

Chapter 131

White Collar Crime

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

I. INTRODUCTION

§ 131:1 Scope note

II. WHO INVESTIGATES FEDERAL CRIMES

- § 131:2 U.S. Department of Justice / Office of the Attorney General
- § 131:3 U.S. Attorneys
- § 131:4 —Southern District of New York
- § 131:5 —Other districts
- § 131:6 Agencies with enforcement powers—Securities and Exchange Commission
- § 131:7 —Department of Health & Human Services
- § 131:8 —Other federal agencies
- § 131:9 Enforcement strategies
- § 131:10 —Specialized units within the DOJ
- § 131:11 —Domestic interagency cooperation
- § 131:12 —Cross-border investigations and collaboration agreements
- § 131:13 —New techniques in investigation of white collar crimes
- § 131:14 Practicalities of interacting with federal authorities
- § 131:15 —Parallel civil/criminal proceedings
- § 131:16 —Voluntary disclosure by corporations

III. FEDERAL CRIMINAL PROCEDURE

- § 131:17 Federal criminal procedure law
- § 131:18 —Pretrial discovery
- § 131:19 *Brady/Jencks* disclosures
- § 131:20 —Jencks disclosures

*The authors acknowledge with great appreciation the valuable assistance of our associates Masha Bresner, David F. Crowley-Buck, Caitlin Forsyth, Alexandra Grossbaum, Leesa Haspel, Julie Inglese, and Luke Roniger in the preparation of this chapter.

- § 131:21 —*Brady* material
- § 131:22 Immunity
- § 131:23 —Scope of immunity
- § 131:24 —Grand jury proceedings
- § 131:25 —During trial
- § 131:26 —Proffer agreements and pretrial negotiations
- § 131:27 —Cooperation initiatives for corporations
- § 131:28 —Protection of whistleblowers

IV. FEDERAL WHITE COLLAR CRIMES

- § 131:29 Federal white collar crimes generally
- § 131:30 Insider trading
- § 131:31 —Legal standard
- § 131:32 —Recent cases
- § 131:33 Foreign Corrupt Practices Act
- § 131:34 —Legal standard
- § 131:35 Mail and wire fraud
- § 131:36 —Honest services cases/*Skilling*
- § 131:37 Securities fraud
- § 131:38 Health care fraud (Medicare and Medicaid)
- § 131:39 Health care fraud—Health Care Fraud Prevention and Enforcement Action Team
- § 131:40 Antitrust
- § 131:41 —Price-fixing
- § 131:42 —Anti-cartel enforcement
- § 131:43 —Cross-border enforcement cooperation
- § 131:44 Crimes under the Bank Secrecy Act
- § 131:45 Criminal sanctions violations
- § 131:46 Mortgage fraud
- § 131:47 —Recent mortgage fraud prosecutions
- § 131:48 Insurance fraud
- § 131:49 Tax fraud
- § 131:50 Environmental crimes
- § 131:51 —Statutory framework for environmental crimes
- § 131:52 —Prosecutorial discretion in environmental crimes prosecutions
- § 131:53 —Deferred prosecution agreements and nonprosecution agreements in environmental crime cases
- § 131:54 —Recent environment crimes cases
- § 131:55 Intellectual property crimes
- § 131:56 Computer crimes
- § 131:57 Obstruction of justice, perjury, and false statements
- § 131:58 Racketeer Influenced and Corrupt Organizations
- § 131:59 Conspiracy
- § 131:60 Extortion crimes under the Hobbs Act

V. ORGANIZATIONAL LIABILITY FOR CRIMES

- § 131:61 Corporate criminal liability
- § 131:62 —Standards for corporate criminal liability

VI. ISSUES OF PROOF AND DEFENSES

- § 131:63 Proof and defenses in white collar cases
- § 131:64 Principals and accessories
- § 131:65 Rules of evidence
- § 131:66 Defenses
- § 131:67 —Double jeopardy
- § 131:68 —Entrapment
- § 131:69 —Defenses to conspiracy
- § 131:70 Defenses to specific federal statutes

