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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.

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The Contributors would especially like to acknowledge and thank the following Arnold & Porter attorneys who contributed greatly to the updates to the current edition of this Deskbook:

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- Eliza Buergenthal
- Erica Carra
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- Leah Harrell
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Table of Chapters

PART I: PROCESS

- Chapter 1** Internal Investigation of Suspected Wrongdoing by Corporate Employees
- Chapter 2** The Attorney-Client Privilege, Work-Product Protection, and Self-Critical Privilege in Internal Investigations
- Chapter 3** Responding to Searches and Seizures
- Chapter 4** Grand Jury Investigations and Multiple Representations of Witnesses
- Chapter 5** Advising Witnesses in Light of Perjury Statutes
- Chapter 6** Representing Companies and Individuals in SEC Investigations and Parallel Proceedings
- Chapter 7** Corporate Compliance Programs Under the Organizational Sentencing Guidelines
- Chapter 8** Reserved
- Chapter 9** Deferred Prosecution Agreements

PART II: SELECTED SUBSTANTIVE WHITE COLLAR CRIMINAL & REGULATORY ISSUES

- Chapter 10** Representing the Drug or Medical Device Manufacturer in an Investigation
- Chapter 11** Government Investigations Under the False Claims Act and Its Qui Tam Provisions
- Chapter 12** Representation of Companies in Criminal Antitrust Investigations
- Chapter 13** Asset Forfeiture and Debarment
- Chapter 14** Money Laundering and Financial Institutions

**Chapter 15 The Foreign Corrupt Practices Act and Global
Anti-Corruption Enforcement**

Chapter 16 U.S. Export Controls and Trade Sanctions

Table of Contents

About the Contributors	vii
Table of Chapters	xix
Acknowledgments	xxxvii
Introduction	xxxix

PART I: PROCESS

Chapter 1 Internal Investigation of Suspected Wrongdoing by Corporate Employees

§ 1:1	Introduction	1-2
§ 1:2	Steps to Take at the Outset of an Investigation.....	1-3
§ 1:2.1	Who Conducts the Investigation—In-House Counsel or Outside Attorneys?	1-3
§ 1:2.2	Defining the Scope of the Investigation	1-4
§ 1:2.3	Doing a Conflicts Check.....	1-5
§ 1:2.4	Expertise of Counsel	1-6
§ 1:3	Investigative Tools	1-7
§ 1:3.1	Document Holds, Collection, and Review	1-7
§ 1:3.2	Recovering Expenses Incurred During Internal Investigations	1-9
§ 1:3.3	Employee Interviews.....	1-10
[A]	Presence of In-House Counsel at the Interview	1-10
[B]	Conducting the Interview	1-11
[C]	Separate Counsel for the Employee.....	1-14
§ 1:3.4	Whether to Prepare a Written Report	1-16
§ 1:3.5	Polygraph Testing.....	1-17
§ 1:3.6	Workplace Searches.....	1-18
§ 1:3.7	Workplace Surveillance	1-19
§ 1:3.8	Drug and Alcohol Testing	1-20
§ 1:4	Attorney-Client Privilege and Attorney Work Product Protection Regarding Internal Investigations	1-21

§ 1:5	Obstruction of Justice	1-23
§ 1:5.1	Obstruction of Justice Statutes	1-23
§ 1:5.2	Liability of Attorneys	1-27
§ 1:5.3	Guidelines for Counsel	1-28
§ 1:6	Subpoenas and Review of Documents Located Overseas	1-29
§ 1:6.1	Obstruction of Justice in International Cases	1-30
§ 1:7	Indemnification and Advancement of Legal Fees	1-31
§ 1:7.1	Mandatory Indemnification	1-31
§ 1:7.2	Permissive Indemnification	1-33
§ 1:7.3	Advancement of Legal Fees and Expenses	1-34
§ 1:7.4	Constitutional Issues	1-35
§ 1:8	Protection for Whistleblowers Against Retaliation	1-37
§ 1:8.1	FCA Anti-Retaliation Protections.....	1-37
§ 1:8.2	Sarbanes-Oxley Whistleblower Protections	1-38
§ 1:8.3	Retaliation Policies.....	1-39
§ 1:8.4	Disciplining Whistleblowers	1-40
§ 1:8.5	Separation/Confidentiality Agreements.....	1-40
§ 1:9	Practitioner’s Checklist for Conducting Internal Investigations	1-42

