GIBSON DUNN

Corporate Compliance and U.S. Sentencing Guidelines

March 30, 2022

Panelists:

Stephanie L. Brooker
Kendall Day
Michael Diamant
Patrick F. Stokes
Elizabeth Niles

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately eight weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

Today's Panelists

Stephanie Brooker

Kendall Day

Michael Diamant

Patrick Stokes

Elizabeth Niles

Agenda

1. **Chapter 8 of the U.S. Sentencing Guidelines Overview**
2. **The Lifecycle of an Investigation and Corporate Resolution Vehicles**
3. **Discussion of Sentencing Guidelines Calculation Scenarios**
4. **Corporate Compliance**

GIBSON DUNN

Chapter 8 of the U.S. Sentencing Guidelines Overview

The Origin of the Sentencing Guidelines

Key Events:

- Sentencing Reform Act of 1984.
  - The purposes for sentencing reform.
- Creation of a Sentencing Commission.
- The addition of Organizational Guidelines in 1991.
- Periodic amendments to the Guidelines Manual over time.

Chapter 8 U.S. Sentencing Guidelines

General Principles

1. The organization should remedy any harm caused by the offense.
2. If the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.
3. "Carrot and Stick Approach" - The fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization.
    - Chapter 8 allows for substantial sentencing reductions for companies that have established effective compliance programs.
4. Probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

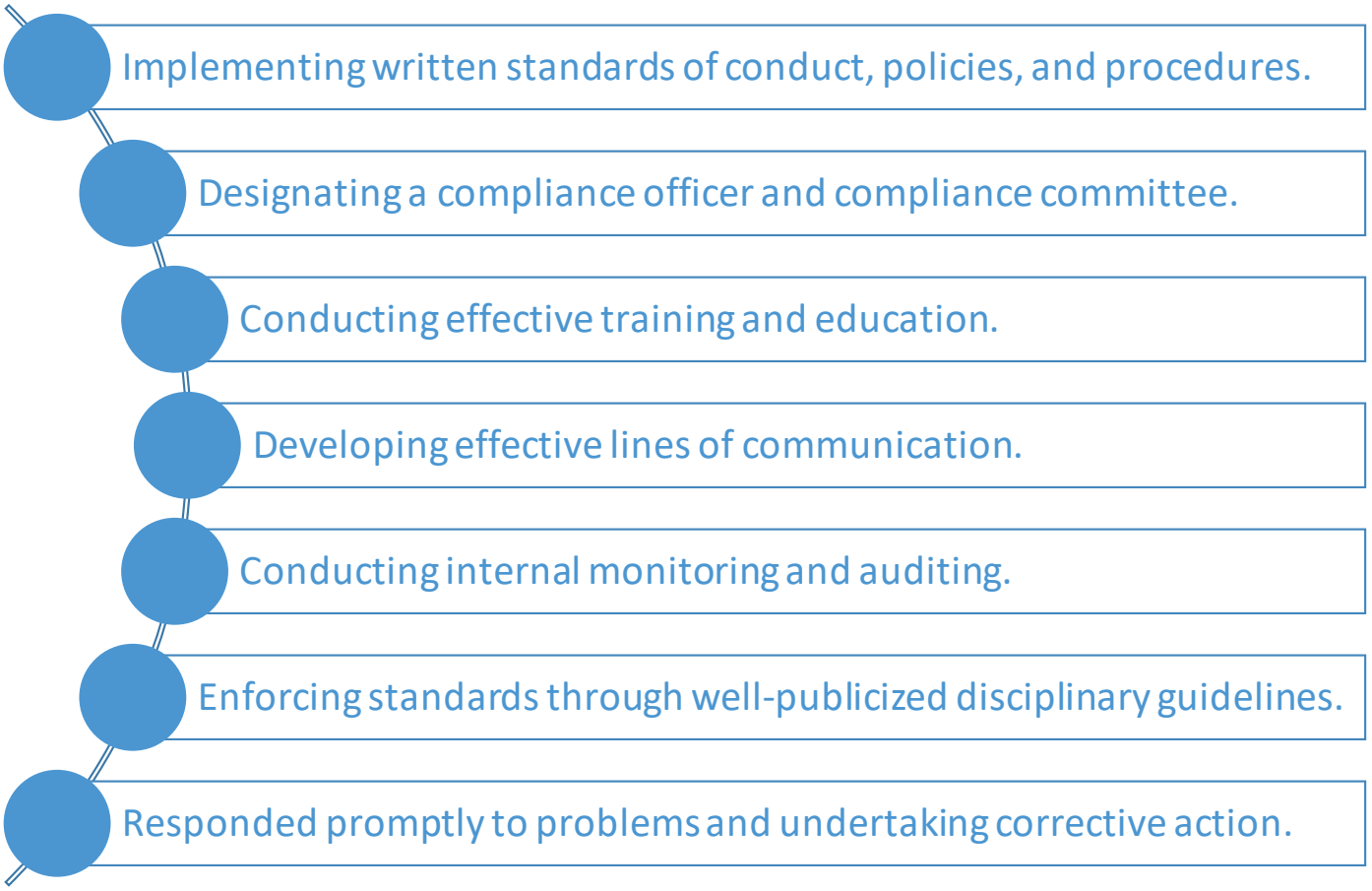
Chapter 8 U.S. Sentencing Guidelines

Application

1. Determine from Part B, Subpart 1 the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
2. Determine from Part C the sentencing requirements and options relating to fines:
   a. If the organization operated primarily for a criminal purpose, apply § 8C1.1.
   b. Otherwise, apply § 8C2.1. For such counts:
      1) § 8C2.2 – Determine whether an abbreviated determination of the guideline fine range may be warranted.
      2) § 8C2.3 – Determine the offense level.
      3) § 8C2.4 – Determine the base fine.
      4) § 8C2.5 – Determine the culpability score.
      5) § 8C2.6 – Determine the minimum and maximum multipliers corresponding to the culpability score.
      6) § 8C2.7 – Determine the minimum and maximum of the guideline fine range.
      7) § 8C2.8 – Determine the amount of the fine within the applicable guideline range.
      8) § 8C2.9 – Determine whether an increase to the fine is required.