VII. DISPOSITION OF CRIMINAL CASES

- § 131:71 Disposition in the defendant's favor
- § 131:72 Plea agreements and cooperation agreements
- § 131:73 Federal sentencing in general
- § 131:74 Corporate sentencing under federal law
- § 131:75 —General standards for corporate sentencing under U.S. Sentencing Guidelines
- § 131:76 —Existence of corporate compliance program as mitigating factor
- § 131:77 —Use of Non-Prosecution Agreements/Deferred Prosecution Agreements
- § 131:78 —Corporate monitors
- § 131:79 —Financial penalties

VIII. PRACTICE AIDS

- § 131:80 Checklist: grand jury considerations
- § 131:81 Checklist: internal investigation considerations

IX. FORMS

- § 131:82 Form: sample proffer agreement
- § 131:83 Form: sample plea agreement
- § 131:84 Form: sample deferred prosecution agreement
- § 131:85 Form: sample non-prosecution agreement
- § 131:86 Form: sample federal criminal jury instructions

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. INTRODUCTION

§ 131:1 Scope note

In the post-Great Recession environment, federal authorities have dramatically increased their investigation and prosecution of white collar crimes. Commentators and the media are clamoring for the government to file charges against those in the white collar community who allegedly are responsible for the economic ills of the recent years. In this highly charged environment, federal prosecutors are applying aggressive investigative techniques (such as the use of wiretaps, search warrants, and undercover informants) to the white collar arena seeking substantial fines against corporations and lengthy prison terms for individuals. Businesses and corporate executives now are the subject of investigation and prosecution for a broad range of white collar offenses in this white hot enforcement environment. The stakes have never been higher for corporations and individuals subject to white collar criminal investigations and prosecutions. As such, it is imperative for practitioners to be aware of the many tools at the disposal of federal prosecutors and the various defenses available to putative white collar targets.

This chapter provides an overview of (a) the nature of the federal investigative authorities,¹ (b) key federal criminal procedural issues,² (c) major federal white collar crimes,³ (d) unique issues of corporate liability under federal law,⁴ (e) key proof and evidentiary issues in federal court,⁵ and (f) sentencing issues in the federal system.⁶ Related considerations are addressed in Chapter 132 “Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 132:1 et seq.).

[Section 131:1]

¹See §§ 131:1 to 131:16.

²See §§ 131:17 to 131:28.

³See §§ 131:29 to 131:60.

⁴See §§ 131:61 to 131:62.

⁵See §§ 131:62 to 131:70.

⁶See §§ 131:71 to 131:79.

II. WHO INVESTIGATES FEDERAL CRIMES

§ 131:2 U.S. Department of Justice / Office of the Attorney General

Congress established the Department of Justice (“DOJ”) by statute in 1870.¹ The Office of the Attorney General is even older, having been established by the Judiciary Act of 1789.² The Attorney General serves as the federal government’s “chief law enforcement officer.”³ The Attorney General’s responsibilities include representing the United States in legal matters,⁴ providing the President and department heads with legal advice and opinions,⁵ and appearing before the United States Supreme Court.⁶ 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, 1870.⁷ Since then, the DOJ has grown 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.⁸ 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

[Section 131:2]

¹An 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>.

²Judiciary 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 execution of his office . . .”).

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

⁴28 U.S.C.A. §§ 515 to 517.

⁵28 U.S.C.A. §§ 511 to 513.

⁶Judiciary 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 . . .”).

⁷U.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).

⁸U.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).

authority.⁹ The Associate Attorney General helps develop and manage DOJ policy and oversees a variety of DOJ units.¹⁰

Today, the DOJ is the self-described “world’s largest law office,”¹¹ with more than 10,000 attorneys as part of its workforce of more than 100,000 people.¹² It prosecutes violations of federal criminal law and litigates civil suits on behalf of the United States.¹³ 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, the United States marshals who protect the judiciary and transport prisoners, and correctional officers.¹⁴ Various DOJ units address white collar matters, including the Antitrust Division, the Criminal Division, and the United States Attorneys.

The DOJ Fraud Section is the primary DOJ unit that prosecutes economic and white collar crimes. For a more detailed discussion of the Fraud Section, see Section 131:10.

§ 131:3 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.¹ U.S. Attorneys are appointed to four-year terms but may continue in office until a replacement is named and the Senate provides its consent.² Assistant U.S. Attorneys support the work of each U.S. Attorney and comprise the DOJ’s corps of federal prosecutors as-

⁹U.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 . . .”).