Chapter 2 The Attorney-Client Privilege, Work-Product Protection, and Self-Critical Privilege in Internal Investigations

§ 2:1	Introduction	2-2
§ 2:2	The Attorney-Client Privilege.....	2-2
§ 2:2.1	Elements of the Corporate Attorney-Client Privilege	2-3
§ 2:2.2	Applicability to Experts, Attorney Agents, and the Corporation’s Former Employees	2-4
§ 2:2.3	Attorney’s Duty to Assert Privilege.....	2-7
§ 2:2.4	What the Privilege Does Not Cover	2-7
§ 2:2.5	The Crime-Fraud Exception.....	2-8
§ 2:2.6	Authority to Waive the Corporate Attorney-Client Privilege.....	2-12
§ 2:2.7	Effect of Inadvertent Disclosure of Privileged Information on Waiver.....	2-13
§ 2:3	Work-Product Protection	2-17
§ 2:3.1	Work-Product Protection Qualified	2-18
§ 2:3.2	Applicability to Materials from an Internal Investigation	2-19
§ 2:3.3	Materials Protected by the Work-Product Doctrine.....	2-20

Table of Contents

§ 2:3.4	Government Assertions of Work-Product Protection over Investigative Materials	2-20
§ 2:4	The Department of Justice's Waiver Policy and the Sentencing Guidelines	2-21
§ 2:4.1	Evolution of DOJ Policy on Waiver of Privilege	2-22
§ 2:4.2	The Principles of Federal Prosecution of Business Organizations.....	2-24
§ 2:4.3	The Yates Memo.....	2-27
§ 2:5	Disclosure to the Government and Its Impact on Waiver of the Attorney-Client Privilege and Work-Product Protection	2-31
§ 2:5.1	Attorney-Client Privilege and Selective Waiver.....	2-31
§ 2:5.2	Work-Product Protection and Selective Waiver.....	2-32
§ 2:6	The Common Interest Privilege.....	2-38
§ 2:6.1	Applicability of the Common Interest Privilege	2-38
§ 2:7	Self-Critical Privilege	2-41
§ 2:7.1	Recognition of the Self-Critical Privilege	2-41
§ 2:7.2	Rejection of the Self-Critical Privilege	2-42
§ 2:8	Government Use of "Filter Teams" to Review Privileged Material.....	2-44
§ 2:9	Additional Practical Waiver Problems in Internal Investigations	2-46
§ 2:9.1	Internal Investigations Because of Business Necessities.....	2-46
§ 2:9.2	Investigation by and for Management.....	2-48
§ 2:9.3	Use of Regularly Employed Auditor.....	2-49
§ 2:9.4	The Pseudo-Hypothetical.....	2-50
§ 2:9.5	Disclosures to Public Relations Consultants.....	2-50
§ 2:10	Practitioner's Checklist for Obtaining Benefits of Cooperation Without Waiver	2-53

Chapter 3 Responding to Searches and Seizures

§ 3:1	Search Warrants.....	3-2
§ 3:1.1	Generally	3-2
§ 3:1.2	Specifics of a Search Warrant	3-2
§ 3:1.3	Execution of the Warrant	3-6
§ 3:1.4	Effects of Search and Seizure on Corporations	3-6
§ 3:2	Searching and Seizing Electronic Data.....	3-9
§ 3:2.1	Warrantless Computer Searches and Seizures	3-10
[A]	Exigent Circumstances	3-11
[B]	Consent.....	3-11
[C]	"Plain View" Exception.....	3-13
[D]	Searches at Border Crossings	3-14
[E]	Exceptions Regarding IP Addresses and Cell Phone Locators	3-18