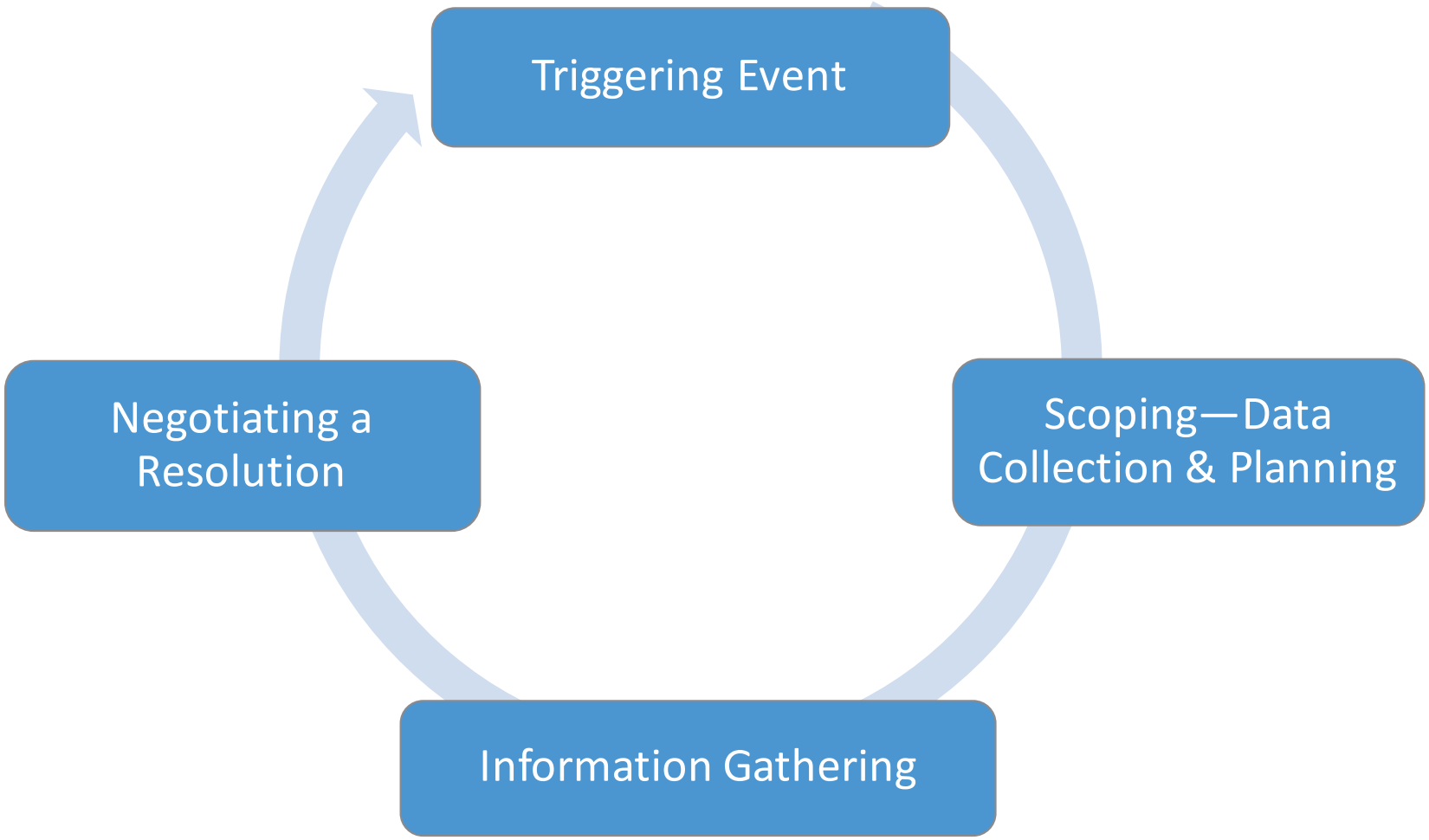
Chapter 8 U.S. Sentencing Guidelines

Elements of an Effective Compliance Program



The Lifecycle of an Investigation & Corporate Resolution Vehicles

Lifecycle of Criminal and Regulatory Investigations



What Drives Outcomes?

DOJ & SEC Guidance

- **DOJ: Filip Factors**
  - The Justice Manual is intended to steer prosecutors' actions as they weigh potential investigation outcomes. Section 9-28.300 of the Justice Manual provides a list of 11 factors (the "Filip Factors") that should be applied in determining whether to charge a corporation. Factors to be weighed include:
    - Nature and seriousness of the offense;
    - Pervasiveness of wrongdoing;
    - History of misconduct;
    - Cooperation, including as to potential wrongdoing by individuals;
    - Adequacy and effectiveness of the corporation's compliance program;
    - Timely voluntary disclosure;
    - Remedial actions taken;
    - Collateral consequences of prosecution;
    - Adequacy of alternative remedies;
    - Adequacy of prosecution of individuals; and
    - Interests of any victims.
- **SEC: Seaboard Factors**
  - The 2001 "Seaboard Report" identified non-exclusive factors that the SEC will consider in evaluating corporate cooperation, which fall into the four broad measures of cooperation: (1) self-policing prior to the discovery of the misconduct; (2) prompt self-reporting; (3) remediation; and (4) cooperation with law enforcement.

