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# **BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS**

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*Editor-in-Chief*

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## Chapter 153

### White Collar Crime

by *Randy M. Mastro and Lee G. Dunst\**

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## I. INTRODUCTION

### § 153:1 Scope note

The investigation and prosecution of white collar crimes continues to be the focus of not only the U.S. Department of Justice, but numerous state and federal agencies. The COVID-19 pandemic, and resulting social, economic, and political turmoil,

as well as the expectation of a more aggressive enforcement environment under President Joe Biden, has only sharpened the investing public's desire for accountability from both businesses and executives as perceived economic inequalities dominate the news. While traditional white collar crimes continue to be prosecuted—such as insider trading and securities fraud—the massive increases in government spending and corresponding expansion of oversight in response to the pandemic will likely see a renewed focus on fraud prosecutions in connection with stimulus payments, taxes, and healthcare. At the same time, both political realities and technological advances suggest continued attention on computer crimes, intellectual property theft, identity theft, and cross-border crimes. As such, it is even more imperative today for practitioners to be aware of the many tools at the disposal of federal prosecutors investigating white collar crime and the various defenses available to putative white collar targets.

This chapter provides an overview of (a) the general nature of the federal investigative authorities,<sup>1</sup> (b) key federal criminal procedural issues,<sup>2</sup> (c) major federal white collar crimes,<sup>3</sup> (d) unique issues of corporate liability under federal law,<sup>4</sup> (e) key proof and evidentiary issues in federal court,<sup>5</sup> and (f) sentencing issues in the federal system.<sup>6</sup>

## II. WHO INVESTIGATES FEDERAL CRIMES

### § 153:2 U.S. Department of Justice/Office of the Attorney General

Congress established the Department of Justice (“DOJ”) by statute in 1870.<sup>1</sup> The Office of the Attorney General is even older, having been established by the Judiciary Act of 1789.<sup>2</sup> The Attorney General serves as the federal government’s “chief law

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#### [Section 153:1]

<sup>1</sup>See §§ 153:2 to 153:17.

<sup>2</sup>See §§ 153:18 to 153:30.

<sup>3</sup>See §§ 153:31 to 153:58.

<sup>4</sup>See §§ 153:59 to 153:60.

<sup>5</sup>See §§ 153:61 to 153:67.

<sup>6</sup>See §§ 153:68 to 153:75.

#### [Section 153:2]

<sup>1</sup>An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162, 162–65 (1870) (codified as amended at 28 U.S.C.A. §§ 501 to 530D); see also U.S. Dep’t of Justice, About the Department, <http://www.justice.gov/about>.

<sup>2</sup>Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (1789) (“And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful exe-

enforcement officer.”<sup>3</sup> The Attorney General’s responsibilities include representing the United States in legal matters,<sup>4</sup> providing the President and department heads with legal advice and opinions,<sup>5</sup> and appearing before the United States Supreme Court.<sup>6</sup> An increase in litigation involving the United States after the end of the Civil War prompted Congress to establish the DOJ as a separate executive agency beginning July 1, 1870.<sup>7</sup> Since then, the DOJ has grown exponentially to more than 40 separate units, and other top DOJ officials, including the Deputy Attorney General and Associate Attorney General, now assist the Attorney General in supervising and managing the agency.<sup>8</sup> The Deputy Attorney General acts as Attorney General in the absence of the Attorney General and may, except to the extent prohibited by law or otherwise delegated, exercise the Attorney General’s power and authority.<sup>9</sup> The Associate Attorney General helps develop and manage DOJ policy and oversees a variety of DOJ units, including, among others, the Antitrust Division, the Civil Division, and the Civil Rights Division.<sup>10</sup> The offices of the United States Attorneys represent the DOJ’s primary prosecutorial vehicle.<sup>11</sup>

Today, the DOJ is the self-described “world’s largest law of-

cution of his office . . .”).

<sup>3</sup>U.S. Dep’t of Justice, OAG: About the Office, <http://www.justice.gov/ag/about-office>.

<sup>4</sup>28 U.S.C.A. §§ 515 to 517.

<sup>5</sup>28 U.S.C.A. §§ 511 to 513.

<sup>6</sup>Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (1789). DOJ’s Web site notes that the Attorney General may himself appear before the Supreme Court “[i]n matters of exceptional gravity or importance.” U.S. Dep’t of Justice, OAG: About the Office, <http://www.justice.gov/ag/about-office>; see also 28 U.S.C.A. § 518 (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested . . .”).

<sup>7</sup>U.S. Dep’t of Justice, About the Department, <http://www.justice.gov/about>; see also An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870) (codified as amended at 28 U.S.C.A. §§ 501 to 530D).

<sup>8</sup>U.S. Dep’t of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf>; see also 28 U.S.C.A. §§ 504 to 507A (establishing other DOJ leadership positions to be filled by presidential appointment with advice and consent of the Senate).

<sup>9</sup>U.S. Dep’t of Justice, DAG: About the Office, <http://www.justice.gov/dag/about-odag.html>; see also 28 U.S.C.A. § 504 (“The President may appoint, by and with the advice and consent of the Senate, a Deputy Attorney General . . .”).

<sup>10</sup>U.S. Dep’t of Justice, OASG: About the Office, <http://www.justice.gov/asg/about-oasg.html>; see also 28 U.S.C.A. § 504a (“The President may appoint, by and with the advice and consent of the Senate, an Associate Attorney General.”).

<sup>11</sup>See §§ 153:3 to 153:5.

office,”<sup>12</sup> with more than 10,000 attorneys as part of its workforce of more than 100,000 people.<sup>13</sup> It prosecutes violations of federal criminal law and litigates civil suits on behalf of the United States.<sup>14</sup> In addition to representing the United States and providing legal advice to the President and executive agencies, the DOJ oversees federal law enforcement. The DOJ’s law enforcement personnel include, among others, investigative agents and the United States Marshals Service, which protects the judiciary and transports prisoners in federal custody.<sup>15</sup> Various DOJ units address white collar matters, including the Antitrust Division, the Criminal Division, and the United States Attorneys.

On March 10, 2021, the United States Senate confirmed Merrick Garland, a then-judge on the Court of Appeals for the District of Columbia, to be Attorney General.<sup>16</sup> On April 20, 2021, the United States Senate confirmed Lisa Monaco as Deputy Attorney General.<sup>17</sup> On April 21, 2021, Vanita Gupta was confirmed by the United States Senate as the Associate Attorney General.<sup>18</sup>

The DOJ Fraud Section is the primary DOJ unit that prosecutes economic and white collar crimes, including the Foreign Corrupt Practices Act.

### § 153:3 U.S. Attorneys

The President has the authority to appoint 93 United States Attorneys (“U.S. Attorneys”), one for each of the judicial districts in the United States, with the exception of Guam and the Northern Mariana Islands, which share one U.S. Attorney.<sup>1</sup> U.S. Attorneys are appointed to four-year terms but may continue in

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<sup>12</sup>U.S. Dep’t of Justice, OAG: About the Office, <http://www.justice.gov/ag/about-out-oag.html>.

<sup>13</sup>U.S. Dep’t of Justice, FY 2018 Agency Financial Report I-3, I-6 (2018), <https://www.justice.gov/doj/page/file/1111821/download#18>.

<sup>14</sup>U.S. Dep’t of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf>.

<sup>15</sup>U.S. Dep’t of Justice, DOJ Agencies, <http://www.justice.gov/agencies>.

<sup>16</sup>Katie Benner, Merrick Garland is Confirmed as Attorney General, N.Y. Times (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/us/politics/merrick-garland-attorney-general-confirmation.html>.

<sup>17</sup>Sarah Lynch, U.S. Senate Confirms Lisa Monaco As Deputy Attorney General, Reuters, (Apr. 20, 2021), <https://www.reuters.com/world/us/majority-us-senate-votes-confirm-lisa-monaco-deputy-attorney-general-2021-04-20/>.

<sup>18</sup>Jeremy Herb, Biden’s Associate Attorney General Nominee Vanita Gupta Confirmed After GOP Senator Breaks Ranks, CNN, (Apr. 21, 2021), <https://www.cnn.com/2021/04/21/politics/vanita-gupta-nomination-advances/index.html>.

#### [Section 153:3]

<sup>1</sup>28 U.S.C.A. § 541(a); U.S. Dep’t of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao/mission>.

office until a replacement is named and the Senate provides its consent.<sup>2</sup> Assistant U.S. Attorneys support the work of each U.S. Attorney and comprise the DOJ's corps of federal prosecutors assigned to individual districts.<sup>3</sup> By statute, U.S. Attorneys are responsible for prosecuting federal criminal cases, representing the United States in civil litigation, and collecting fines and penalties owed to the United States.<sup>4</sup> Individual U.S. Attorneys have significant discretion to exercise their prosecutorial authority consistent with the needs of their districts.<sup>5</sup> In some districts, that discretion includes a particular focus on white collar investigations and prosecutions.

### § 153:4 U.S. Attorneys—Southern District of New York

The U.S. Attorney's Office for the Southern District of New York ("SDNY") has a long and storied history of litigating high-profile cases on behalf of the United States. This office has been an integral part of the United States' legal team since the early days of the country. Just two days after signing the Judiciary Act of 1789 into law, President George Washington appointed the first U.S. Attorney for the district (then known as the New York District).<sup>1</sup> Currently, the SDNY encompasses eight counties in and near New York City, including the boroughs of Manhattan and the Bronx.<sup>2</sup> Among other responsibilities, the office traditionally emphasizes the prosecution of white collar crime, in part because a large number of financial services entities and major corporations, as well as the major financial exchanges (including the NASDAQ, American Stock Exchange, New York Mercantile Exchange, and New York Stock Exchange), are located in Manhattan.<sup>3</sup>

The SDNY's Criminal Division prosecutes securities fraud,

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<sup>2</sup>See 28 U.S.C.A. § 542(a) ("The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.").

<sup>3</sup>U.S. Dep't of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao/mission>.

<sup>4</sup>28 U.S.C.A. § 541.

<sup>5</sup>28 U.S.C.A. § 547.

#### [Section 153:4]

<sup>1</sup>U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Office History, <http://www.justice.gov/usao-sdny/office-history>.

<sup>2</sup>U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: About the District, <http://www.justice.gov/usao-sdny/about-district>.

<sup>3</sup>U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Criminal Division, <http://www.justice.gov/usao-sdny/criminal>

other financial crimes, and “economic espionage,” either through its Securities and Commodities Fraud Task Force or the Complex Frauds and Cybercrime Unit.<sup>4</sup> The Securities and Commodities Fraud Task Force investigates and prosecutes a range of white collar offenses that affect the markets, including insider trading, market manipulation, and fraud stemming from violations of accounting or regulatory reporting requirements and procedures, among other crimes.<sup>5</sup> The Complex Frauds and Cybercrime Unit investigates and prosecutes white collar offenses including financial institution fraud, health care fraud, tax fraud, and cybercrimes.<sup>6</sup>

On March 23, 2021, U.S. Senate Majority Leader Chuck Schumer of New York called on President Biden to nominate Damian Williams as U.S. Attorney for the Southern District of New York.<sup>7</sup> Mr. Williams would be the first African-American man to oversee the Southern District of New York.<sup>8</sup> He is currently the Chief of the Southern District’s Securities and Commodities Fraud Task Force, a position he has held since 2012.<sup>9</sup> Before that, he was an Assistant U.S. Attorney in the office, and former law clerk for U.S. Attorney General Garland when he served on the United States Court of Appeals for the District of Columbia and Supreme Court Justice John Paul Stevens.<sup>10</sup>

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al-division.