§ 3:2.2	Warrants to Search Computers and Other Electronic Devices.....	3-22
[A]	Computer Searches that Go Beyond the Scope of the Warrant.....	3-24
[B]	Cell Phone Searches.....	3-25
[C]	Time Limits for Government Seizures of Electronic Information.....	3-26
§ 3:2.3	Out-of-District/Country Warrants.....	3-27
§ 3:2.4	Data Privacy and Access	3-29
§ 3:3	Searching and Seizing Other Electronic Communications.....	3-30
§ 3:3.1	Wiretapping	3-30
§ 3:3.2	Intercepting Text Messages and Emails.....	3-31
§ 3:3.3	GPS Tracking.....	3-32
§ 3:3.4	Searching Electronic Storage and Social Media Accounts	3-34
§ 3:4	Protecting Privileged Documents During a Search.....	3-35
§ 3:5	Practitioner’s Checklist for Responding to Searches and Seizures	3-39

Chapter 4 Grand Jury Investigations and Multiple Representations of Witnesses

§ 4:1	Overview of the Grand Jury Process.....	4-2
§ 4:1.1	Responding to a Grand Jury Subpoena	4-4
[A]	Litigation Holds.....	4-4
[B]	Insurance Considerations	4-6
[C]	Review of Relevant Documents.....	4-7
[D]	Unduly Broad Subpoenas.....	4-7
[E]	Discoverability of Documents Subject to Protective Orders	4-8
§ 4:1.2	Motions to Quash Grand Jury Subpoenas.....	4-9
§ 4:1.3	Computer Records and Electronic Documents.....	4-10
§ 4:1.4	Subpoena Compliance and Data Privacy Laws.....	4-14
§ 4:1.5	Motions to Dismiss Grand Jury Indictments.....	4-16
§ 4:1.6	Parallel Proceedings.....	4-19
§ 4:2	Ethical Issues in Multiple Representations Before a Grand Jury.....	4-21
§ 4:2.1	Ethical Considerations and Conflicts of Interest	4-22
§ 4:2.2	New York’s Attorney Ethics Rules.....	4-30
§ 4:2.3	The Prosecutor’s Response	4-31
§ 4:2.4	The Judicial Response.....	4-33
§ 4:3	Practical Considerations When Considering Multiple Representation	4-35

Table of Contents

Chapter 5 Advising Witnesses in Light of Perjury Statutes

§ 5:1	Introduction	5-1
§ 5:1.1	Federal Perjury Statutes	5-2
§ 5:1.2	Distinctions Between Sections 1621 and 1623	5-4
§ 5:1.3	False Statements Statute	5-5
§ 5:2	Materiality	5-9
§ 5:2.1	Standard for Materiality	5-10
§ 5:2.2	Literal Truth Defense	5-14
§ 5:3	Perjury Prosecution Absent Prosecution for the Underlying Offense.....	5-18
§ 5:4	Dangers of Crossing the Line.....	5-22
§ 5:5	Perjury Traps	5-24
§ 5:6	Conclusion	5-25

**Chapter 6 Representing Companies and Individuals in
SEC Investigations and Parallel Proceedings**

§ 6:1	SEC Investigations.....	6-2
§ 6:1.1	Enforcement Scheme	6-3
[A]	Authority and Powers of the Division of Enforcement	6-3
[B]	Civil Suits in Federal Courts Versus Administrative Proceedings	6-4
[C]	Criminal Enforcement Through DOJ/Parallel Proceedings.....	6-7
§ 6:1.2	How Investigations Arise/Whistleblower Program	6-8
[A]	Origins of Investigations	6-8
[B]	The Whistleblower Program	6-8
[C]	Retaliation Against Whistleblowers	6-10
[C][1]	Terms of Employment	6-11
[C][2]	Confidentiality Agreements.....	6-11
[C][3]	Severance Agreements	6-12
[C][4]	Repurchase Agreements	6-12
[D]	Whistleblower Awards	6-13
§ 6:1.3	Responding to Investigative Requests—Initial Considerations.....	6-14
[A]	Initial Contact with the Staff	6-15
[B]	Conducting an Inquiry into the Facts	6-16
[C]	Assessing the Facts and Taking Appropriate Steps	6-18