Overview of DOJ & SEC Enforcement Resolution Vehicles

Criminal:

DOJ

- Declination
- Declination w/ Disgorgement
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Guilty Plea
- Trial

Civil:

SEC

- Declination
- Civil Injunction
- Cease-and-Desist Orders
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Trial

NPAs, DPAs, and Declinations

Use by SEC and DOJ

Agency	DPA	NPA	Declination + Disgorgement
	• Filed with court as public record • Accompanies criminal information • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties • Rarely deniable in collateral litigation • Waiver of the Speedy Trial Act	• Not filed with court, but typically public • No charging documents • Includes statement of facts • Usually term-limited • Tolls SOLs • Financial penalties common • Rarely deniable in collateral litigation • Voluntary disclosure increasingly required • Less likely to include a monitorship than a DPA	• Not filed with court • Public by design • No charging documents • Includes light factual statements • Disgorgement typical • Voluntary disclosure a prerequisite • Leaves door open to future charges
	• Not filed with court; typically public • No complaint • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties	• Not filed with court; typically public • No complaint • May include statement of facts • Agreement to enter future tolling agreement • May include financial penalties	• N/A

Recent DOJ and SEC Updates and Guidance

Policy Changes

- **DOJ**
  - In the final months of 2021, DOJ made several important announcements regarding corporate enforcement as part of President Biden's broader initiative to revisit the standards and practices applied to corporate criminal enforcement.
    - DOJ announced the formation of a Corporate Crime Advisory Group, which will be made up of representatives from all divisions of DOJ involved in corporate criminal enforcement. This new advisory body has a broad mandate to make recommendations and propose revisions to DOJ's policies on corporate criminal enforcement topics.
  - **Zero Tolerance for Recidivism and Noncompliance**: Speeches by DOJ leadership in late 2021 emphasized that companies should expect DOJ to enforce agreement terms, noting that DOJ will be firm with companies that do not comply. DOJ also announced that it will take into account a corporation's full criminal, civil, and regulatory record in making charging decisions, even if alleged prior misconduct is dissimilar from the alleged conduct at issue.

Recent DOJ and SEC Guidance

Announcements by DOJ Leadership (continued)

- **Additional Resources**: DOJ announced that it would be adding resources, including FBI agents, to investigate corporate wrongdoing.
- **Continued Pursuit of Individual Actions**: In October 2021, Deputy Attorney General Monaco announced a return to the Yates standard, which requires that companies seeking cooperation credit provide DOJ with all non-privileged information about all individuals involved in misconduct to receive credit.
- **Monitor Policy Reconsidered:** In 2021, DOJ also "rescinded" any prior guidance suggesting that monitorships are disfavored. Prosecutors are, therefore, free to impose a corporate monitor requirement when they determine it is appropriate.

- **SEC**
  - Effective December 7, 2020, the SEC amended its whistleblower program rules to include NPAs and DPAs in its definition of "administrative action." Given that the SEC can reward whistleblowers for information leading to a successful "administrative action," this amendment expands the scope of actions in which the SEC can make such awards.

Discussion of Sentencing Guidelines Calculation Scenarios

Overview of Relevant Factors for Guidelines Calculation

Focus on FCPA Cases

- Although the Guidelines require mathematical calculations, applying the Guidelines requires much more interpretation than a mere mechanical application.
- Relevant factors include:
  - Whether the bribery or accounting provisions of the FCPA are used for the underlying charge;
  - Profit amount;
  - The level of a public official;
  - The involvement of high-level personnel or substantial authority personnel;
  - The level and size of the organization or business unit involved in the misconduct; and
  - Placement within the Guidelines range.

These factors are nuanced and provide key opportunities for negotiation in reaching a resolution.

Definitions of Key Terms for Guidelines Calculation

- **"High-level personnel of the organization"**
  - Defined by the Guidelines as "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization."
    - Includes: directors; executive officers; individuals in charge of a major business or functional unit of the organization; and individuals with a substantial ownership interest.
- **"Substantial authority personnel"**
  - Defined by the Guidelines as "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization."
    - Includes: high-level personnel of the organization; individuals who exercise substantial supervisory authority (e.g., a sales manager); and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual authorized to negotiate significant contracts).

Base Case Example #1

Violation of FCPA Anti-Bribery Provisions

Offense Level (USSG § 2C1.1)	**Culpability Score** (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between $3.5 and $9.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 8
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = $80 million (USSG § 8C2.4)	**Guidelines Fine = $128 – $256 million**

Offense Level

Impact of Profit / Bribe Amount

Offense Level (USSG § 2C1.1)	**Culpability Score** (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+14 for profits / bribes of between $550,000 and $1.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 8
Adjusted Offense Level = 32	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = $30 million	**Guidelines Fine = $48 – $96 million**

Spotlight on SEC Disgorgement

- In addition to impacting the Sentencing Guidelines calculation, the amount of profit from the alleged misconduct also determines the amount of **disgorgement** that can be ordered by the SEC.
  - Once a causal link is established between unlawful activity and the profit to be disgorged, the SEC may disgorge illicit profits that stem from violations of the federal securities laws.
- In ***Kokesh v. SEC***, 137 S. Ct. 1635 (2017), the Supreme Court held that the SEC's disgorgement remedy is a penalty and is subject to the five-year statute of limitations in 28 U.S.C. § 2462.
- In ***Liu v. SEC***, 140 S. Ct. 1936 (2020), the Supreme Court upheld the SEC's statutory authority to seek disgorgement but also cabined the remedy in a number of ways.
- In January 2021, Congress overrode the presidential veto of the National Defense Authorization Act, which contained an amendment to the SEC's remedial powers, expressly authorizing the SEC to obtain disgorgement in federal court and doubling the statute of limitations for some types of relief.

