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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 needs 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, www.arnoldporter.com/en.

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

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- Kathleen Dallon
- Leah Harrell
- Tamryn Holley
- Olivia Foster
- Kirby Mayo
- Max Romanow
- Elliot Rosenwald
- Laurel Ruza
- Ryan White

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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, 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—generated substantial pressure on Congress, the DOJ, the U.S. Sentencing Commission, state and local prosecutors, and judges to impose heavier corporate sentences. Corporations have paid billions annually to resolve FCA cases and find themselves in the crosshairs of the SEC and DOJ regarding foreign subsidiaries' allegedly corrupt payments to foreign officials. Looking forward, one legacy of the COVID-19 pandemic will almost certainly be 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. 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—launch ever more 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, 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.

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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 Cty. Aug. 26, 2019).

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. Subsequent DOJ pronouncements regarding corporate cooperation and compliance elaborate on these principles,[3] 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."[4] As a result, the government has enlisted corporations in its battles against crime. Instead of devoting its resources exclusively to deterring and detecting law-breakers, the government now spends time and effort seeking to modify the behavior of companies to become 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 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.

There are good reasons for implementing 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;

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3. *See infra* chapters 1 and 2.
4. 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.

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 and 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 and anti-money laundering laws. The potential for large monetary awards may incentivize corporate employees to report information to the government before they use internal reporting procedures. 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.[5]

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 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 new 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

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

relationship between the investigating attorneys and the employee, and courts have criticized incomplete warnings in this regard.[6] 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 maximize the opportunity to obtain leniency for, or even avoid prosecution of, their corporate and individual clients by 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.

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.

• • •

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*

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

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.