§ 6:1.4	The Investigative Process	6-19
[A]	Informal Inquiries and Formal Investigations	6-19
[B]	Document Preservation, Collection, Review, and Production	6-20
[C]	Staff Interviews and Testimony	6-23
§ 6:1.5	Privilege Issues	6-25
[A]	Waiver of Privilege	6-25
[B]	Fifth Amendment Privilege	6-27
§ 6:1.6	Wells Submission Process	6-28
§ 6:1.7	Cooperation and the Seaboard Factors	6-30
§ 6:1.8	Charges and Remedies	6-35
§ 6:1.9	Settlement	6-41
§ 6:1.10	Recent Enforcement Trends	6-46
[A]	Increased Use of Whistleblowers	6-47
[B]	Crypto and Cybersecurity	6-48
[C]	Gatekeeper Accountability	6-51
[D]	Environmental, Social and Governance (ESG)	6-52
[E]	Increased Use of Data Analytics	6-53
[F]	Individual Accountability	6-54
§ 6:2	Parallel Proceedings	6-54
§ 6:2.1	General Strategic Issues and Considerations	6-55
§ 6:2.2	Admissibility of Statements Made During Parallel Civil Proceedings	6-56
§ 6:2.3	Wiretapping and Parallel Proceedings	6-56

Chapter 7 Corporate Compliance Programs Under the Organizational Sentencing Guidelines

§ 7:1	Introduction	7-1
§ 7:2	An Effective Program to Prevent and Detect Violations of Law	7-4
§ 7:2.1	Practical Considerations	7-4
§ 7:2.2	Requirements for an Effective Compliance and Ethics Program	7-6
[A]	Standards and Procedures	7-11
[B]	Top-Level Personnel Responsible	7-14
[C]	Exclusion of Individuals Who Present Known Risks	7-18
[D]	Communications and Training	7-21
[E]	Monitoring and Audits	7-23
[E][1]	Internal Auditing and Monitoring	7-24
[E][2]	Employee Hotlines and the Ombudsman	7-25
[E][3]	Business Ethics Questionnaires	7-26
[E][4]	Effectiveness Review	7-27

Table of Contents

[F]	Incentives and Discipline.....	7-28
[G]	Ongoing Compliance Program Enhancements.....	7-29
[H]	Ongoing Risk Assessments.....	7-30
[I]	Other Guidance.....	7-31
§ 7:3	Caremark Liability.....	7-32

Chapter 8 Reserved

Chapter 9 Deferred Prosecution Agreements

§ 9:1	Introduction	9-1
§ 9:2	What Is a DPA?	9-2
§ 9:3	Recent Trends	9-5
§ 9:3.1	Developments in Corporate Cooperation and Individual Prosecution Requirements	9-7
§ 9:3.2	Developments in International Cooperation.....	9-12
§ 9:3.3	The Role of Congress in DPAs	9-15
§ 9:4	DOJ's Increasing Role in Setting Corporate Compliance Standards.....	9-16
§ 9:5	DPA or Declination?.....	9-19
§ 9:6	The Terms of the Agreement	9-21
§ 9:7	DOJ Guidance on the Use of Corporate Monitors.....	9-24
§ 9:8	Judicial Review of DPAs.....	9-26
§ 9:9	SEC's Use of DPAs and NPAs	9-28
§ 9:10	Antitrust DPAs.....	9-31
§ 9:11	DPAs and State Regulators	9-34
§ 9:12	DPAs in the United Kingdom	9-35
§ 9:13	Practical Considerations in Negotiating DPAs.....	9-37

PART II: SELECTED SUBSTANTIVE WHITE COLLAR CRIMINAL & REGULATORY ISSUES

Chapter 10 Representing the Drug or Medical Device Manufacturer in an Investigation

§ 10:1	Introduction	10-1
§ 10:2	The Statutory and Regulatory Scheme.....	10-2
§ 10:2.1	The FDCA.....	10-2
§ 10:2.2	The Anti-Kickback Statute.....	10-3
§ 10:2.3	The False Claims Act.....	10-4
§ 10:2.4	The Health Care Fraud Statute.....	10-4
§ 10:2.5	The Foreign Corrupt Practices Act.....	10-4