Culpability Score

Impact of Company / Business Unit Size

Offense Level (USSG § 2C1.1)	**Culpability Score** (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+3 for a unit with more than 200 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between $3.5 and $9.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 6
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.2 – 2.4
Base Fine = $80 million	**Guidelines Fine = $96 – $192 million**

Culpability Score

Impact of Voluntary Self-Disclosure and Cooperation

Offense Level (USSG § 2C1.1)	**Culpability Score** (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between $3.5 and $9.5 million	-5 for reasonably prompt self-disclosure (prior to imminent threat of disclosure), fully cooperating in investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 5
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.0 – 2.0
Base Fine = $80 million	**Guidelines Fine = $80 – $160 million**

Culpability Score

Impact of Voluntary Self-Disclosure and Cooperation

Using the prior slide as an example, the below demonstrates the impact of the "extra credit" framework from the FCPA Corporate Enforcement Policy.

Base Guidelines Fine = $80 – $160 million

- If the Company voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, and is not a recidivist, the Policy provides for a **50% reduction** off of the low end of the Guidelines range.
  - **Adjusted Range = $40 million – $80 million**
- If the Company did not voluntary self-disclose but later fully cooperated and timely and appropriately remediated, the Policy provides for a **25% reduction** off of the low end of the Guidelines range.
  - **Adjusted Range = $60 million – $120 million**
- If a Company received the 50% reduction but was placed in the middle of the range, the Company may still end up with a $60 million fine.
  - This illustrates the importance of the placement within the Guidelines range.

Voluntary Self-Disclosure Analysis

- Importance of considering voluntary self-disclosure
  - **USSG § 8C2.5(g)** provides a reduction of the culpability score for voluntary disclosure. This penalty reduction is available when the company discloses: (1) prior to imminent threat of disclosure or gov't investigation; and (2) within reasonably prompt time after becoming aware of the offense, disclosed, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility.
  - The **SEC's Seaboard Factors** also include the following consideration: "Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?"

Factors to consider when assessing whether to disclose:
- Clarity of violation and strength of evidence
- Systemic conduct or isolated incident
- Seniority of culpable employees
- Risk of reputational harms
- Remedial measures undertaken
- Alternative sources of discovery

Base Case Example #2

Violation of FCPA Internal Controls

Offense Level (USSG § 2B1.1)	**Culpability Score** (USSG § 8C2.5-6)
Base Offense Level = 6	Base Culpability Score = 5
+18 for profits / bribes of between $3.5 and $9.5 million	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+2 for conduct outside the United States	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
Adjusted Offense Level = 26	Adjusted Culpability Score = 8
	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = $6.5 million	**Guidelines Fine = $10.4 – $20.8 million**

Other Factors Impacting Fine Amounts

- ***Offsets***
  - –The DOJ's policy against "piling on" encourages DOJ attorneys to "coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."*
    - DOJ will often credit payments made to other regulators to reduce the actual penalty amount that the organization must pay.
- ***Inability to Pay***
  - –USSG § 8C3.3 provides for the reduction of the fine amount below the Guidelines range if "the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required."
    - In order for this provision to apply, the payment of the fine would have to substantially jeopardize the continued viability of the organization.
  - –Example: In September 2020, asphalt company Sargeant Marine pled guilty to conspiracy to violate the anti-bribery provisions of the FCPA. DOJ agreed to reduce the fine amount from $90 million to $16.6 million because of the company's inability-to-pay claims.

Asphalt Company Got $70 Million Break on Penalty

Sargeant Marine's criminal penalty could have been $90 million, but was shorn to $16.6 million under the Justice Department's latest guidance on inability-to-pay claims

* U.S. Dep't of Justice, Justice Manual, § 1-12.100 Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.

Key Takeaways

- Key factors to consider in assessing penalty calculations include the profit amount, the size of the company or business unit, the involvement of high-level personnel, and the level of the public official.
- The Guidelines set a baseline in corporate cases, but the many factors that are inputs into the Guidelines calculation are key points for negotiation.
- The Guidelines are also only one component of how the government assesses penalties.
- Voluntary self-disclosure, cooperation, and remediation can significantly reduce fine amounts.

GIBSON DUNN

Corporate Compliance

Corporate Compliance

- **Sentencing Guidelines**
  - The Guidelines provide for a three-point reduction to the culpability score "if the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program." USSG § 8C2.5(f).
  - To qualify for the reduction, a company must: 1) **exercise due diligence to prevent and detect criminal conduct**; and 2) **promote an organizational culture** that encourages ethical conduct and a commitment to compliance law.
  - The Guidelines further mandate that compliance and ethics programs shall be "**reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct**."
  - However, "[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct." USSG § 8C2.1.
  - Additional guidelines provisions set out exceptions that make it very difficult to qualify for these requirements. USSG § 8C2.5(f)(2) and (3).

Corporate Compliance

- **Additional Guidance: DOJ's Evaluation of Corporate Compliance Programs**
  - Guidance external to the Sentencing Guidelines provides additional details regarding how the government will consider corporate compliance mechanisms at sentencing.
  - The Justice Department's "Evaluation of Corporate Compliance Programs" Memorandum, updated in June 2020, provides a definitive framework for such assessments.
  - The Memo sets out a rubric for evaluating compliance program effectiveness for the purposes of determining the form of prosecution/resolution, amount of monetary penalty, and continuing compliance obligations.

Corporate Compliance

- **Additional Guidance**
  - The Memo mirrors the Justice Manual in asking three primary questions:

1) Is the corporation's compliance program well designed?

Risk-Based

Policies/Procedures

Training

Reporting/Investigations

2) Is the program being applied earnestly and in good faith?