<sup>4</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, The Southern District of New York: Criminal Division, <http://www.justice.gov/usao-sdny/criminal-division>.

<sup>5</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, The Southern District of New York: Criminal Division, <http://www.justice.gov/usao-sdny/criminal-division>.

<sup>6</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, The Southern District of New York: Criminal Division, <http://www.justice.gov/usao-sdny/criminal-division>.

<sup>7</sup>Reuters Staff, *Schumer Urges Three Black Nominees for Top U.S. Attorney Jobs in New York*, Reuters (Mar. 23, 2021), <https://www.reuters.com/article/us-usa-biden-sdny/schumer-urges-three-black-nominees-for-top-u-s-attorney-jobs-in-new-york-idUSKBN2BF2ME>.

<sup>8</sup>Reuters Staff, *Schumer Urges Three Black Nominees for Top U.S. Attorney Jobs in New York*, Reuters (Mar. 23, 2021), <https://www.reuters.com/article/us-usa-biden-sdny/schumer-urges-three-black-nominees-for-top-u-s-attorney-jobs-in-new-york-idUSKBN2BF2ME>.

<sup>9</sup>Hailey Konnath, *SDNY Could See 1st Black US Atty With Schumer’s Pick*, Law 360 (Mar. 23, 2021), <https://www.law360.com/articles/1367922/sdny-could-see-1st-black-us-atty-with-schumer-s-pick>.

<sup>10</sup>Hailey Konnath, *SDNY Could See 1st Black US Atty With Schumer’s Pick*, Law 360 (Mar. 23, 2021), <https://www.law360.com/articles/1367922/sdny-could-see-1st-black-us-atty-with-schumer-s-pick>.

**§ 153:5 U.S. Attorneys—Other districts**

In addition to the SDNY, federal prosecutors in other districts actively investigate and prosecute white collar crimes in their districts. For example, the U.S. Attorney’s Office for the Eastern District of New York (“EDNY”) is responsible for federal prosecutions for the New York City boroughs of Brooklyn, Queens, and Staten Island, and for Nassau County and Suffolk County on Long Island.<sup>1</sup> Created in 1865,<sup>2</sup> the EDNY today prosecutes a wide range of federal offenses, including white collar cases. The EDNY’s Business and Securities Fraud unit, within the Criminal Division, prosecutes various federal crimes, including multiple types of fraud (such as corporate, securities, health care, bank, and mortgage).<sup>3</sup>

On March 23, 2021, Senator Schumer urged President Biden to nominate Breon Peace as U.S. Attorney for the Eastern District of New York.<sup>4</sup> Mr. Peace is currently a partner at Cleary Gottlieb Steen & Hamilton LLP, and before that he was an Assistant U.S. Attorney for the Eastern District.<sup>5</sup>

While the New York City area, the country’s financial capital, is a hub of white collar federal prosecutions, other U.S. Attorney’s Offices across the country also investigate and prosecute white collar crimes in their districts. For example, the Fraud and Public Corruption Section of the U.S. Attorney’s Office for the District of Columbia prosecutes health care fraud, tax crimes, securities fraud, computer crimes, and intellectual property crimes, among other actions.<sup>6</sup> The D.C. office also enforces various public corruption laws, such as federal laws prohibiting bribes and honest services fraud,<sup>7</sup> false claims, fraud and kickbacks in government

**[Section 153:5]**

<sup>1</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, Eastern District of New York, <http://www.justice.gov/usao/nye/about.html>.

<sup>2</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, Eastern District of New York, <http://www.justice.gov/usao-edny>.

<sup>3</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, Eastern District of New York, Criminal Division, <http://www.justice.gov/usao/nye/crim.html>.

<sup>4</sup>Hailey Konnath, SDNY Could See 1st Black US Atty With Schumer’s Pick, Law 360 (Mar. 23, 2021), <https://www.law360.com/articles/1367922/sdny-could-see-1st-black-us-atty-with-schumer-s-pick>.

<sup>5</sup>Hailey Konnath, SDNY Could See 1st Black US Atty With Schumer’s Pick, Law 360 (Mar. 23, 2021), <https://www.law360.com/articles/1367922/sdny-could-see-1st-black-us-atty-with-schumer-s-pick>.

<sup>6</sup>U.S. Dep’t of Justice, The United States Attorney’s Office for the District of Columbia, Fraud and Public Corruption, [http://www.justice.gov/usao/dc/divisions/criminal\\_fraud\\_public\\_corruption.html](http://www.justice.gov/usao/dc/divisions/criminal_fraud_public_corruption.html).

<sup>7</sup>See § 153:38 for a discussion of honest services fraud.

contracting, and cases against federal employees.<sup>8</sup> Owing to its unique geographic location, in the nation's capital, the office's jurisdiction also encompasses congressional referrals for perjury and false statements.<sup>9</sup> The D.C. office is also leading the investigation and prosecution into the crimes allegedly committed in connection with the breach of the U.S. Capitol in Washington, D.C., on January 6, 2021.<sup>10</sup>

Significant white collar cases also are handled in other U.S. Attorney's Offices around the country. For example, the U.S. Attorney's Office for the Northern District of Illinois is well known for its public corruption prosecutions, including that of former Illinois Governor Rod Blagojevich several years ago,<sup>11</sup> and it touts the prosecution of health care fraud and computer crime as among its current top priorities.<sup>12</sup> Since the COVID-19 pandemic, the office has charged two separate individuals who were engaged in different fraud schemes related to sale of personal protective equipment ("PPE").<sup>13</sup>

The U.S. Attorneys' Offices in California also handle a variety

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<sup>8</sup>U.S. Dep't of Justice, The United States Attorney's Office for the District of Columbia, Fraud and Public Corruption, [http://www.justice.gov/usao/dc/divisions/criminal\\_fraud\\_public\\_corruption.html](http://www.justice.gov/usao/dc/divisions/criminal_fraud_public_corruption.html).

<sup>9</sup>Deborah Connor, U.S. Dep't of Justice, The United States Attorney's Office District of Columbia, Fraud and Public Corruption, [http://www.justice.gov/usao/dc/divisions/criminal\\_fraud\\_public\\_corruption.html](http://www.justice.gov/usao/dc/divisions/criminal_fraud_public_corruption.html).

<sup>10</sup>U.S. Dep't of Justice, The United States Attorney's Office for the District of Columbia, Capitol Breach Investigation Resource Page, <https://www.justice.gov/usao-dc/capitol-breach-cases>.

<sup>11</sup>The U.S. Attorney's District initiated criminal proceedings against Blagojevich in December 2008 and issued a superseding indictment in April 2009 and a second superseding indictment in February 2010. See UNITED STATES OF AMERICA, v. Rod BLAGOJEVICH, Christopher Kelly, Alonzo Monk, William F. Cellini, Sr., John Harris, and Robert Blagojevich., 2009 WL 874042 (N.D. Ill. 2009); UNITED STATES OF AMERICA, v. Rod BLAGOJEVICH, Alonzo Monk, John Harris, and Robert Blagojevich., 2010 WL 6496183 (N.D. Ill. 2010). Blagojevich received a sentence of 14 years in prison following his conviction on corruption charges. Monica Davey, Blagojevich Sentenced to 14 Years in Prison, N.Y. Times, (Dec. 7, 2011), <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html>. He began his sentence in March 2012 and currently is incarcerated at a federal prison in Colorado. Blagojevich Leaves for Federal Prison in Colorado to Serve 14-year Sentence, CBS News, (Mar. 15, 2012), <http://www.cbsnews.com/news/blagojevich-leaves-for-federal-prison-in-colorado-to-serve-14-year-sentence/>.

<sup>12</sup>U.S. Dep't of Justice, United States Attorney's Office, Northern District of Illinois, <http://www.justice.gov/usao-ndil/about>.

<sup>13</sup>Press Release, Suburban Chicago Businessman Charged in Federal Court With Price Gouging of Personal Protective Equipment (Oct. 8, 2020), available at <https://www.justice.gov/usao-ndil/pr/suburban-chicago-businessman-charged-federal-court-price-gouging-personal-protective>; Press Release, Suburban Chicago Businessman Charged With Swindling Hospitals in Connection With Attempted Purchase of \$2.6 Million in PPE (Nov. 10, 2020), available at <https://>

of significant prosecutions. The U.S. Attorney’s Office for the Northern District of California has a robust White Collar Crime Section, which handles fraud cases, environmental crimes, and food-safety cases, among others.<sup>14</sup> The U.S. Attorney’s Office for the Central District of California, which covers an area with a population that is the largest of any federal judicial district in the United States,<sup>15</sup> focuses on various areas of criminal enforcement, including intellectual property crimes and financial crimes.<sup>16</sup>

White collar prosecutions, however, are not limited to any specific districts. In 2019, for example, the U.S. Attorney’s Office for the District of Massachusetts indicted dozens of individuals in a nationwide racketeering conspiracy to gain admission to elite colleges through bribery and fraud.<sup>17</sup> Known as “Operation Varsity Blues,”<sup>18</sup> this sprawling and high profile investigation resulted in charges against 53 individuals across the country (34 of whom have pleaded guilty).<sup>19</sup>

### § 153:6 Agencies with enforcement powers—Securities and Exchange Commission

The SEC is the federal government’s regulatory and enforcement agency with jurisdiction over the securities markets and corporations that are active in those markets.<sup>1</sup> The SEC has broad authority to regulate corporations and individuals and to

[www.justice.gov/usao-ndil/pr/suburban-chicago-businessman-charged-swindling-hospitals-connection-attempted-purchase](http://www.justice.gov/usao-ndil/pr/suburban-chicago-businessman-charged-swindling-hospitals-connection-attempted-purchase).

<sup>14</sup>U.S. Dep’t of Justice, U.S. Attorney’s Office: Central District of California, <http://www.justice.gov/usao-cdca>.

<sup>15</sup>U.S. Dep’t of Justice, United States Attorney’s Office, Northern District of California, <http://www.justice.gov/usao/can/divisions/index.html>.

<sup>16</sup>See U.S. Dep’t of Justice, U.S. Attorney’s Office: Central District of California, Criminal Division, <http://www.justice.gov/usao/cac/criminal.html> (listing the sections within the Criminal Division).

<sup>17</sup>Press Release, U.S. Dep’t of Justice, Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme (Mar. 12, 2019), available at <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic>.

<sup>18</sup>See Chris Villani, Universities Hit With New ‘Varsity Blues’ Class Action, Law360, (June 18, 2019), <https://www.law360.com/articles/1170471/universities-hit-with-new-varsity-blues-class-action->.

<sup>19</sup>U.S. Dep’t of Justice, Investigations of College Admissions and Testing Bribery Scheme, <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> (last updated June 25, 2020).