§ 10:2.6	Other Regulatory Tools	10-5
[A]	Corporate Integrity Agreements.....	10-5
[B]	Exclusion from Federal Healthcare Programs	10-6
[C]	Fines	10-7
§ 10:3	Recent Developments in Enforcement Actions	10-7
§ 10:3.1	Enforcement Actions Against Pharmaceutical Manufacturers	10-7
§ 10:3.2	Enforcement Actions Against Medical and Diagnostic Testing Device Manufacturers.....	10-21
§ 10:3.3	Individual Accountability.....	10-25
§ 10:3.4	<i>Sorrell, Caronia</i> , and First Amendment Challenges	10-31
§ 10:4	FDA Warning and Untitled Letters to Pharmaceutical Companies Regarding Promotional Materials	10-37
§ 10:5	Compliance Strategies	10-43
§ 10:6	Conclusion	10-44

Chapter 11 Government Investigations Under the False Claims Act and Its Qui Tam Provisions

§ 11:1	Introduction	11-2
§ 11:2	The FCA Statute.....	11-4
§ 11:2.1	Liability and Damages Provisions	11-4
§ 11:2.2	Qui Tam Provisions	11-10
[A]	Complaint Filed Under Seal.....	11-11
[B]	Provisions Allowing Relators to Share in Monetary Recovery	11-14
[C]	Authority over Dismissal and Settlement	11-16
§ 11:3	Steps of a Government Investigation.....	11-18
§ 11:3.1	Agency Subpoenas	11-18
§ 11:3.2	Civil Investigative Demands	11-19
§ 11:3.3	The Government’s Decision to Intervene.....	11-19
§ 11:4	Elements of FCA Liability.....	11-20
§ 11:4.1	False Claim	11-20
§ 11:4.2	Intent.....	11-24
§ 11:4.3	Materiality	11-28
§ 11:4.4	Causation	11-35
§ 11:5	FCA Issues in the Healthcare Area	11-36
§ 11:5.1	Off-Label Marketing.....	11-37
[A]	Generally	11-37
[B]	False Statements and First Amendment Issues	11-38
§ 11:5.2	Anti-Kickback Violations	11-42
§ 11:5.3	Pharmaceutical Pricing Cases	11-44

Table of Contents

§ 11:5.4	Concealment of Safety Data and Risk Minimization.....	11-46
§ 11:5.5	Rule 9(b) Issues Involving Providers and Manufacturers	11-50
§ 11:5.6	Causation, Individualized Proof, and Damage Issues Involving Providers and Manufacturers	11-53
§ 11:6	FCA Issues Regarding Government Contractors.....	11-56
§ 11:6.1	Government Contractor Risks	11-56
§ 11:6.2	Combating Risk and Defending Claims.....	11-62
§ 11:6.3	Confronting Concurrent Proceedings.....	11-65
§ 11:7	Defenses	11-67
§ 11:7.1	Statute of Limitations	11-67
§ 11:7.2	Tax Code Cases.....	11-71
§ 11:8	Special Defenses Against a Qui Tam Relator	11-71
§ 11:8.1	Public Disclosure Bar	11-71
§ 11:8.2	Original Source	11-80
§ 11:8.3	First-to-File Bar.....	11-84
§ 11:9	Protection of Whistleblower.....	11-87
§ 11:10	Other Whistleblower Laws.....	11-93
§ 11:10.1	Tax Whistleblower Law	11-93
§ 11:10.2	Securities Whistleblower Law	11-94