Mgt. Commitment

Incentives and Discipline

Compliance Function

3) Does the corporation's program work in practice?

Continuous Improvement

Investigations

Remediation

Corporate Compliance

- **Sentencing Credit for Effective Compliance Program**
  - The Memo notes that "prosecutors may credit the quality and effectiveness of **a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions**, even if it fails to prevent an infraction."
  - So too does that guidance suggest that proactive corporate efforts—like the **continuous improvement, periodic testing, and review of compliance programs**—may be rewarded through remediation credit or a lower applicable fine range under the Sentencing Guidelines.
  - In practice, corporations receive credit for an effective compliance program in multiple ways. These include factoring into the penalty amount (often in a manner not identified as an explicit reduction), whether prosecutors require a monitorship as part of a resolution, and the tone and content of the ultimate charging decision.

Corporate Compliance

- **Additional Guidance: Developments Since the 2020 DOJ Update**
  - **Since the June 2020 updates, the defense bar and DOJ have increasingly focused on corporate compliance program health in resolving investigations**.
  - In September 2020, the then-Acting Assistant Attorney General emphasized the importance of this focus, stressing the importance of "corporate rehabilitation" through compliance program improvements and explained that the Criminal Division had "moved away from simply seeking ever-larger fine payments from corporations, and [was] in every case taking great care to achieve the maximum public benefit available using all of the tools at [DOJ's] disposal."

Corporate Compliance

- **Additional Guidance: Developments Since the 2020 DOJ Update**
  - The theme of incentivizing companies to pursue compliance has been addressed by more recent statements by DOJ leadership as well.
    - "Particular areas… that you should see change is going to be our use of corporate resolutions, our policies affirming the need to hold individuals accountable for white-collar crime, and the weight we give to companies' cooperation…**We need to be self-critical in order to serve as an adequate deterrent against white collar malfeasance, and to incentivize corporations to employ robust compliance programs**." – October 5, 2021 Address by Principal Associate Deputy Attorney General Carlin.
    - "**[O]ur responsibility is to incentivize responsible corporate citizenship, a culture of compliance and a sense of accountability**. So, the department will not hesitate to take action when necessary to combat corporate wrongdoing. . . . Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it's going to cost them down the line." – October 28, 2021 Address by Deputy Attorney General Monaco.

Corporate Compliance

- **Additional Guidance: Developments Since the 2020 DOJ Update**
  - The 2020 update's emphasis on "***reasonable, individualized determination[s]***" has made its way into several negotiated terms relating to specific corporate compliance programs– although DOJ often uses the same template as a starting point in many of its resolutions to detail the requirements for corporate compliance programs, **context-specific requirements are appearing in recent resolutions**.
    - For example, the 2021 Epsilon DPA follows the trend of fact-specific resolutions, adding a category for "Consumer Rights" not found in the compliance program requirements incorporated in other resolutions.
    - The 2021 SAP NPA alleges that SAP acquired various companies but "made the decision to allow these companies to continue to operate as standalone entities, without being fully integrated into SAP's more robust export controls and sanctions compliance program." Because of this allegation, SAP's NPA requires it to audit newly acquired companies within 60 days of acquisition and inform DOJ about any potential violations.

Corporate Compliance

- **Compliance Programs and Prosecutorial Discretion**
  - Given the infrequency with which formal sentencing credits are afforded companies, **the most meaningful "enforcement" advantage of an effective compliance program may be on prosecutorial decision-making**, including in whether to grant a declination or NPA or requiring a corporate monitor.
  - For example, the **Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy**, provides a presumption that a company will receive a declination absent aggravating circumstances when it voluntarily self-discloses misconduct, fully cooperates, and provides "timely and appropriate[]" remediation.
    - In turn, the FCPA policy defines timely and appropriate remediation to include: "Implementation of an effective compliance and ethics program" measured by, among other items, a culture of compliance, the dedication of resources, the authority and independence of the compliance function, and the effectiveness of a company's risk assessment, auditing and reporting functions.

Corporate Compliance

- **Compliance Programs and Prosecutorial Discretion**
  - Similarly, for companies that (1) voluntarily self-disclose export control or sanctions violations to the **National Security Division ("NSD") Counterintelligence and Export Control Section ("CES")**, (2) fully cooperate, and (3) timely and appropriately remediate, consistent with the 2019 NSD Guidance, there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors.
    - Like the FCPA policy, the NSD policy also defines timely and appropriate remediation to include: "Implementation of an effective compliance and ethics program" measured by, among other items, a culture of compliance, the dedication of resources, the authority and independence of the compliance function, and the effectiveness of a company's risk assessment, auditing and reporting functions.

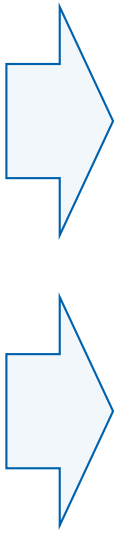
Corporate Compliance

- **Compliance Programs and Prosecutorial Discretion**
  - The NSD's 2019 policy is illustrated by SAP's August 2021 non-prosecution agreement. In voluntary disclosures SAP made to DOJ and the Commerce and Treasury Departments, SAP acknowledged export control and sanctions violations. As a result of its voluntary disclosure to DOJ, extensive cooperation and remediation costing more than $27 million, the company agreed to an NPA with NSD.

Corporate Compliance

- **Core Components for Effective Compliance**
  - Domestic and international authorities previously mentioned and provided below consistently stress the same core components of a corporate compliance program.