#### [Section 153:6]

<sup>1</sup>See generally Chapter 88, “Securities” (§§ 88:1 et seq.) and Chapter 92, “Regulatory Litigation with the SEC” (§§ 92:1 et seq.) for additional discussion of the SEC.

investigate and prosecute wrongdoing under federal securities laws. Created by the Securities Exchange Act of 1934, the SEC's mission "is to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation."<sup>2</sup>

In 1972, the SEC consolidated its enforcement functions by creating the Division of Enforcement ("Enforcement Division"). The Enforcement Division conducts investigations, brings civil actions in federal court and administrative proceedings before the SEC administrative law judges, and works in close coordination with other law enforcement agencies, including the DOJ, to prosecute criminal cases. Civil proceedings brought by the Enforcement Division typically seek monetary penalties, disgorgement of profits, or injunctions against conduct violating securities laws, among other remedies.<sup>3</sup>

The Enforcement Division investigates either through an informal process or a formal investigative order, the former of which is known as a "matter under inquiry" and may lead to a formal investigation.<sup>4</sup> A 2011 restructuring of the Division enabled senior staff to approve formal orders for investigations, streamlining a process that previously required approval by vote of the Commissioners themselves.<sup>5</sup> The SEC also may use a "Wells Notice" to alert entities or individuals that the SEC is considering or planning to recommend the filing of allegations against the entities or individuals and the potential securities laws violations.<sup>6</sup>

The SEC coordinates closely with the DOJ through the Inter-agency Financial Fraud Enforcement Task Force, often conducting parallel investigations. For a further discussion of the Task Force and SEC-DOJ coordination efforts in general, see Section 153:12.

Under then-SEC Chairman Mary Jo White, who served as Chairman from April 2013 to November 2016, the SEC increased

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<sup>2</sup>Sec. & Exch. Comm'n, *The Investors Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml>.

<sup>3</sup>See Sec. & Exch. Comm'n, *The Investors Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml>.

<sup>4</sup>See Sec. & Exch. Comm'n, *Div. of Enforcement, Enforcement Manual 14–18* (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>5</sup>Robert Khuzami, Sec. & Exch. Comm'n, *Remarks at SIFMA's Compliance and Legal Society Annual Seminar* (Mar. 23, 2011), <http://www.sec.gov/news/speech/2011/spch032311rk.htm>.

<sup>6</sup>See Sec. & Exch. Comm'n, *Div. of Enforcement, Enforcement Manual 22–25* (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

its focus on the whistleblower program. The SEC made its first award under the whistleblower program in August 2012, and White credited the program with allowing the SEC staff to investigate “more efficiently” and “to better utilize agency resources.”<sup>7</sup> As of December 2020, the SEC has awarded approximately \$736 million to 128 individual whistleblowers.<sup>8</sup>

The SEC’s Enforcement Division continues to pursue the enforcement of securities laws aggressively. During fiscal year 2020, the Enforcement Division brought 715 enforcement actions—405 of which were standalone actions—and obtained judgements and orders totaling approximately \$4.68 billion in disgorgement and penalties, the highest amount on record as of that date.<sup>9</sup>

Although in recent years the SEC has obtained billions of dollars in disgorgement, recent Supreme Court cases have called into question future recoveries. On June 5, 2017, the Supreme Court, in *Kokesh v. Securities and Exchange Commission*, unanimously limited the federal government’s power to recover the profits made from illegal behavior.<sup>10</sup> The question before the Court was whether disgorgement was a form of penalty (and therefore subject to the statute of limitations) or a remedy for unjust enrichment.<sup>11</sup> The Court held that disgorgement was a penalty and, therefore, that the SEC must abide by a five-year statute of limitations when seeking disgorgement of illegal

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<sup>7</sup>Oversight of the SEC’s Agenda, Operations, and FY 2014 Budget Request: Hearing before H. Comm. on Fin. Servs., 113th Cong. 4–5 (2013) (statement of Mary Jo White, Chairman, Sec. & Exch. Comm’n), available at <http://www.sec.gov/news/testimony/2013/ts051613mjw.htm>.

<sup>8</sup>SEC Press Release, SEC Awards Over \$1.6 Million to Whistleblower, (Dec. 22, 2020) available at <https://www.sec.gov/news/press-release/2020-333>. See Gibson, Dunn & Crutcher LLP, When Whistleblowers Call: Planning Today For Employee Complaints During and After the COVID-19 Crisis (Apr. 6, 2020), available at <https://www.gibsondunn.com/wp-content/uploads/2020/04/when-whistleblowers-call-planning-today-for-employee-complaints-during-and-after-the-covid-19-crisis.pdf>.

<sup>9</sup>U.S. Sec. & Exch. Comm’n, Div. of Enforcement 2020 Annual Report (Nov. 2, 2020), available at <https://www.sec.gov/files/enforcement-annual-report-2020.pdf>.

<sup>10</sup>Robert Barnes, Supreme Court Rules to Limit SEC Power to Recover Profit from Frauds, Wash. Post, (June 5, 2017), available at [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644\\_story.html?utm\\_term=.08b9f3710ae1](https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644_story.html?utm_term=.08b9f3710ae1).

<sup>11</sup>Robert Barnes, Supreme Court Rules to Limit SEC Power to Recover Profit from Frauds, Wash. Post, (June 5, 2017), available at [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644\\_story.html?utm\\_term=.08b9f3710ae1](https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644_story.html?utm_term=.08b9f3710ae1).

profits.<sup>12</sup>

On June 22, 2020, the Supreme Court, in an 8 to 1 decision in *Liu v. SEC*, upheld the SEC's authority to seek disgorgement as equitable relief so long as it does not exceed a wrongdoer's net profits and is awarded for victims.<sup>13</sup> While *Kokesh* held disgorgement was a penalty and not a remedy for unjust enrichment, the Court explained in *Liu* that common law restraints on financial penalties have "no bearing on the SEC's ability to conform future requests for a defendant's profits to the limits outlined in common-law cases."<sup>14</sup> This decision casts some doubt on SEC disgorgement practices, such as ordering disgorged funds deposited into the U.S. Treasury, or declining to deduct business expenses.<sup>15</sup>

On December 11, 2020, Congress amended the Securities and Exchange Act of 1934 through its passage of a military spending bill, known as the National Defense Authorization Act.<sup>16</sup> That amendment gives the SEC, for the first time in its history, explicit statutory authority to seek disgorgement in federal district court. It also doubled the current statute of limitations for a claim for disgorgement with a scienter-based violation to 10 years. The amendment appears to be a direct response to the Supreme Court's recent decisions limiting the SEC's authority.

On January 18, 2021, President Biden nominated Gary Gensler to serve as Commissioner of the SEC.<sup>17</sup> On April 14, 2021, Mr.

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<sup>12</sup>Robert Barnes, Supreme Court Rules to Limit SEC Power to Recover Profit from Frauds, Wash. Post, (June 5, 2017), available at [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644\\_story.html?utm\\_term=.08b9f3710ae1](https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-to-limit-sec-power-to-recover-profit-from-fraud/2017/06/05/13fc02b8-4a02-11e7-a186-60c031eab644_story.html?utm_term=.08b9f3710ae1).

<sup>13</sup>*Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936, 207 L. Ed. 2d 401, Fed. Sec. L. Rep. (CCH) P 100851 (2020).

<sup>14</sup>*Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936, 207 L. Ed. 2d 401, Fed. Sec. L. Rep. (CCH) P 100851 (2020).

<sup>15</sup>Gibson Dunn & Crutcher LLP, Supreme Court Limits Disgorgement Remedy in SEC Civil Enforcement Actions (June 22, 2020), available at <https://www.gibsondunn.com/supreme-court-limits-disgorgement-remedy-in-sec-civil-enforcement-actions/>.

<sup>16</sup>Gibson Dunn & Crutcher LLP, Congress Burries Expansion of SEC Disgorgement Authority in Annual Defense Budget (December 18, 2020), available at <https://www.gibsondunn.com/congress-buries-expansion-of-sec-disgorgement-authority-in-annual-defense-budget/>.

<sup>17</sup>Arlette Saenz and Gregory Krieg, Biden Nominates Gary Gensler for SEC Commissioner, Rohit Chopra to Lead Consumer Financial Protection Bureau, CNN (Jan. 18, 2021), available at <https://www.cnn.com/2021/01/17/politics/gary-gensler-rohit-chopra-sec-cfpb-nominations/index.html>.

Gensler was confirmed by the Senate as Commissioner.<sup>18</sup>

### § 153:7 Agencies with enforcement powers—Department of Health & Human Services

The Department of Health & Human Services (“HHS”) plays an active role in investigating and mitigating white collar crimes that impact the U.S. health care system. From enforcing regulatory regimes against corporations that are part of the health care sector,<sup>1</sup> to coordinating investigations and prosecutions of Medicare and Medicaid fraud, the HHS’ white collar enforcement role is varied and increasing.

At HHS, the Office of the Inspector General (“OIG”) is responsible for the agency’s investigative and law enforcement activity.<sup>2</sup> The OIG has more than 1,600 personnel across the country whose mission includes “fight[ing] waste, fraud and abuse.”<sup>3</sup> The OIG has many tools at its disposal to fight fraud. For example, the OIG, in conjunction with the DOJ, can impose Corporate Integrity Agreements (“CIAs”) on corporations seeking to settle investigative and enforcement actions.<sup>4</sup> Similar to Deferred Prosecution Agreements used by the DOJ,<sup>5</sup> corporations enter into CIAs to avoid certain penalties—in this case, being excluded from federal health care programs, such as Medicare or Medicaid.<sup>6</sup> The OIG has also increasingly utilized the False Claims Act (“FCA”) which prohibits the submission of false reimbursement claims to the government.<sup>7</sup> On December 4, 2020, the HHS announced the creation of a False Claims Act Working Group to enhance its

<sup>18</sup>Tory Newmyer, Gary Gensler, Outspoken Wall Street Critic, Confirmed to Lead the SEC, Wash. Post (Apr. 14, 2021), available at <https://www.washingtonpost.com/business/2021/04/14/gary-gensler-confirmed-sec/>.

#### [Section 153:7]

<sup>1</sup>See generally Chapter 104, “Health Care Institutions” (§§ 104:1 et seq.).

<sup>2</sup>U.S. Dep’t of Health & Human Servs., Office of the Inspector General (OIG), <https://oig.hhs.gov/about-oig/about-us/index.asp>.

<sup>3</sup>U.S. Dep’t of Health & Human Servs., Office of the Inspector General (OIG), <https://oig.hhs.gov/about-oig/about-us/index.asp>.

<sup>4</sup>U.S. Dep’t of Health & Human Servs., Corporate Integrity Agreements, <http://oig.hhs.gov/fraud/cias.asp>. See generally Chapter 160, “The False Claims Act” (§§ 160:1 et seq.).

<sup>5</sup>The DOJ’s use of Deferred Prosecution Agreements is discussed further in Section 153:73.

<sup>6</sup>U.S. Dep’t of Health & Human Servs., Corporate Integrity Agreements, <http://oig.hhs.gov/fraud/cias.asp>.