Chapter 12 Representation of Companies in Criminal Antitrust Investigations

§ 12:1	Introduction	12-2
§ 12:2	Elements of a Sherman Act Antitrust Criminal Prosecution.....	12-2
§ 12:2.1	Conspiracy.....	12-4
§ 12:2.2	Criminal Intent	12-5
§ 12:2.3	Interstate Nexus	12-6
§ 12:2.4	Statute of Limitations	12-6
§ 12:3	Department of Justice Policy for Prosecution of Sherman Act Cases.....	12-8
§ 12:3.1	Section 1 Criminal Enforcement.....	12-8
§ 12:3.2	Labor Market Criminal Enforcement	12-9
§ 12:3.3	Section 2 Criminal Enforcement.....	12-14
§ 12:3.4	Emphasis on Corporate Compliance and Individual Responsibility	12-16
	[A] Department of Justice Policies	12-16
	[B] Extradition of Foreign Nationals	12-19
§ 12:4	Criminal Penalties	12-23
§ 12:4.1	Individual Sentences	12-24

§ 12:4.2	Corporate Fines	12-26
[A]	Calculation of Fines	12-26
[B]	Largest Imposed Fines.....	12-30
§ 12:4.3	Major Recent and Ongoing Antitrust Investigations	12-31
[A]	Generic Drugs Investigation	12-31
[B]	Broiler Chickens	12-33
[C]	Procurement Collusion and Fraud	12-34
[D]	Algorithms and Artificial Intelligence	12-37
§ 12:4.4	Recent Trials	12-38
§ 12:5	DOJ Corporate Leniency Policy	12-39
§ 12:5.1	Pre-Investigation (“Type A”) Leniency	12-39
§ 12:5.2	Alternative Grounds for Leniency	12-40
§ 12:5.3	Leniency Policy FAQs.....	12-40
§ 12:5.4	Leniency for Corporate Directors, Officers, and Employees.....	12-42
§ 12:5.5	DOJ Safe Harbor Policy.....	12-43
§ 12:5.6	Deferred Prosecution Agreements.....	12-44
§ 12:5.7	Corporate Monitors	12-45
§ 12:5.8	International Cartel Investigations	12-45
§ 12:6	Extraterritorial Application of U.S. Antitrust Laws....	12-46
§ 12:7	State Antitrust Prosecutions	12-50
§ 12:8	Antitrust Compliance Strategies.....	12-54

Chapter 13 Asset Forfeiture and Debarment

§ 13:1	Asset Forfeiture	13-2
§ 13:1.1	The Civil Asset Forfeiture Reform Act of 2000	13-3
§ 13:1.2	Initiation of Civil Judicial Forfeiture	13-4
[A]	Pre-Seizure Warrant “Freezing” of Assets	13-4
[B]	Pre-Forfeiture Seizure of Assets.....	13-5
[C]	Pre-Trial Procedures Under Supplemental Rule G	13-6
§ 13:1.3	Civil Trial Procedure	13-10
[A]	Initial Burden on the Government.....	13-10
[B]	Innocent Owner Defense	13-11
[C]	Bona Fide Purchaser or Seller for Value	13-13
[D]	Knowledge or Reason to Believe Property Subject to Forfeiture.....	13-14
[D][1]	Willful Blindness	13-15
[D][2]	Knowledge in the Law Firm Fee Context	13-16
[E]	The Department of Justice Policy on Forfeiture of Attorney Fees.....	13-18
[E][1]	Department of Justice Policy on Federal Adoption	13-20

Table of Contents

[F]	Use of Potentially Forfeitable Assets to Retain and Pay Counsel	13-22
[F][1]	Criminal Forfeitures	13-22
[F][2]	Civil Forfeitures	13-23
[G]	Excessive Fines Defense.....	13-24
§ 13:1.4	Civil Judicial Forfeiture of Transferred Traceable Assets.....	13-25
§ 13:1.5	Seizure of Fungible Assets.....	13-26
§ 13:1.6	Awards of Attorney Fees to Prevailing Claimants	13-28
§ 13:2	Debarment	13-30
§ 13:2.1	Overview of Suspension and Debarment	13-30
§ 13:2.2	Consequences of Suspension and Debarment.....	13-35
§ 13:2.3	Term of Suspension or Debarment	13-36
§ 13:2.4	Grounds for Imposing Debarment or Suspension.....	13-37
§ 13:2.5	Factors Informing Agency Discretion to Debar or Suspend.....	13-40
§ 13:2.6	Debarment or Suspension Based on Imputation or Affiliation.....	13-43
[A]	Imputation	13-43
[B]	Affiliation	13-43
§ 13:3	Practical Considerations in Addressing Debarment and Suspension for a Firm	13-46