- U.S. Sentencing Guidelines
- FCPA Resource Guide
- U.K. Bribery Act Guidance
- U.K. Financial Conduct Authority Financial Crime Guide
- ISO 37001 – Anti-Bribery Management Systems
- World Bank Group Integrity Compliance Guidelines
- DOJ DPAs and Plea Agreements
- OFAC Compliance Framework
- DOJ Antitrust Division Guidance



- ❑ Clearly Defined and Enforced Policies and Procedures
- ❑ Culture of Compliance and Management Commitment
- ❑ Periodic Risk Assessment
- ❑ Sufficient Resources
- ❑ Appropriate Training and Guidance
- ❑ Reporting and Investigations
- ❑ Periodic Review, Monitoring and Testing
- ❑ Remediation and Lessons Learned

Corporate Compliance

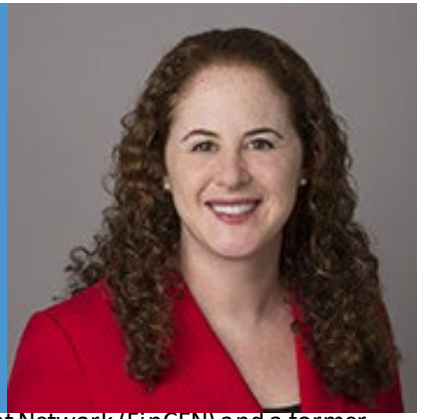
- **Examples**
  - Epsilon (2021): Epsilon paid $150 million and entered into a DPA with DOJ related to allegations that employees at Epsilon sold customer data to clients that were engaging in consumer fraud. The DPA required Epsilon to "conduct periodic reviews and testing" of its compliance program as it relates to "preventing and detecting the transfer or sale of consumer data."
  - Credit Suisse (2021): Credit Suisse paid $247.5 million and entered into a three-year DPA with DOJ and the USAO EDNY to resolve FCPA bribery allegations in Mozambique. The company agreed to enhanced reporting provisions on the bank's remediation and compliance program including meeting with DOJ at least quarterly and submitting yearly reports on its remediation efforts, testing of its compliance program, and proposals to ensure effective deterrence and detection of violations.

GIBSON DUNN

Panelists

Stephanie L. Brooker

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.887.3502
SBrooker@gibsondunn.com



Stephanie L. Brooker, former Director of the Enforcement Division at the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) and a former federal prosecutor, is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. She is Co-Chair of the firm's White Collar Defense and Investigations, the Financial Institutions, and the Anti-Money Laundering Practice Groups. As a prosecutor, Ms. Brooker tried 32 criminal trials, investigated a broad range of white collar and other federal criminal matters, briefed and argued criminal appeals, and served as the Chief of the Asset Forfeiture and Money Laundering Section in the U.S. Attorney's Office for the District of Columbia. Ms. Brooker has been named a National Law Journal White Collar Trailblazer and a Global Investigations Review Top 100 Women in Investigations.

Ms. Brooker's practice focuses on internal investigations, regulatory enforcement defense, white-collar criminal defense, and compliance counseling. She handles a wide range of white collar matters, including representing financial institutions, multi-national companies, and individuals in connection with criminal, regulatory, and civil enforcement actions involving sanctions; anti-corruption; anti-money laundering (AML)/Bank Secrecy Act (BSA); securities, tax, and wire fraud, foreign influence; "me-too;" cryptocurrency; and other legal issues. She routinely handles complex cross-border investigations. Ms. Brooker's practice also includes BSA/AML and FCPA compliance counseling and deal due diligence and significant criminal and civil asset forfeiture matters.

Ms. Brooker's investigations matters involve multiple government agencies, including the Department of Justice (DOJ), Securities and Exchange Commission (SEC), Federal Reserve Board (FRB), Office of Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Office of Foreign Assets Control (OFAC), New York Department of Financial Services (NYDFS), Financial Industry Regulatory Authority (FINRA), state banking agencies and gaming regulators, and foreign regulators.

Ms. Brooker served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia, where she served for many years as a trial attorney in Federal and Superior Court. In the latter part of her tenure, she served as the first Chief of the new Asset Forfeiture and Money Laundering Section. This Section was responsible for all asset forfeiture and money laundering issues in Criminal Division cases and for litigation of civil forfeiture cases. In this role, she investigated and prosecuted complex civil and criminal forfeiture cases involving high-priority enforcement areas, such as national security, sanctions violations, and major financial fraud. She established the USAO's first DC Financial Crimes Task Force and supervised the investigation and prosecution of BSA and money laundering cases. During her tenure, she received the U.S. Attorney's Award for Creativity and Innovation in Management. She was also awarded three Special Achievement Awards for Superior Performance and the Office's Criminal Division Award.

Ms. Brooker also served as the first Director of FinCEN's Enforcement Division, which is the lead federal regulator with responsibility for enforcing the U.S. AML laws and regulations. In this role, she oversaw all of FinCEN's domestic and foreign enforcement and compliance under the BSA. She also oversaw rulemaking actions under Section 311 of the PATRIOT Act against foreign institutions and jurisdictions, Geographic Targeting Orders, and examination and enforcement actions against cryptocurrency companies following FinCEN's 2013 cryptocurrency guidance. Prior to serving as Enforcement Director, Ms. Brooker served as Chief of Staff and Senior Advisor to the Director of FinCEN.

M. Kendall Day

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.955.8220
KDay@gibsondunn.com

M. Kendall Day is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher, where he is co-chair of Gibson Dunn's Financial Institutions Practice Group, co-leads the firm's Anti-Money Laundering practice, and is a member of the White Collar Defense and Investigations Practice Group. Mr. Day's practice focuses on internal investigations, regulatory enforcement defense, white-collar criminal defense, and compliance counseling. He represents financial institutions; fintech, crypto-currency, and multi-national companies; and individuals in connection with criminal, regulatory, and civil enforcement actions involving anti-money laundering (AML)/Bank Secrecy Act (BSA), sanctions, FCPA and other anti-corruption, securities, tax, wire and mail fraud, unlicensed money transmitter, false claims act, and sensitive employee matters. Mr. Day's practice also includes BSA/AML compliance counseling and due diligence, and the defense of forfeiture matters.