<sup>7</sup>See Press Release, U.S. Dep’t of Justice, Justice Department Recovers Over \$3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), available at <http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015>.

partnership with DOJ and the OIG.<sup>8</sup>

In addition to the OIG, the agency's Office of Civil Rights ("OCR") engages in enforcement against corporations. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires certain health care entities to maintain the security and privacy of patients and health care consumers.<sup>9</sup> The OCR is responsible for enforcing compliance with the HIPAA security and privacy requirements by entities subject to the HIPAA, including providers, health plans, and health care clearinghouses that receive and compile health information.<sup>10</sup> The OCR's enforcement powers include conducting investigations and responding to patient complaints.<sup>11</sup>

In early 2016, the OCR began auditing hundreds of U.S. health care providers in order to determine their compliance with HIPAA requirements.<sup>12</sup> These unannounced audits ended in 2018. As of June 2020, the OCR had settled or imposed a civil money penalty in 75 HIPAA-related cases for a total of over \$166 million, and has made 925 referrals to the DOJ concerning potential violations.<sup>13</sup>

HHS recently increased its focus on combatting the opioid epidemic.<sup>14</sup> In October 2020, the Office of Audit Services Findings and Opinions issued an Update on Oversight of Opioid Prescribing and Monitoring Opioid Use: States Have Taken Action to Ad-

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<sup>8</sup>Press Release, HHS Announces False Claims Act Working Group to Enhance Efforts to Combat Fraud and Focus Resources on Bad Actors (Dec. 4, 2020), <https://www.hhs.gov/about/news/2020/12/04/hhs-announces-false-claims-act-working-group-enhance-efforts-combat-fraud-and-focus-resources-bad-actors.html>.

<sup>9</sup>See generally Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat 1936 (1996). See also Chapter 143, "Privacy and Security" (§§ 143:1 et seq.) for additional discussion of HIPAA.

<sup>10</sup>U.S. Dep't of Health & Human Servs., Covered Entities and Business Associates, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html>. See generally Chapter 104, "Health Care Institutions" (§§ 104:1 et seq.).

<sup>11</sup>U.S. Dep't of Health & Human Servs., How OCR Enforces the HIPAA Privacy & Security Rules, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/examples/how-OCR-enforces-the-HIPAA-privacy-and-security-rules/index.html>.

<sup>12</sup>U.S. Dep't of Health & Human Servs., OCR Launches Phase 2 of HIPAA Audit Program, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/phase2announcement/>.

<sup>13</sup>Press Release, U.S. Dep't of Health and Hum. Serv., Enforcement Results as of June 30, 2020, (Jun. 30, 2020) available at <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-highlights/index.html>.

<sup>14</sup>U.S. Dep't of Health & Human Servs., OCR Launches Phase 2 of HIPAA Audit Program, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/phase2announcement/>.

dress the Opioid Epidemic.<sup>15</sup> The audit update included 11 states and identified actions that each state took related to their oversight of opioid prescribing and monitoring in five categories—policies and procedures, data analytics, outreach, programs, and other actions.<sup>16</sup> The report did not contain any recommendations.

In response to the COVID-19 pandemic, HHS launched a reporting service for individuals to report fraud schemes related to COVID-19, and it is anticipated that HHS will be active in addressing pandemic-related fraud.<sup>17</sup> The Justice Department, with help from HHS, has publicly charged 474 defendants with criminal offenses based on fraud schemes connected to the COVID-19 pandemic, including schemes targeting the Paycheck Protection Program, Economic Injury Disaster Loan program and Unemployment Insurance programs.<sup>18</sup>

On December 6, 2020, President Biden announced Xavier Becerra to lead HHS,<sup>19</sup> and Rachel Levine to be assistant secretary for health at the Department for Health and Human Services.<sup>20</sup> Becerra was confirmed by the United States Senate on March 18, 2021.<sup>21</sup> Levine was confirmed by the United States Senate on March 24, 2021.<sup>22</sup>

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<sup>15</sup>Office of Audit Services Findings and Opinions, Update on Oversight of Opioid Prescribing and Monitoring Opioid Use: States Have Taken Action to Address the Opioid Epidemic (Oct. 2020), available at <https://oig.hhs.gov/oas/reports/region9/92001000.pdf>.

<sup>16</sup>Office of Audit Services Findings and Opinions, Update on Oversight of Opioid Prescribing and Monitoring Opioid Use: States Have Taken Action to Address the Opioid Epidemic (Oct. 2020), available at <https://oig.hhs.gov/oas/reports/region9/92001000.pdf>.

<sup>17</sup>Press Release, U.S. Dep't of Health and Hum. Serv., Fraud Alert: COVID-19 Scams, (Jul. 7, 2020) available at [https://oig.hhs.gov/coronavirus/fraud-alert-covid19.asp?utm\\_source=web&utm\\_medium=web&utm\\_campaign=covid19-fraud-alert](https://oig.hhs.gov/coronavirus/fraud-alert-covid19.asp?utm_source=web&utm_medium=web&utm_campaign=covid19-fraud-alert).

<sup>18</sup>Press Release, U.S. Dep't of Justice, Justice Dep't Takes Action Against COVID-19 Fraud (Mar. 26, 2021), available at <https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud>.

<sup>19</sup>Jeff Zeleny, Biden Nominates Xavier Becerra to Lead Health and Human Services, CNN (Dec. 6, 2020), <https://www.cnn.com/2020/12/06/politics/xavier-becerra-health-and-human-services/index.html>.

<sup>20</sup>Eileen Sullivan and Winnie Hu, Biden Announces His Picks For Senior Positions in Health and in Transportation, N.Y. Times, (Jan. 19, 2021), <https://www.nytimes.com/2021/01/19/us/politics/rachel-levine-transgender-health-human-services.html>.

<sup>21</sup>Sheryl Gay Stolberg, Senate Confirms Xavier Becerra as the Secretary of Health and Human Services, N.Y. Times (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/politics/xavier-becerra-health-secretary.html>.

<sup>22</sup>Dan Diamond & Samantha Schmidt, Rachel Levine, Historic Transgen-

**§ 153:8 Agencies with enforcement powers—PCAOB**

The Public Company Accounting Oversight Board (“PCAOB”), is a nonprofit corporation created by Congress to oversee the audits of public companies in order to protect investors and the public interest in the preparation of independent audit reports.<sup>1</sup> The PCAOB registers public accounting firms that prepare audit reports, establishes and adopts auditing quality control, ethics, and independent standards, inspects registered firms’ audits and quality control systems, and investigates and disciplines registered public accounting firms for violations of specified laws, rules, or professional standards.<sup>2</sup>

The SEC has oversight authority over the PCAOB and the members of the PCAOB Board are appointed to staggered five-year terms by the SEC. According to PCAOB’s Annual Report for fiscal year 2019, the PCAOB reported, without naming firms or individuals, that it issued 30 disciplinary orders, 27 individuals were sanctioned, 19 audit firms were sanctioned, and 13 orders involved the six largest global accounting firm networks.<sup>3</sup>

**§ 153:9 Agencies with enforcement powers—Other federal agencies**

There are several other federal agencies with enforcement powers, including the Food & Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), the Consumer Financial Protection Bureau (“CFPB”), the Commodity Futures Trading Commission (“CFTC”), the Federal Trade Commission (“FTC”), the Office of Foreign Assets Control (“OFAC”) and the Financial Crimes Enforcement Network (“FinCEN”).<sup>1</sup>

The FDA’s Office of Criminal Investigations was established to provide the FDA with a specific arm to conduct and coordinate criminal investigations.<sup>2</sup> The FDA’s Office of Criminal Investigations investigates violations of the Food, Drug, and Cosmetic Act,

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der Nominee, Confirmed as Assistant Health Secretary, Wash. Post (Mar. 24, 2021), <https://www.washingtonpost.com/health/2021/03/24/rachel-levine-confirmed/>.

**[Section 153:8]**

<sup>1</sup>PCAOB, About, available at <https://pcaobus.org/about>.

<sup>2</sup>PCAOB, About, available at <https://pcaobus.org/about>.

<sup>3</sup>See Public Company Accounting Oversight Board, 2019 Annual Report at 5, available at [https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/about/administration/documents/annual\\_reports/2019-pcaob-annual-report.pdf?sfvrsn=3d0b243\\_2](https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/about/administration/documents/annual_reports/2019-pcaob-annual-report.pdf?sfvrsn=3d0b243_2).

**[Section 153:9]**

<sup>1</sup>For a more detailed discussion of FTC, OFAC, and FinCEN, see § 153:41.

<sup>2</sup>U.S. Food & Drug Admin., What OCI Investigates, <http://www.fda.gov/IC>

the Anti-Tampering Act, and related federal statutes. The subjects of such investigations include conduct related to making and selling counterfeit drugs, off-label promotion of FDA-approved drugs and medical devices, and trafficking in unapproved products that fall within the FDA's purview.<sup>3</sup>

The EPA has criminal enforcement powers with regard to conduct violating certain environmental laws, including dumping wastewater in violation of the Clean Water Act, the improper disposal of hazardous waste in violation of the Resource Conservation and Recovery Act, and the use of a contractor to remove asbestos without adhering to the accepted safety standards for such work, in violation of the Clean Air Act.<sup>4</sup>

The CFPB, created by the Dodd-Frank Act, is responsible for implementing and enforcing consumer financial laws for the purpose of protecting consumers from unfair practices.<sup>5</sup> The CFPB has the power to issue subpoenas and civil investigative demands “[w]henver the [CFPB] has reason to believe that any person may be in possession . . . of any documentary materials or tangible things, or may have any information, relevant to a violation.”<sup>6</sup> The CFPB can also conduct hearings and adjudication proceedings, including cease-and-desist proceedings.<sup>7</sup> In addition, the CFPB is empowered to seek civil penalties and equitable relief in civil court.<sup>8</sup> During its first year of operation, the CFPB launched several high profile investigations against credit card companies<sup>9</sup> and mortgage lenders.<sup>10</sup>

In addition to its own enforcement powers, the CFPB also is

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[ECI/CriminalInvestigations/ucm123062.htm](#). See generally Chapter 131, “Food and Drug” (§§ 131:1 et seq.).

<sup>3</sup>U.S. Food & Drug Admin., What OCI Investigates, <http://www.fda.gov/IC/ECI/CriminalInvestigations/ucm123062.htm>. See generally Chapter 131, “Food and Drug” (§§ 131:1 et seq.).

<sup>4</sup>See U.S. Env'tl. Prot. Agency, What is an Environmental Crime?, <http://www.epa.gov/compliance/criminal/investigations/environmentalcrime.html>. See generally Chapter 177, “Environmental Claims” (§§ 177:1 et seq.).

<sup>5</sup>See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5511(a) (West 2013). See generally Chapter 113, “Consumer Protection” (§§ 113:1 et seq.).

<sup>6</sup>Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5562(c) (West 2013).

<sup>7</sup>See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5563 (West 2013).

<sup>8</sup>See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5564 (West 2013).

