practice of corporate criminal representation for both inside and outside counsel. In today's enforcement climate, every action by a company in dealing with suspected criminal conduct by its employees, implementing a compliance program or responding to a grand jury subpoena can set in motion a chain of events that may determine its ultimate fate at the hands of a prosecutor, jury, or judge.

As an example, in conducting an internal investigation, the company's attorneys must advise employees whom they interview that the attorneys represent only the company, who will ultimately determine whether to maintain confidentiality or to disclose the information to a third party (typically, law enforcement agencies). The failure to give such advice could result in creation of an attorney-client relationship between the investigating attorneys and the employee, and courts have criticized incomplete warnings in this regard.[8] In turn, that relationship could limit the company's ability to disclose voluntarily the employee's violations of law to government agencies.

White collar defense counsel can maximize the opportunity to obtain leniency for, or even avoid prosecution of, their corporate and individual clients through strong advocacy of factual and legal defenses available in the event of a trial. Put another way, defense counsel should consider openly and persuasively identifying for the prosecutors the weaknesses in their factual and legal theories. Ultimately, this tactic requires balancing risks and rewards. On the one hand, such disclosure of defenses well in advance of trial may give the prosecution an opportunity to fill holes in its case. On the other, identifying flaws in the prosecution's case may be defense counsel's only leverage to obtain a plea or deferred prosecution agreement, or even to avoid charges altogether. Even when deployed, this tactic will succeed only to the extent that such weaknesses exist; therefore, from the outset defense counsel must thoroughly and creatively develop aggressive defenses that will at least shake a prosecutor's confidence in his or her case. Even if unsuccessful at deterring a prosecution, such defenses certainly will be needed for a trial. Marshaling such defenses is no less important in civil enforcement investigations, where aggressive advocacy in response to the government's theories

8. *See, e.g.*, *In re* Grand Jury Subpoena, 415 F.3d 333, 340 (4th Cir. 2005).

of liability and damages may lead to a declination or more favorable settlement terms.

Today, a corporation whose employees have violated criminal law will fall into one of two camps. The first camp includes companies that did not cooperate in a sufficiently timely and thorough manner, and then receive severe and painful punishment at the hands of prosecutors armed with the variety of law enforcement tools summarized above. The second camp, whose ranks are growing, includes companies that receive amnesty, a declination of prosecution, or other lenient treatment because they first adopted defensive measures, such as compliance programs to deter and detect criminal violations, and then responded swiftly and carefully to such violations. How a corporation conducts its internal investigations often dictates the camp into which it falls.

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As never before, in giving advice on corporate criminal and regulatory issues, a company's in-house counsel must have at least a working knowledge of the many issues that surround modern criminal and regulatory practice. The Arnold & Porter Kaye Scholer LLP *Deskbook on Internal Investigations, Corporate Compliance, and White Collar Issues* represents the *beginning* of the process of reaching that level of understanding. It can never be a substitute for the advice of experienced white collar law practitioners.

The Deskbook is divided into two parts. Part I addresses "process" issues, including corporate compliance, internal investigations, and government leniency programs. Part II addresses "substance," that is, selected, specific white collar substantive law issues, such as pharmaceutical drug offenses, the False Claims Act, the Foreign Corrupt Practices Act, criminal antitrust, perjury statutes, and money laundering.