Chapter 14 Money Laundering and Financial Institutions

§ 14:1	Obligations of Financial Institutions in Combating Money Laundering.....	14-2
§ 14:1.1	Overview: Regulatory Framework	14-2
§ 14:1.2	The Money Laundering Control Act	14-5
[A]	Section 1956(a)(1): Conducting Certain Financial Transactions	14-6
[B]	Section 1956(a)(2): Transporting Funds into or out of the United States.....	14-7
[C]	Section 1956(a)(3): “Sting” Operations	14-8
[D]	Section 1957: Money Transactions in “Criminally Derived Property”	14-8
[E]	Penalties for Violations	14-9
§ 14:1.3	The Bank Secrecy Act	14-10
[A]	Financial Institutions Are Required to Implement AML Compliance Programs	14-11
[B]	Financial Institutions Are Required to Implement Adequate Customer Identification Programs.....	14-12

[C]	Financial Institutions Are Required to File Suspicious Activity Reports.....	14-15
[D]	Financial Institutions Are Required to File Currency Transaction Reports.....	14-17
[E]	Joint Statements on BSA/AML Collaboration and Innovation	14-19
[F]	Agency Coordination When Imposing Penalties for Violations	14-20
§ 14:1.4	The Corporate Transparency Act and Implementing Regulations	14-24
§ 14:1.5	New York Department of Financial Services As a Prominent Regulatory Force	14-26
§ 14:1.6	Money Laundering Guidance Regarding Foreign Corruption Proceeds.....	14-27
§ 14:1.7	Special Issues for U.S. Financial Institutions Relating to Foreign Banks Utilizing U.S. Correspondent Accounts.....	14-29
[A]	Money Laundering Risks of Correspondent Accounts.....	14-29
[B]	De-Risking Discouraged by Treasury	14-32
[C]	Payable-Through Accounts	14-35
§ 14:2	Money Laundering Enforcement, Penalties, and Trends.....	14-36
§ 14:2.1	Overview and Recent Developments.....	14-36
§ 14:2.2	Penalties for Failing to Maintain an Adequate AML Program	14-38
[A]	Federal Enforcement Actions Following BSA and AML Violations.....	14-39
[B]	DFS's Prominent Role in AML Enforcement Efforts Against Foreign Banks and Cryptocurrency Exchanges.....	14-45
[C]	Focus on Money Services Businesses	14-51
[D]	Increased Scrutiny of Broker-Dealers	14-55
[E]	Personal Liability for BSA/AML Violations.....	14-60
[F]	Penalties for Structuring to Avoid CTRs	14-62
[G]	The Panama Papers.....	14-63
[H]	Venezuela and Expanding Criminal Charges.....	14-65
§ 14:2.3	Digital Currency, Cannabis, and Other Emerging Industries Posing AML Challenges.....	14-68
§ 14:2.4	Money Laundering by Corrupt Foreign Leaders: Kleptocracy Initiative	14-75
§ 14:2.5	Combating Terrorism Financing	14-79
§ 14:2.6	Violations of Export Controls and Economic Sanctions Can Lead to Money Laundering Issues for Financial Institutions.....	14-86

Table of Contents

Chapter 15 The Foreign Corrupt Practices Act and Global Anti-Corruption Enforcement

§ 15:1	Introduction	15-1
§ 15:1.1	Enforcement Statistics	15-2
§ 15:1.2	Trends in Enforcement Policies, Priorities, and Practices.....	15-22
[A]	Multi-Jurisdictional Cooperation	15-25
[B]	Collateral Litigation.....	15-28
§ 15:2	The Foreign Corrupt Practices Act.....	15-29
§ 15:2.1	Who Is Subject to the FCPA?	15-29
§ 15:2.2	Anti-Bribery Provisions	15-31
§ 15:2.3	Penalties for Anti-Bribery Provision Violations.....	15-34
§ 15:2.4	Exceptions and Defenses.....	15-35
§ 15:2.5	Accounting Violations.....	15-39
§ 15:2.6	The Resource Guide.....	15-45
§ 15:3	International Cooperation and Anti-Corruption Enforcement	15-48
§ 15:3.1	International Conventions on Bribery.....	15-49
§ 15:3.2	The U.K. Bribery Act of 2010 and U.K. Enforcement	15-51
§ 15:3.3	Brazilian Anti-Corruption Laws and Enforcement	15-57