Prior to joining Gibson Dunn, Mr. Day had a distinguished 15-year career as a white collar prosecutor with the Department of Justice (DOJ), rising to the highest career position in the DOJ's Criminal Division as an Acting Deputy Assistant Attorney General (DAAG). As a DAAG, Mr. Day had responsibility for approximately 200 prosecutors and other professionals. Mr. Day also previously served as Chief and Principal Deputy Chief of the Money Laundering and Asset Recovery Section. In these various leadership positions, from 2013 until 2018, Mr. Day supervised investigations and prosecutions of many of the country's most significant and high-profile cases involving allegations of corporate and financial misconduct. He also exercised nationwide supervisory authority over the DOJ's money laundering program, particularly any BSA and money-laundering charges, deferred prosecution agreements and non-prosecution agreements involving financial institutions.

Earlier in his time as a white collar prosecutor, from 2005 until 2013, Mr. Day served as a deputy chief and trial attorney in the Public Integrity Section of the DOJ. During his tenure at the Public Integrity Section, Mr. Day prosecuted and tried some of the Criminal Division's most challenging cases, including the prosecutions of Jack Abramoff, a Member of Congress and several chiefs of staff, a New York state supreme court judge, and other elected local officials. He started his career in 2003 when he was selected to join the Attorney General's Honors Program as a prosecutor in the DOJ's Tax Division. Mr. Day also was stationed overseas as the Justice Department's Anti-Corruption Resident Legal Advisor in Serbia.

Mr. Day received a number of awards while at the DOJ, including the Attorney General's Award for Distinguished Service, the second highest award for employee performance; the Assistant Attorney General's Award for Exceptional Service; and the Assistant Attorney General's Award for Ensuring the Integrity of Government.

Mr. Day clerked for Chief United States District Court Judge Benson E. Legg of the District of Maryland. He earned his J.D. from the University of Virginia School of Law, where he graduated in 2002 after winning first place in the Lile Moot Court Competition and being selected to receive the Margaret G. Hyde Graduation Award. He graduated with honors and highest distinction from the University of Kansas in 1999 with a B.A. in Italian Literature and Humanities.

Michael S. Diamant

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.887.3547
ASmith@gibsondunn.com

Michael S. Diamant is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. He is a member of the White Collar Defense and Investigations Practice Group, and serves on the firm's Finance Committee. His practice focuses on white collar criminal defense, internal investigations, and corporate compliance.

Mr. Diamant has broad white collar defense experience representing corporations and corporate executives facing criminal and regulatory charges. He has represented clients in an array of matters, including accounting and securities fraud, antitrust violations, and environmental crimes, before law enforcement and regulators, like the U.S. Department of Justice and the Securities and Exchange Commission. Mr. Diamant also has managed numerous internal investigations for publicly traded corporations and conducted fieldwork in nineteen different countries on five continents. Mr. Diamant also regularly advises major corporations on the structure and effectiveness of their compliance programs. This often includes reviewing reporting mechanisms, internal payment controls, and compliance messaging, as well as drafting new compliance materials, such as ethics and anti-corruption handbooks.

Chambers and Partners' global guide, *Chambers Global*, continually recognizes Mr. Diamant as one of the leading U.S. Foreign Corrupt Practices Act ("FCPA") experts in the United States. In 2021, 2020, 2019, 2018, 2017, and 2016, he was similarly ranked by *Chambers USA* nationwide for FCPA.

In his FCPA practice, Mr. Diamant regularly conducts internal investigations for corporations regarding possible anti-bribery violations and assists them in complying with government subpoenas and negotiating settlements with enforcement agencies. He also routinely advises corporations on the adequacy of the design and implementation of their FCPA compliance programs. Mr. Diamant has designed entire anti-bribery compliance programs, as well as guidance and payment approval materials, for Fortune 100 corporations. He also frequently conducts FCPA training for in-house counsel, corporate executives, and line employees. And he has served as a faculty member for the Ethics and Compliance Officer Association's Global Law School.

Mr. Diamant also has extensive World Bank Group enforcement experience, working on behalf of clients under investigation by the World Bank Integrity Vice Presidency and assisting companies already subject to World Bank sanction. Recent engagements have included negotiating resolutions with the World Bank and aiding clients in myriad post-settlement interactions with the Bank. In addition to the World Bank Group matters, Mr. Diamant has worked on behalf of clients to deal with the enforcement functions of other multilateral development banks.

Patrick F. Stokes

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.955.8504
PStokes@gibsondunn.com

Patrick Stokes is a litigation partner in Gibson, Dunn & Crutcher's Washington, D.C. office. He is the co-chair of the Anti-Corruption and FCPA Practice Group and a member of the firm's White Collar Defense and Investigations, Securities Enforcement, and Litigation Practice Groups.

Mr. Stokes' practice focuses on internal corporate investigations, government investigations, enforcement actions regarding corruption, securities fraud, and financial institutions fraud, and compliance reviews. He has tried more than 30 federal jury trials as first chair, including high-profile white-collar cases, and handled 16 appeals before the U.S. Court of Appeals for the Fourth Circuit. Mr. Stokes regularly represents companies and individuals before DOJ and the SEC, and is equally comfortable leading confidential internal investigations, negotiating with government enforcement authorities, or advocating in court proceedings.