<sup>9</sup>See Press Release, Consumer Fin. Prot. Bureau, CFPB Probe into Capital One Credit Card Marketing Results in \$140 Million Consumer Refund (July 18, 2012), available at <http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe/>.

empowered to conduct investigations jointly with other regulators.<sup>11</sup> In fact, the CFPB is required to refer its findings to the DOJ if it “obtains evidence that any person, domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law.”<sup>12</sup> In June 2020, the Supreme Court ruled in *Seila Law v. CFPB* that the CFPB was a constitutional agency.<sup>13</sup> However, the Court limited the statutory framework that created the agency, striking down a provision that precluded the President from firing the CFPB director unless he or she was accused of “inefficiency, neglect of duty, or malfeasance in office.”<sup>14</sup> Americans filed a record-breaking number of complaints with the CFPB as the COVID-19 pandemic spurred a widespread economic crisis. Complaints concerning unfair arrangements arising out of consumers’ inability to make payments on credit lines, mortgages, and vehicles broke record highs each successive month after March 2020 through June 2020.<sup>15</sup>

Although the CFTC existed prior to the enactment of the Dodd-Frank Act, the Dodd-Frank Act empowered the CFTC to take a more prominent enforcement role.<sup>16</sup> In particular, the Dodd-Frank Act’s amendments to the Commodities Exchange Act expanded the CFTC’s ability to pursue cases alleging manipulation and fraud by enacting language more akin to the language in Section

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<sup>10</sup>See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements (Nov. 19, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/>.

<sup>11</sup>See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5562(a)(1) (West 2013); Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and State Partners Obtain Refunds for Consumers Charged Illegal Debt-Relief Fees (Dec. 21, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-and-state-partners-obtain-refunds-for-consumers-charged-illegal-debt-relief-fees/>.

<sup>12</sup>Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5566 (West 2013).

<sup>13</sup>*Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 207 L. Ed. 2d 494, Fed. Sec. L. Rep. (CCH) P 100857 (2020).

<sup>14</sup>*Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 207 L. Ed. 2d 494, Fed. Sec. L. Rep. (CCH) P 100857 (2020).

<sup>15</sup>Andrew Keshner, Consumer complaints to the CFPB are skyrocketing as the coronavirus outbreak continues, MarketWatch, (Jul. 19, 2020) available at <https://www.marketwatch.com/story/consumer-complaints-to-the-cfpb-are-skyrocketing-as-the-coronavirus-outbreak-continues-2020-07-17>.

<sup>16</sup>Ben Protess, Libor Case Energizes a Wall Street Watchdog, N.Y. Times, (Aug. 12, 2012), <http://dealbook.nytimes.com/2012/08/12/libor-case-energizes-gensler-and-the-c-f-t-c/> (“The agency’s revival stems from the wave of new regulation. Dodd-Frank, passed in 2010, greatly expanded the responsibility of the agency, stretching its reach to the dark corners of the \$300 trillion derivatives market. Before that, the agency oversaw the \$40 trillion futures business.”).

10(b) of the Securities Exchange Act of 1934.<sup>17</sup> Under this revised language, the CFTC adopted Regulation 180.1, modeled after Rule 10b-5.<sup>18</sup> The amended language reduced the burden of proving manipulative or fraudulent conduct by requiring only a showing of recklessness, rather than specific intent.<sup>19</sup> The 2018 rollback of Dodd-Frank under the Trump Administration does not appear to have significantly impacted the agency's enforcement role.<sup>20</sup>

On May 20, 2020, the CFTC announced that the Division of Enforcement issued new guidance outlining factors the Division considers in recommending civil monetary penalties to the Commission to be imposed in CFTC enforcement actions.<sup>21</sup> The staff guidance provides a three-pronged approach to evaluate the appropriate penalty to recommend to the Commission: (1) the “gravity of the violation”; (2) “mitigating and aggravating circumstances”; and (3) “other considerations.” In applying the various factors, staff will be guided by the overarching consideration of ensuring that any proposed penalty achieves the dual goals of specific and general deterrence.<sup>22</sup>

The CFTC's enforcement role has also increased through its

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<sup>17</sup>See Prohibition on the Employment, or Attempted Employment, of Manipulation and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,399. See generally Chapter 95, “Commodities and Futures” (§§ 95:1 et seq.).

<sup>18</sup>See Prohibition on the Employment, or Attempted Employment, of Manipulation and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,399 (“Further, by modeling final Rule 180.1 on SEC Rule 10b-5, the Commission takes an important step toward harmonization of regulation of the commodities, commodities futures, swaps and securities markets given that new CEA section 6(c)(1) and Exchange Act Section 10(b) include virtually identical prohibitions against ‘any manipulative or deceptive device or contrivance.’”).

<sup>19</sup>See Prohibition on the Employment, or Attempted Employment, of Manipulation and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,410 (“In the past, the CFTC had the ability to prosecute manipulation, but to prevail, it had to prove the specific intent of the accused to create an artificial price. Under the new law and one of the rules before us today, the Commission's anti-manipulation reach is extended to prohibit the reckless use of fraud-based manipulative schemes. This closes a significant gap, as it will broaden the types of cases we can pursue and improve the chances of prevailing over wrongdoers.”).

<sup>20</sup>See Jacob Pramuk, Trump Signs the Biggest Rollback of Bank Rules Since the Financial Crisis, CNBC (May 24, 2018), <https://www.cnbc.com/2018/05/24/trump-signs-bank-bill-rolling-back-some-dodd-frank-regulations.html>.

<sup>21</sup>Press Release, Commodity Futures Trading Comm'n, CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance (May 20, 2020), available at <https://cftc.gov/PressRoom/PressReleases/8165-20>.

<sup>22</sup>Press Release, Commodity Futures Trading Comm'n, CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance (May 20, 2020), available

recent foray into regulating virtual currencies. In March 2018, the Eastern District of New York upheld a 2015 determination that cryptocurrencies are commodities within the anti-fraud jurisdiction of the CFTC.<sup>23</sup> In September 2018, the District of Massachusetts made a similar determination.<sup>24</sup> The agency has begun regulating virtual currencies, but it is not yet clear what the scope of this regulation will be.<sup>25</sup> In the meantime, the CFTC brought numerous enforcement actions in 2018 and 2019 targeting individuals and companies for fraudulent behavior in cryptocurrency markets.<sup>26</sup> Several of these have already resulted in the award of substantial monetary judgments: in two 2018 cases in the Eastern District of New York, the court ordered defendants to pay over \$1.1 million and over \$1.9 million, respectively.<sup>27</sup>

at <https://cftc.gov/PressRoom/PressReleases/8165-20>.

<sup>23</sup>Press Release, Commodity Futures Trading Comm'n, Federal Court in New York Enters Preliminary Injunction Order against Patrick K. McDonnell and His Company Cabbage Tech, Corp. d/b/a Coin Drop Markets in Connection with Fraudulent Virtual Currency Scheme (Mar. 6, 2018), available at <https://www.cftc.gov/PressRoom/PressReleases/pr7702-18>.

<sup>24</sup>Press Release, Commodity Futures Trading Comm'n, Federal Court Finds that Virtual Currencies Are Commodities (Oct. 3, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7820-18>.

<sup>25</sup>Press Release, Commodity Futures Trading Comm'n, CFTC Staff Issues Advisory for Virtual Currency Products (May 21, 2018), available at <https://www.cftc.gov/PressRoom/PressReleases/7731-18>.

<sup>26</sup>See, e.g., Press Release, Commodity Futures Trading Comm'n, Foreign Trading Platform and Its CEO to Pay \$990,000 for Illegal Bitcoin-Related Transactions with U.S. Customers (Mar. 11, 2019), available at <https://cftc.gov/PressRoom/PressReleases/7886-19>; Press Release, Commodity Futures Trading Comm'n, CFTC Orders Former Virtual Currency Trader to Pay More than \$1.1 Million for Fraudulent Bitcoin and Litecoin Scheme (Nov. 9, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7839-18>; Press Release, Commodity Futures Trading Comm'n, CFTC Files Three Enforcement Actions Addressing Insider Trading; Forex Fraud; and Fraudulent Solicitation, Impersonation of a CFTC Investigator, and Forging CFTC Documents, All in Attempt to Steal Bitcoin (Sept. 28, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7814-18>; Press Release, Commodity Futures Trading Comm'n, CFTC Charges Trading Platform with Illegal Transactions Margined in Bitcoin, Failing to Implement Procedures to Prevent Money-Laundering, and Failing to Register with the CFTC (Sept. 27, 2018), <https://cftc.gov/PressRoom/PressReleases/7809-18>; Press Release, Commodity Futures Trading Comm'n, Federal Court Orders Commodity Pool Operator and Its Principal to Pay More Than \$1.9 Million for Bitcoin and Binary Options Fraud Scheme (July 23, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7760-18>.

<sup>27</sup>Press Release, Commodity Futures Trading Comm'n, CFTC Wins Trial Against Virtual Currency Fraudster (Aug. 24, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7774-18>; Press Release, Commodity Futures Trading Comm'n, Federal Court Orders Commodity Pool Operator and Its Principal to Pay More Than \$1.9 Million for Bitcoin and Binary Options Fraud

The Office of Foreign Assets Control is part of the U.S. Department of the Treasury and administers and enforces economic and trade sanctions based on U.S. foreign policy and national security.<sup>28</sup> Although 2020 saw a decline in OFAC enforcement actions compared to 2019, such a decline is unlikely to represent a material shift in priorities as OFAC continues to aggressively pursue enforcement actions.<sup>29</sup> Notably, under the Trump Administration, OFAC increased its sanctions enforcement—a trend that is expected to continue under the Biden Administration.

### § 153:10 Enforcement strategies

Recent trends in enforcement have focused on both cooperation and individual accountability. In September 2015, then-Deputy Attorney General Sally Yates issued a policy memorandum on behalf of the DOJ entitled “Individual Accountability for Corporate Wrongdoing.”<sup>1</sup> The “Yates Memo,” as it is commonly called, established six steps to further the DOJ’s effort to “fully leverage its resources to identify culpable individuals at all levels in corporate cases.”<sup>2</sup> Generally speaking, the Yates Memo sought to achieve these goals by punishing a lack of full cooperation. In May 2018, then-Deputy Attorney General Rod Rosenstein announced an update to DOJ enforcement policies in corporate investigations.<sup>3</sup> Continuing the Yates Memo’s trend, the announced policy promotes cooperation and individual

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Scheme (July 23, 2018), available at <https://cftc.gov/PressRoom/PressReleases/7760-18>.

<sup>28</sup>U.S. Dep’t of Treasury, Office of Foreign Assets Control - Sanctions Programs and Information, available at <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information>.

<sup>29</sup>Ama Adams, A Review of 2020’s Key US Sactions Developments, Law360, (Dec. 18, 2020), available at <https://www.law360.com/articles/1338652/a-review-of-2020-s-key-us-sanctions-developments>.

#### [Section 153:10]

<sup>1</sup>Gibson, Dunn & Crutcher LLP, DOJ’s Newest Policy Pronouncement: The Hunt for Corporate Executives (Sept. 11, 2015), available at <https://www.gibsondunn.com/dojs-newest-policy-pronouncement-the-hunt-for-corporate-executives/>. See Chapter 5, “Internal Investigations” (§§ 5:1 et seq.) for additional discussion of the Yates Memo.

<sup>2</sup>Gibson, Dunn & Crutcher LLP, DOJ’s Newest Policy Pronouncement: The Hunt for Corporate Executives, (Sept. 11, 2015), available at <https://www.gibsondunn.com/dojs-newest-policy-pronouncement-the-hunt-for-corporate-executives/>.