Chapter 16 U.S. Export Controls and Trade Sanctions

§ 16:1	Introduction	16-2
§ 16:2	Export Controls and Economic Sanctions: Regulatory Framework.....	16-3
§ 16:2.1	Office of Foreign Assets Control Regulations	16-3
[A]	U.S. Economic Sanctions: History and Statutory Authority.....	16-3
[B]	Types of OFAC Regulations and Prohibitions.....	16-7
[C]	OFAC Jurisdiction: Who Should Comply?	16-14
[D]	OFAC's Reporting, Procedures and Penalties Regulations	16-18
[E]	OFAC Exemptions and Licensing Procedures.....	16-21
[F]	Challenging an OFAC Designation.....	16-25
§ 16:2.2	International Traffic in Arms Regulations.....	16-29
[A]	Overview of ITAR Prohibitions	16-30
[B]	Licensing Process and Exemptions.....	16-31
[C]	Summary of Part 130 Requirements	16-33
[D]	Summary of Section 126.1 Requirements.....	16-34
[E]	Treatment of Dual Nationals/Third-Country Nationals.....	16-35

WHITE COLLAR ISSUES DESKBOOK

§ 16:2.3 Export Administration Regulations 16-36
 [A] Overview of EAR Prohibitions 16-37
 [B] Licensing Process and Exceptions 16-38
 [C] Increased Use of End-User Controls 16-42
 [D] Anti-Boycott Regulations 16-44
§ 16:2.4 Determining Appropriate Jurisdiction..... 16-47
 [A] Sanctions or Export? 16-48
 [B] EAR or ITAR Classification? 16-48
§ 16:3 Enforcement 16-51
 § 16:3.1 OFAC Violations: Penalties and Trends 16-52
 § 16:3.2 ITAR Violations: Penalties and Trends 16-63
 § 16:3.3 EAR Violations: Penalties and Trends 16-67
§ 16:4 Compliance with Export Control and Sanctions
 Regulations 16-74
 § 16:4.1 Corporate Compliance Programs 16-74
 § 16:4.2 “Know Your Customer” 16-77
§ 16:5 Responding to Violations 16-80
 § 16:5.1 Voluntary Disclosure Prior to Commencement
 of a Government Investigation 16-80
 [A] Notification and Documentation
 Requirements..... 16-81
 [B] Penalty Enforcement and Mitigation 16-82
 [C] The Decision to Disclose Voluntarily 16-83
 § 16:5.2 Defending Sanctions and Export Control
 Violations in a Government Investigation 16-85
 § 16:5.3 Due Diligence in Mergers and Acquisitions 16-86

Appendices App.-1

Appendix A Yates Memo..... App. A-1
Appendix B Principles of Federal Prosecution of
 Business Organizations..... App. B-1
Appendix C NYCBA Formal Opinion 2004-02 App. C-1
Appendix D DOJ/SEC FCPA Resource Guide App. D-1
Appendix E The Fraud Section’s FCPA Enforcement
 Plan and Guidance App. E-1
Appendix F Guidance on Enhanced Security for
 Transactions That May Involve Proceeds
 of Foreign Official Corruption..... App. F-1
Appendix G Sentencing Guidelines Manual, Chapter 8:
 Sentencing of Organizations App. G-1

Table of Contents

Appendix H	DOJ Corporate Leniency Policy	App. H-1
Appendix I	DOJ Leniency Policy for Individuals	App. I-1
Appendix J	SEC Enforcement Manual, Chapter 6: Cooperation.....	App. J-1
Index	I-1

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,

-
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).

Introduction

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

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

Introduction

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

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).

Introduction

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.