Prior to joining Gibson Dunn, Mr. Stokes spent nearly 18 years with the U.S. Department of Justice (DOJ). From 2014 to 2016 he headed the FCPA Unit, managing the DOJ's FCPA enforcement program and all criminal FCPA matters throughout the United States, covering every significant business sector, and including investigations, trials, and the assessment of corporate anti-corruption compliance programs and monitorships. Mr. Stokes also served as the DOJ's principal representative at the OECD Working Group on Bribery working with law enforcement and policy setters from 41 signatory countries on anti-corruption enforcement policy issues.

From 2010 to 2014, he served as Co-Chief of the DOJ's Securities and Financial Fraud Unit. In this role, he oversaw investigations and prosecutions of financial fraud schemes involving market manipulation, accounting fraud, benchmark interest rate manipulations, insider trading, Troubled Asset Relief Program (TARP) fraud, government contract and procurement fraud, and large-scale mortgage fraud, among others. Mr. Stokes also led the successful prosecution of one of the largest bank and securities fraud cases to come out of the financial crisis.

From 2002 to 2008, Mr. Stokes served as an Assistant United States Attorney in the Eastern District of Virginia, where he prosecuted a wide variety of financial fraud, immigration, and violent crime cases. From 1998 to 2002, he served in the DOJ's Tax Division as a trial attorney in the Western Criminal Enforcement Section where he prosecuted a wide variety of tax and financial fraud schemes.

Mr. Stokes received various awards while at the DOJ, including the Attorney General's Distinguished Service Award in 2013 and 2014 and the Assistant Attorney General's Exceptional Service Award (Criminal Division) in 2011 and 2014.

Elizabeth M. Niles

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.887.3754
ENiles@gibsondunn.com

Elizabeth Niles is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. She practices in the firm's Litigation Department, focusing on white collar criminal defense and investigations, employment law, and complex commercial litigation.

Ms. Niles regularly represents a diverse range of clients, including major multinational corporations, in criminal, regulatory, and internal investigations. Her practice includes advising clients under investigation by regulators; coordinating and conducting witness interviews, document reviews, and productions; working with in-house legal, audit, and compliance teams; preparing presentations and reports; and preparing subject matter experts for meetings with government agencies. Ms. Niles has experience in complex commercial litigation, including authoring motions and petitions; preparing expert and corporate witnesses for depositions; and coordinating and preparing cross-examinations at trial. She was a member of the Gibson Dunn trial team that obtained a complete dismissal of SEC administrative proceedings against Lynn Tilton and her company, Patriarch Partners.

Ms. Niles clerked for Judge William F. Kuntz, II on the United States District Court for the Eastern District of New York.

Ms. Niles received her J.D. from Harvard Law School in 2014, where she served as Managing Editor of the *Harvard Journal on Legislation*. She received her Masters of Education from the Boston University School of Education and her undergraduate degree in Government and English from Georgetown University.

Ms. Niles is admitted to practice in the State of New York and the District of Columbia.

On a *pro bono* basis, Ms. Niles works with international rule of law NGOs on trainings related to wildlife trafficking laws and anti-human trafficking and forced labor laws. Ms. Niles is also the Co-Chair of the ABA International Section's International Animal Law Committee Wildlife Crime Working Group.

Acknowledgements

The panelists would like to extend our thanks to our excellent team who contributed to this webcast.

Akila Bhargava is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. Ms. Bhargava currently practices in the firm's Litigation Department, and focuses primarily on white collar defense and investigations.

Before joining the firm, Ms. Bhargava was a litigation associate at an international law firm and worked on a variety of white collar defense matters and complex civil litigation, including DOJ and FTC investigations, securities litigation, antitrust litigation, and commercial disputes.

Ms. Bhargava graduated from the University of Pennsylvania Law School in 2018, where she was Research Editor on the *University of Pennsylvania Law Review* and President of the South Asian Law Students Association. She also served as an Arthur Littleton and H. Clayton Louderback Legal Writing Fellow and a Penn Law Global Women's Leadership Project Fellow. In 2015, Ms. Bhargava graduated with a Bachelor of Arts in English from Vanderbilt University.

Ms. Bhargava is admitted to practice in New York and the District of Columbia.

Our Offices

Beijing
Unit 1301, Tower 1
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

Brussels
Avenue Louise 480
1050 Brussels
Belgium
+32 (0)2 554 70 00

Century City
2029 Century Park East
Los Angeles, CA 90067-3026
+1 310.552.8500

Dallas
2001 Ross Avenue, Suite 2100
Dallas, TX 75201
+1 214.698.3100

Denver
1801 California Street
Denver, CO 80202-2642
+1 303.298.5700

Dubai
Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0)4 370 0311

Frankfurt
TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
+49 69 247 411 500

Hong Kong
32/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong
+852 2214 3700

Houston
811 Main Street, Suite 3000,
Houston, TX 77002-6117
Tel: +1 346.718.6600

London
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
England
+44 (0) 20 7071 4000

Los Angeles
333 South Grand Avenue
Los Angeles, CA 90071-3197
+1 213.229.7000

Munich
Hofgarten Palais
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

New York
200 Park Avenue
New York, NY 10166-0193
+1 212.351.4000

Orange County
3161 Michelson Drive
Irvine, CA 92612-4412
+1 949.451.3800

Palo Alto
1881 Page Mill Road
Palo Alto, CA 94304-1125
+1 650.849.5300

Paris
16, avenue Matignon,
75008 Paris, France
+33 (0) 1 56 43 13 00

San Francisco
555 Mission Street
San Francisco, CA 94105-0921
+1 415.393.8200

São Paulo
Rua Funchal, 418, 35°andar
Sao Paulo 04551-060
Brazil
+55 (11)3521.7160

Singapore
One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

Washington, D.C.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
+1 202.955.8500