<sup>3</sup>Rod J. Rosenstein, U.S. Dep’t of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

accountability.<sup>4</sup> However, Rosenstein's policy offered a major shift from the Yates Memo: it focuses on incentivizing cooperation, not punishing a lack of cooperation.<sup>5</sup> Notably, Rosenstein's policy stresses cooperation directly with the Department of Justice and explains that "[c]ooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States."<sup>6</sup>

There are four key features to this policy. First, the policy affirms that the federal government's criminal enforcement authority should not be used outside the investigation and prosecution of a possible crime.<sup>7</sup> Second, the policy calls for attorneys in different DOJ components to coordinate with one another when seeking to resolve corporate cases based on the same misconduct.<sup>8</sup> Third, the policy encourages DOJ attorneys to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same conduct.<sup>9</sup> Fourth, the policy outlines factors the DOJ attorneys may evaluate in determining whether multiple penalties serve the interests

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<sup>4</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>5</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>6</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>7</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>8</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>9</sup>Rod J. Rosenstein, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

of justice in a particular case.<sup>10</sup>

Similar changes were made concerning prosecutions under the Foreign Corrupt Practices Act (“FCPA”) which Rosenstein announced in November 2017.<sup>11</sup> Under this policy, the DOJ may decline to prosecute companies that demonstrate “responsible corporate conduct” after the company discovers an FCPA violation and satisfies the rigorous requirements of the policy.<sup>12</sup> In March 2019, the DOJ updated the FCPA Corporate Enforcement Policy, thereby facilitating companies’ ability to take advantage of the leniency that the policy offers.<sup>13</sup>

In November 2019, the DOJ added language to the policy to ensure that a company that disclosed possible infractions soon after learning about them would not be expected to have a full grasp of the situation.<sup>14</sup> The purpose was to dis-incentivize companies from opting to wait to disclose possible FCPA violations in order to meet the policy’s disclosure requirements.<sup>15</sup> In addition, companies are now required to identify evidence that the company knows to exist even if it is not in the company’s possession.<sup>16</sup>

In July 2020, the DOJ Criminal Division published the second edition of “A Resource Guide to the U.S. Foreign Corrupt Prac-

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<sup>10</sup>Rod J. Rosenstein, U.S. Dep’t of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the N.Y. City Bar White Collar Crime Inst. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

<sup>11</sup>Rod J. Rosenstein, U.S. Dep’t of Justice, Deputy Attorney Gen. Rod J. Rosenstein Delivers Remarks at the Am. Conference Inst.’s 20th Anniversary N.Y. Conference on the Foreign Corrupt Practices Act (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-remarks-american-conference-institutes>.

<sup>12</sup>Rod J. Rosenstein, U.S. Dep’t of Justice, Deputy Attorney Gen. Rod J. Rosenstein Delivers Remarks at the Am. Conference Inst.’s 20th Anniversary N.Y. Conference on the Foreign Corrupt Practices Act (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-remarks-american-conference-institutes>.

<sup>13</sup>Jonathan S. Kolodner et al., DOJ Updates FCPA Corporate Enforcement Policy, N.Y.U. Sch. of Law Program on Corp. Compliance & Enf’t, (Apr. 2019), [https://wp.nyu.edu/compliance\\_enforcement/2019/04/10/doj-updates-fcpa-corporate-enforcement-policy/](https://wp.nyu.edu/compliance_enforcement/2019/04/10/doj-updates-fcpa-corporate-enforcement-policy/); U.S. Dep’t of Justice, U.S. Attorneys’ Justice Manual § 9-47.120 (Updated Nov. 2020), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

<sup>14</sup>Gibson Dunn & Crutcher LLP, 2019 Year-End FCPA Update, (Jan. 6, 2020) available at <https://www.gibsondunn.com/2019-year-end-fcpa-update/>.

<sup>15</sup>Gibson Dunn & Crutcher LLP, 2019 Year-End FCPA Update, (Jan. 6, 2020) available at <https://www.gibsondunn.com/2019-year-end-fcpa-update/>.

<sup>16</sup>Dylan Tokar, Foreign Bribery Leniency Program Gets Minor Adjustment, Wall St. J., (Nov. 20, 2019), <https://www.wsj.com/articles/foreign-bribery-leniency-program-gets-minor-adjustment-11574291351>.

tices Act.”<sup>17</sup> Among the key updates included in the guide are: (1) additional information on the interpretations of “foreign official,” “instrumentality,” and “agent” in light of the DOJ’s victory in the *Hoskins* case; (2) incorporation of the recent leniency policy and the Corporate Enforcement policy changes; (3) clarification regarding the division of corporate successor liability in the mergers and acquisitions context; (4) an update to the disgorgement section to include the recent decision in *Liu v. SEC*; and (5) an explanation of the factors that contribute to resolving investigations without prosecution.<sup>18</sup>

The Biden Administration is likely to go even further than the Trump Administration on FCPA enforcement for several reasons. First, the Biden Administration is acting aggressively to repopulate key DOJ offices, such as the Criminal Division’s Fraud Section, which has exclusive authority over FCPA cases.<sup>19</sup> Second, given the economic downturn as a result of the COVID-19 economic downturn, incentives for fraud increase. FCPA cases spiked in 2001 and 2007–2009, correlating with the two most recent economic downturns. It is possible that the same will happen now, with the disruption of international trade, profit targets are under pressure, and industries are consolidating.<sup>20</sup> Third, President Biden’s appointees, National Security Advisor Jake Sullivan, Attorney General Merrick Garland, and SEC Chairman Gary Gensler, have confirmed a commitment to focus on combating corruption around the world.<sup>21</sup> This focus, bolstered by the hiring of seasoned lawyers to fill roles within the DOJ’s and SEC’s foreign bribery units, suggests that the FCPA will be a key enforcement priority for the Biden Administration.

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<sup>17</sup>U.S. Dep’t of Justice & Sec. & Exch. Comm’n, A Resource Guide to the Foreign Corrupt Practices Act, (2d Ed. July 2020) available at <https://www.justice.gov/criminal-fraud/file/1292051/download>.

<sup>18</sup>U.S. Dep’t of Justice & Sec. & Exch. Comm’n, A Resource Guide to the Foreign Corrupt Practices Act, (2d Ed. July 2020), available at <https://www.justice.gov/criminal-fraud/file/1292051/download>.

<sup>19</sup>J. Scott Maberry, The Next Four Years of FCPA Enforcement: What to Expect From The Biden Administration, *The National Law Review* (Apr. 1, 2021), available at <https://www.natlawreview.com/article/next-four-years-fcpa-enforcement-what-to-expect-biden-administration>.

<sup>20</sup>J. Scott Maberry, The Next Four Years of FCPA Enforcement: What to Expect From The Biden Administration, *The National Law Review* (Apr. 1, 2021), available at <https://www.natlawreview.com/article/next-four-years-fcpa-enforcement-what-to-expect-biden-administration>.

<sup>21</sup>Michael DeBernardis, FCPA Enforcement: Under the Biden Administration: Three Areas to Watch, *Global Trade Magazine* (Mar. 30, 2021), available at <https://www.globaltrademag.com/fcpa-enforcement-under-the-biden-administration-three-areas-to-watch/>.

**§ 153:11 Enforcement strategies—Specialized units within the DOJ**

The Fraud Section of the Criminal Division of the DOJ investigates and prosecutes complex white collar criminal cases across the country. The Fraud Section has experience with sophisticated fraud schemes, expertise in managing complex and multidistrict litigation, and the ability to deploy resources to address law enforcement priorities as well as to respond to geographically shifting crime problems.<sup>1</sup> For instance, on January 7, 2021, the DOJ entered into an agreement with Boeing to resolve a criminal charge related to conspiracy to defraud the Federal Aviation Administration's Aircraft Evaluation Group in connection with its evaluation of Boeing's 737 MAX aircraft.<sup>2</sup> The investigation included the FBI, the Department of Transportation Office of the Inspector General, attorneys from the Fraud Section, and the U.S. Attorney's Office of the Northern District of Texas, and culminated in a \$2.5 billion criminal monetary payment from Boeing.<sup>3</sup>

This increased specialization and focus on white collar crime has cascaded down from the DOJ to the U.S. Attorneys' Offices. The prosecution of white collar crimes historically has been a high priority within the DOJ, and it has received heightened attention and resources in recent years because of the increased use of technology in various financial frauds and economic espionage.<sup>4</sup>

For example, within the SDNY, white collar crimes are generally assigned to the Securities and Commodities Fraud Task Force or the Complex Frauds and Cybercrime Unit. The SDNY's Securities and Commodities Fraud Task Force is responsible for investigating and prosecuting crimes relating to the operation of securities and commodities markets, including such crimes as insider trading, market manipulation schemes, accounting and

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**[Section 153:11]**

<sup>1</sup>U.S. Dep't of Justice, Fraud Section, <http://www.justice.gov/criminal-fraud>. See generally Chapter 151, "Fraud" (§§ 151:1 et seq.).

<sup>2</sup>Press Release, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion, U.S. Dep't of Justice (Jan. 7, 2021), available at <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion>.

<sup>3</sup>Press Release, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion, U.S. Dep't of Justice (Jan. 7, 2021), available at <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion>.

<sup>4</sup>See U.S. Dep't of Justice, The United States Attorney's Office, Criminal Division, (Oct. 22, 2019), available at <https://www.justice.gov/usao-sdny/criminal-division>.

regulatory reporting frauds, and penny stock “pump and dump” schemes.<sup>5</sup> The Complex Frauds and Cybercrime Unit oversees the investigation and prosecution of bank fraud, mortgage fraud, health care fraud, tax fraud, and cybercrimes.<sup>6</sup> Crimes with a particular international focus, such as Foreign Corrupt Practices Act (“FCPA”) cases,<sup>7</sup> are usually handled by the Complex Frauds and Cybercrimes Unit; however, other units may handle such cases depending on how the case is brought in—for example, a FCPA issue may arise in a unit investigation that investigates terrorism.<sup>8</sup>

### § 153:12 Enforcement strategies—Domestic interagency cooperation

Domestic interagency cooperation has become a key strategy in the DOJ’s enhanced efforts to combat sophisticated financial crimes. The Fraud Section of the Criminal Division chairs several working groups, including the Securities and Commodities Fraud Working Group, the Interagency Bank Fraud Enforcement Working Group, and the Mortgage Fraud Working Group. These working groups provide forums for information sharing and coordination among the diverse domestic and federal agencies of which they are composed.<sup>1</sup>

In June 2020, the SEC and the DOJ Antitrust Division signed the first-ever interagency Memorandum of Understanding to foster cooperation and communication between the agencies with the aim of enhancing competition in the securities industry.<sup>2</sup> With the intent of formalizing the exchange of knowledge be-

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<sup>5</sup>U.S. Dep’t of Justice, The United States Attorney’s Office, Criminal Division, (Oct. 22, 2019), available at <https://www.justice.gov/usao-sdny/criminal-division>.

<sup>6</sup>Press Release, Office of the U.S. Att’y for the S. Dist. of N.Y., United States Attorney Preet Bharara Announces Supervisory Appointments to Criminal Division (Oct. 19, 2009), available at <https://www.justice.gov/archive/usao/ny/p/pressreleases/October09/criminaldivisionsupervisoryappointmentspr.pdf>.

<sup>7</sup>See § 153:35 and Chapter 156, “The Foreign Corrupt Practices Act” (§§ 156:1 et seq.).

<sup>8</sup>Harry A. Chernoff, Esq., Assistant United States Attorney, Southern District of New York, Comments at Federal Bar Council’s Program Concerning the FCPA Here and Abroad: The Challenges of Multi-Jurisdictional FCPA Investigations (Oct. 21, 2010).

#### [Section 153:12]

<sup>1</sup>James B. Comey, Statement Before the Senate Judiciary Committee, Oversight of the Federal Bureau of Investigation (May 3, 2017), <https://www.fbi.gov/news/testimony/oversight-of-the-federal-bureau-of-investigation-050317>.

<sup>2</sup>Press Release, Securities and Exchange Commission and Justice Department’s Antitrust Division Sign Historic Memorandum of Understanding, (Jun. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-140>.

tween the two agencies, key provisions of the agreement establish frameworks for regular discussions, review of law enforcement and regulatory matters affecting competition in the securities industry, and periodic meetings amongst respective agency officials.<sup>3</sup>

Another feature of interagency cooperation is the coordinated filing of both civil and criminal actions.<sup>4</sup> For example, in March 2020, then-Attorney General William Barr announced a nationwide task force to address COVID-19-related market manipulation, hoarding, and price-gouging. The task force was directed to work closely with other agencies empowered to designate particular items and equipment as scarce, and coordinate nationwide investigations and prosecutions of these illicit activities. The task force consists of over 100 prosecutors from U.S. Attorneys' offices across the country, and its work is ongoing. Prosecutors work with federal and state law enforcement agencies to investigate alleged misconduct. The task force has opened hundreds of investigations involving allegations of hoarding, price-gouging, counterfeiting or misbranding of medical devices, and fraud.<sup>5</sup>

The Office of the Inspector General is tasked with oversight efforts to assist the DOJ, including oversight of CARES Act funding. The OIG issued a report on the DOJ's administration of CARES Act funding and concluded that there were two areas of concern—awards to areas with limited coronavirus impact and fraud schemes targeting CARES Act Funds.<sup>6</sup>

### § 153:13 Enforcement strategies—Cross-border investigations and collaboration agreements

In addition to domestic interagency cooperation, the DOJ coordinates with its foreign counterparts to ensure that jurisdictional issues do not impede efforts to combat white collar crimes. Such collaboration allows prosecutors and regulators from different countries to share both investigative burdens and resulting

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<sup>3</sup>Press Release, Securities and Exchange Commission and Justice Department's Antitrust Division Sign Historic Memorandum of Understanding, (Jun. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-140>.

<sup>4</sup>See generally Chapter 91, "Regulatory Litigation" (§§ 91:1 et seq.) and Chapter 154, "Interplay Between Commercial Litigation and Criminal Proceedings" (§§ 154:1 et seq.).

<sup>5</sup>U.S. Dep't of Justice, Department of Justice Coronavirus Response, <http://www.justice.gov/coronavirus/DOJresponse>.

<sup>6</sup>Press Release, U.S. Dep't of Justice Office of the Inspector General, DOJ OIG Releases Interim Report on the Office of Justice Programs' Administration of CARES Act Funding (July 9, 2020), available at <https://oig.justice.gov/news/d-oi-oig-releases-interim-report-office-justice-programs-administration-cares-act-funding>.

finances and penalties. As white collar crime has become increasingly international in scope, recent agreements and settlements illustrate that international investigative and prosecutorial collaboration has kept pace.<sup>1</sup> Such cross-border collaboration often results from cooperative requests made pursuant to mutual legal assistance agreements.<sup>2</sup> For example, the DOJ has cooperated with the U.K. Serious Fraud Office (“SFO”) and the U.K. Financial Services Authority in such areas as oversight of credit rating agencies, hedge fund advisers, and the clearing of over-the-counter derivatives.<sup>3</sup> Further, the SEC has negotiated both multilateral and bilateral information sharing arrangements, generally known as memoranda of understanding, with a number of countries, relating to cross-border enforcement, regulatory cooperation, technical assistance, and bilateral dialogues.<sup>4</sup> In addition to these memoranda of understanding, the SEC has more than 75 official cooperative arrangements with foreign regulators and law enforcement agencies.<sup>5</sup> In May 2019, the SEC became a signatory to an administrative agreement for the transfer of personal data as part of its membership in the International Organization of Securities Commissions.<sup>6</sup>

Cross-border collaboration continues to increase. In January 2020, the DOJ announced that airline manufacturer Airbus SE would pay \$4 billion to French, U.K., and U.S. authorities after an investigation triggered by a British whistleblower.<sup>7</sup> The DOJ also announced settlements that resulted from cooperation with

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**[Section 153:13]**

<sup>1</sup>See generally Chapter 28, “Cross-Border Litigation” (§§ 28:1 et seq.).

<sup>2</sup>F. Joseph Warin et al., Securities Docket Webcast: FCPA and International Anti-Corruption Enforcement—Trends in 2010 18 (Apr. 8, 2010), available at <https://www.securitiesdocket.com/wp-content/uploads/2010/04/April8Consolidated-FinPDF.pdf>.

<sup>3</sup>Sec. & Exch. Comm’n, SEC and UK FSA Hold Fifth Meeting of the SEC-FSA Strategic Dialogue (Feb. 1, 2010), available at [www.sec.gov/news/press/2010/2010-17.htm](http://www.sec.gov/news/press/2010/2010-17.htm).

<sup>4</sup>The complete list of memoranda of understanding is available on the SEC’s website at [http://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml).

<sup>5</sup>See Mary Jo White, Securities Regulation in the Interconnected, Global Marketplace, International Bar Association Annual Conference, Legal Practice Division Luncheon, (Sept. 21, 2016), available at <https://www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html>.

<sup>6</sup>Secs. & Exch. Comm’n, Cooperative Agreements with Foreign Regulators (Updated Jan. 22, 2021), [https://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](https://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml).

<sup>7</sup>Press Release, U.S. Dep’t of Justice, Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case, (Jan. 31, 2020) available at <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-glo>

Italian prosecutors in April 2020.<sup>8</sup> In June 2020, the SEC announced a \$112 million settlement with Novartis AG, a Swiss global pharmaceutical and healthcare company, for violations of the FCPA, attributing the investigation to cooperation between DOJ Criminal Division, the Swiss Financial Market Supervisory Authority, and the U.K. Financial Conduct Authority.<sup>9</sup>

### § 153:14 Enforcement strategies—Recent techniques in investigation of white collar crimes

The DOJ utilizes a variety of aggressive investigative techniques in its fight against white collar crime, including court-authorized electronic surveillance and undercover sting operations.<sup>1</sup> The use of these techniques, reserved historically for drug and organized crime conspiracies, demonstrates the government's willingness to use all the tools at its disposal in this era of heightened enforcement.

In 2015, then-deputy chief of the Justice Department's Criminal Division stated that wiretaps, body wires, and physical surveillance "have become a staple in our white collar investigations [and] I can promise you we will continue to use them."<sup>2</sup> In a 2015 case against the CEO of PetroTiger, Joseph Sigelman, alleging violations of the Foreign Corrupt Practices Act, a federal judge allowed evidence against Sigelman that was obtained via a secret camera placed by the FBI on the company's general counsel, who was a cooperating witness.<sup>3</sup>

In a November 2016 speech at NYU Law's Program on Corporate Compliance and Enforcement, then-SEC Chairman Mary Jo White noted the extent to which the SEC has increas-

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[bal-penalties-resolve-foreign-bribery-and-itar-case.](#)

<sup>8</sup>Press Release, Sec. & Exch. Comm'n, SEC Charges Eni S.p.A. with FCPA Violations, (Apr. 17, 2020), available at <https://www.sec.gov/enforce/34-88679-s>.

<sup>9</sup>Press Release, Sec. & Exch. Comm'n, SEC Charges Novartis AG with FCPA Violations, (Jun. 25, 2020), available at <https://www.sec.gov/news/press-release/2020-144>.

#### [Section 153:14]

<sup>1</sup>Robert H. Hotz, Jr. & Harry Sandick, Unconventional Investigative Techniques in White Collar Cases: Wiretaps, Search Warrants, and Sting Operations (May 11, 2011), available at <https://www.akingump.com/images/content/2/2/v4/22068/PLI-Outline-Final.pdf>; see also Michael Ricciuti, 2014 Saw The Arrival of 'Grey Collar' Crime, Law360, (Jan. 5, 2014), <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

<sup>2</sup>Joel Schectman, DOJ Returns to Bare-Knuckle tactics in Bribery Case, Wall St. J., (Feb. 11, 2015), <http://blogs.wsj.com/riskandcompliance/2015/02/11/u-s-justice-dept-returns-to-bare-knuckle-tactics-in-bribery-case/?mod=ST1>.

<sup>3</sup>Joel Schectman, DOJ Returns to Bare-Knuckle tactics in Bribery Case, Wall St. J., (Feb. 11, 2015), <http://blogs.wsj.com/riskandcompliance/2015/02/11/u-s-justice-dept-returns-to-bare-knuckle-tactics-in-bribery-case/?mod=ST1>.

ingly made use of data and data analytics to investigate misconduct.<sup>4</sup> The SEC created the Center for Risk and Quantitative Analytics precisely to gather information and provide data analytic expertise.<sup>5</sup> Chairman White attributed the efficacy of many successful SEC cases against overseas traders to the use of such tools and indicated a future commitment to utilization of these tactics.<sup>6</sup>

In October 2017, Paul Manafort, President Trump's former 2016 campaign chairman, was indicted for conspiracy against the United States after wiretaps revealed his alleged connection to the Russian government.<sup>7</sup> Manafort ultimately pleaded guilty to 10 federal crimes, including tax fraud, bank fraud, failure to disclose foreign bank accounts, and criminal conspiracy, across two prosecutions in the Eastern District of Virginia and the District of Columbia.<sup>8</sup> He was sentenced to 73 months in prison.<sup>9</sup> On December 23, 2020, Trump granted Manafort a full pardon.<sup>10</sup>

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<sup>4</sup>Mary Jo White, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results, New York University School of Law Program on Corporate Compliance and Enforcement, (Nov. 18, 2016), available at <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>.

<sup>5</sup>Mary Jo White, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results, New York University School of Law Program on Corporate Compliance and Enforcement, (Nov. 18, 2016), available at <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>.

<sup>6</sup>Mary Jo White, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results, New York University School of Law Program on Corporate Compliance and Enforcement, (Nov. 18, 2016), available at <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>.

<sup>7</sup>Paul Manafort, Rick Gates Plead Not Guilty To 12 Counts, Including Conspiracy Against The U.S., CBS News, (Oct. 30, 2017), <https://www.cbsnews.com/news/paul-manafort-fbi-surrender-indictment-12-counts-conspiracy-live-updates/>.

<sup>8</sup>Kevin Breuninger, Paul Manafort Gets Additional 43 Months in Second Mueller Sentence After Ex-Trump Campaign Boss Says He's 'Sorry,' CNBC, (Mar. 13, 2019), <https://www.cnbc.com/2019/03/13/paul-manafort-gets-additional-43-months-in-second-mueller-sentence.html>; Sharon LaFraniere, Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts, N.Y. Times, (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

<sup>9</sup>Kevin Breuninger, Paul Manafort Gets Additional 43 Months in Second Mueller Sentence After Ex-Trump Campaign Boss Says He's 'Sorry,' CNBC, (Mar. 13, 2019), <https://www.cnbc.com/2019/03/13/paul-manafort-gets-additional-43-months-in-second-mueller-sentence.html>; Sharon LaFraniere, Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts, N.Y. Times, (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

<sup>10</sup>Brett Samuels, Trump Pardons Manafort, Stone and Charles Kushner in Latest Round, Hill, (Dec. 23, 2020), available at <https://thehill.com/homenews/administration/531540-trump-pardons-stone-manafort-and-jared-kushners-fat>

The DOJ and FBI continue to employ these tactics as part of multiple investigations into Chinese technology company Huawei for the theft of trade secrets and violations of U.S. sanctions against Iran. These investigations resulted in charges filed in January 2019 against the CFO, in connection with violations of U.S. sanctions against Iran, and the company, in connection with both violations of U.S. sanctions against Iran and stealing trade secrets from T-Mobile.<sup>11</sup>

Similarly, in March 2019, after incriminating evidence was obtained through wiretaps, dozens of individuals involved in a nationwide conspiracy that facilitated cheating on college entrance exams and the admission of students to elite universities as purported athletic recruits were arrested by federal agents in multiple states—known as “Operation Varsity Blues.”<sup>12</sup> The central figure, William “Rick” Singer, was charged with racketeering conspiracy, money laundering conspiracy, and obstruction of justice. Investigators in Massachusetts authorized the wiretap in 2018, and conducted electronic surveillance on a series of calls between parents engaged in the scheme and Singer.<sup>13</sup> A federal judge later refused to throw out the wiretaps, despite arguments by the parents that the calls had no nexus to Massachusetts, a conclusion supporting the notion that federal authorities may have broad justification for wiretaps in any U.S. jurisdiction.<sup>14</sup>

### § 153:15 Practicalities of interacting with federal authorities

White collar cases continue to most frequently involve the DOJ working collaboratively with the SEC.<sup>1</sup> White collar criminal defense practitioners should be sensitive to the considerations

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<sup>11</sup>Sara Salinas, *The FBI Reportedly Raided a Huawei Lab and Set Up a Sting At CES As Part of a Previously Unrevealed Investigation*, CNBC, (Feb. 4, 2019), <https://www.cnbc.com/2019/02/04/third-fbi-huawei-investigation-includes-a-lab-raid-ces-sting-report.html>.

<sup>12</sup>Press Release, U.S. Dep’t of Justice, *Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme*, (Mar. 12, 2019), available at <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic>.

<sup>13</sup>Chris Villani, *‘Varsity Blues’ Parents Can’t Get Wiretap Evidence Tossed*, Law360, (June 24, 2020), available at <https://www.law360.com/articles/1286423>.

<sup>14</sup>Chris Villani, *‘Varsity Blues’ Parents Can’t Get Wiretap Evidence Tossed*, Law360, (June 24, 2020), available at <https://www.law360.com/articles/1286423>.

#### [Section 153:15]

<sup>1</sup>U.S. Dep’t of Justice & Sec. & Exch. Comm’n, *A Resource Guide to the Foreign Corrupt Practices Act*, (2d Ed. July 2020) available at <https://www.justice.gov/criminal-fraud/file/1292051/download>.

that accompany interactions with federal authorities, particularly the unique strategic issues when faced with parallel proceedings<sup>2</sup> and the question of corporate voluntary disclosure.<sup>3</sup>

**§ 153:16 Practicalities of interacting with federal authorities—Parallel civil/criminal proceedings**

More than 50 years ago, the Supreme Court recognized the federal government's power to conduct simultaneous civil and criminal investigations, provided that the government does not act in bad faith.<sup>1</sup> In recognition of this principle, the U.S. Court of Appeals for the Ninth Circuit held that information provided to the SEC could be used in either criminal or civil proceedings brought by either the SEC or another government agency. The Ninth Circuit held that there is "nothing improper about the government undertaking simultaneous criminal and civil investigations."<sup>2</sup> The court also noted that, although the government may not "affirmatively mislead the subject of parallel civil and criminal investigations," the SEC had no affirmative duty to inform witnesses of an existing or contemplated criminal investigation.<sup>3</sup> Because parallel proceedings may arise in a government investigation of almost any commercial transaction in which allegations of fraud have been made, counsel representing a client in an investigation involving the SEC should carefully consider whether a related criminal investigation may have already commenced.<sup>4</sup>

Federal prosecutors, state attorneys general, and federal regulatory agencies increasingly have been coordinating their resources to investigate and prosecute white collar claims on parallel tracks.<sup>5</sup> When both civil and criminal cases progress simultaneously against the same defendant for conduct arising from the

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<sup>2</sup>See § 153:16.

<sup>3</sup>See § 153:17.

**[Section 153:16]**

<sup>1</sup>*U.S. v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1, 13 Fed. R. Serv. 2d 868 (1970).

<sup>2</sup>*U.S. v. Stringer*, 535 F.3d 929, 933–34 (9th Cir. 2008).

<sup>3</sup>*U.S. v. Stringer*, 535 F.3d 929, 940–41 (9th Cir. 2008) (internal quotations omitted).

<sup>4</sup>See generally Chapter 91, "Regulatory Litigation" (§§ 91:1 et seq.); Chapter 92, "Regulatory Litigation with the SEC" (§§ 92:1 et seq.); and Chapter 154, "Interplay Between Commercial Litigation and Criminal Proceedings" (§§ 154:1 et seq.).

<sup>5</sup>Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, Sec. Litig. Rep. 1 (Feb. 2010), available at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/DefendingParallelProceedings.pdf>.

same set of facts, the complexity of proceedings can be significantly increased by layers of intertwined policies, procedures, and regulations.<sup>6</sup> Defendants facing parallel proceedings are particularly vulnerable because strategies and decisions that support the defense of one proceeding may compromise the defense of another. As such, in defending parallel proceedings, counsel must develop global defense strategies that coordinate the defense of each proceeding with the defense of all others.<sup>7</sup> Therefore, it is imperative that criminal counsel be retained as soon as possible if civil counsel lacks criminal defense experience. Additional discussion on this subject can be found in Chapter 154, “Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 154:1 et seq.).

In defending parallel proceedings, counsel should evaluate whether it would be beneficial to seek or oppose a stay of one of the proceedings, and under what circumstances courts will be likely to impose a stay.<sup>8</sup> While in a civil case both parties are entitled to broad discovery “regarding any non-privileged matter that is relevant to any party’s claim or defense,”<sup>9</sup> in a criminal case, a defendant is entitled only to discovery “material to preparing the defense [or that] the government intends to use [ ] in its case-in-chief at trial.”<sup>10</sup> Because of these differences in the scope of available discovery, the government may seek a stay of the civil proceeding pending completion of the criminal case in order to limit the pretrial discovery available to the defendant.<sup>11</sup> Depending on the circumstances, however, a defendant may seek

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<sup>6</sup>Laura L. Flippin & Morgan J. Miller, *Double Teamed: Defending Parallel Investigations Under SEC’s New Cooperation Initiative*, Wash. Legal Found. Legal Backgrounder, (Apr. 23, 2010) at 1, available at [https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/4-23-10FlipPin\\_LegalBackgrounder.pdf](https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/4-23-10FlipPin_LegalBackgrounder.pdf).

<sup>7</sup>Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, Sec. Litig. Rep. 4 (Feb. 2010), available at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/DefendingParallelProceedings.pdf>. See generally Chapter 154, “Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 154:1 et seq.) for extensive discussion of defending parallel proceedings.

<sup>8</sup>Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, Sec. Litig. Rep. 4 (Feb. 2010), available at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/DefendingParallelProceedings.pdf>. See generally Chapter 154, “Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 154:1 et seq.) for discussion of stays of parallel proceedings.

<sup>9</sup>Fed. R. Civ. P. 26(b)(1).

<sup>10</sup>Fed. R. Crim. P. 16(a)(1)(E).

<sup>11</sup>See generally Stephen P. Younger & Jenya Moshkovich, *Parallel Proceedings in Securities Enforcement Actions: The Growing Trend Against Automatic Grants of Government Requests for Stays of Civil Cases*, 3 J. Sec. L., Reg. &

a stay of the civil proceeding to prevent the government from learning of evidence or information produced in the civil case that it would not have learned without such litigation. While a defendant might oppose a stay of civil proceedings out of a preference for the speedy resolution of both cases, it may find a stay desirable for a variety of reasons, such as avoiding the expense of defending two proceedings, or to avoid the Hobson's Choice of either waiving the Fifth Amendment privilege by testifying, or asserting the privilege at the potential price of a possible adverse inference in the civil case.<sup>12</sup>

Courts are not constitutionally required to stay regulatory or civil proceedings pending the outcome of a parallel criminal proceeding unless there is "substantial prejudice to the rights of the parties involved."<sup>13</sup> Rather, courts have wide discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem[ ] to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense."<sup>14</sup> In deciding whether to grant a stay, courts generally focus on the following factors in balancing the parties' various competing interests: the extent to which the criminal and noncriminal proceedings overlap; the status of the proceedings, including whether the defendant has been indicted; whether the government entity that has initiated the criminal case is also a party in the civil case;

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Compliance 307 (Nov. 1, 2010), available at <https://www.pbwt.com/content/uploads/2015/07/Parallel-Proceedings-in-Securities-Enforcement-Actions.pdf>. Such stays prevent a defendant from using liberal civil discovery rules to get around narrower criminal discovery rules and obtain evidence to defend against a criminal proceeding. While historically these stays have been routinely granted, more recent cases suggest that courts will scrutinize such requests more closely.

<sup>12</sup>See generally Stephen P. Younger & Jenya Moshkovich, *Parallel Proceedings in Securities Enforcement Actions: The Growing Trend Against Automatic Grants of Government Requests for Stays of Civil Cases*, 3 J. Sec. L., Reg. & Compliance 307, 308 (Nov. 1, 2010), available at <https://www.pbwt.com/content/uploads/2015/07/Parallel-Proceedings-in-Securities-Enforcement-Actions.pdf>. It should be noted that corporations do not have a Fifth Amendment privilege against self-incrimination, but their employees and former employees do. When an employee asserts this privilege in a civil or regulatory proceeding, it may result in an adverse inference against the company in that proceeding. See generally Chapter 154, "Interplay Between Commercial Litigation and Criminal Proceedings" (§§ 154:1 et seq.) for discussion of the Fifth Amendment privileges.

<sup>13</sup>*Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374, Fed. Sec. L. Rep. (CCH) P 97172, Fed. Sec. L. Rep. (CCH) P 97573 (D.C. Cir. 1980); see *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (holding that a prison may use internal disciplinary committees, even when the evidence from those committees may be used later in a criminal proceeding).

<sup>14</sup>*U.S. v. Kordel*, 397 U.S. 1, 12 n.27, 90 S. Ct. 763, 25 L. Ed. 2d 1, 13 Fed. R. Serv. 2d 868 (1970) (internal citations omitted).