¹⁰U.S. Dep’t of Justice, OASG: About the Office, <http://www.justice.gov/asg/about-ooag.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.”).

¹¹U.S. Dep’t of Justice, OAG: About the Office, <http://www.justice.gov/ag/about-oag.html>.

¹²U.S. Dep’t of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf>.

¹³U.S. Dep’t of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf>.

¹⁴U.S. Dep’t of Justice, DOJ Agencies, <http://www.justice.gov/agencies>.

[Section 131:3]

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

²28 U.S.C.A. § 541.

signed to individual districts.³ 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.⁴ Individual U.S. Attorneys have significant discretion to address the needs of their districts.⁵ In some districts, that discretion includes a particular focus on white collar investigations and prosecutions.

§ 131:4 U.S. Attorneys—Southern District of New York

The U.S. Attorney's Office for the Southern District of New York (the "SDNY") has a long and storied history of litigating high-profile cases for the United States. This office has been an integral part of the United States' legal team since the early days of this 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").¹ Currently, the SDNY encompasses eight counties in and near New York City, including the city boroughs of Manhattan and the Bronx.² 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 NYSE MKT LLC formerly known as the NASDAQ, American Stock Exchange, New York Mercantile Exchange, and New York Stock Exchange), are located in Manhattan.³

The SDNY's Criminal Division prosecutes securities fraud, other financial crimes, and "economic espionage," either through its Securities and Commodities Fraud Task Force or the Complex

³See 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.").

⁴28 U.S.C.A. § 547.

⁵U.S. Dep't of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao/mission>.

[Section 131:4]

¹U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Office History (Feb. 1, 2016), <http://www.justice.gov/usao-sdny/office-history>.

²U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: About the District (Feb. 1, 2016), <http://www.justice.gov/usao-sdny/about-district>.

³U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Criminal Division (Feb. 1, 2016), <http://www.justice.gov/usao-sdny/criminal-division>.

Frauds and Cybercrime Unit.⁴ The Securities and Commodities Fraud Task Force investigates and prosecutes a range of 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.⁵ The Complex Frauds and Cybercrime Unit investigates and prosecutes white collar offenses including financial institution fraud, health care fraud, tax fraud, and cybercrimes.⁶

Since the 2009 appointment of SDNY U.S. Attorney Preet Bharara, the office has focused heavily on insider trading cases. During this time, the SDNY has prosecuted and convicted over 80 individuals on insider trading charges, primarily related to hedge funds.⁷ In fact, until July 2014, Bharara's conviction record was perfect, winning 85 straight convictions.⁸ Since the end of 2015, however, the office seems to be slowing its efforts. In October 2015, Bharara dropped seven insider trading cases after the U.S. Supreme Court declined to review the Second Circuit Court of Appeals decision *U.S. v. Newman and Chiasson*, which overturned two insider trading convictions.⁹ It remains unclear at what rate Bharara and the SDNY will move forward with prosecutions.

Among high-profile cases, the SDNY recently litigated the insider trading trial of hedge fund manager Raj Rajaratnam, who allegedly earned, or avoided losses of, more than \$45 million for

⁴U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Criminal Division (Feb. 1, 2016), <http://www.justice.gov/us-ao-sdny/criminal-division>.

⁵U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Criminal Division (Feb. 1, 2016), <http://www.justice.gov/us-ao-sdny/criminal-division>.

⁶U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: Criminal Division (Feb. 1, 2016), <http://www.justice.gov/us-ao-sdny/criminal-division>.

⁷Sheelah Kolhatkar, Will Preet Bharara Take His Insider-Trading Smackdown to the Supreme Court?, Bloomberg News, June 17, 2015, <http://www.bloomberg.com/news/articles/2015-06-17/the-decision-that-will-help-shape-preet-bharara-s-legacy-was-just-delayed>.

⁸James B. Stewart, The Limits of the Law in Insider Trading, N.Y. Times, July 18, 2014, <http://www.nytimes.com/2014/07/19/business/Rengan-Rajaratnam-case-shows-limits-of-insider-trading-laws.html>.

⁹Matthew Goldstein, U.S. Prosecutor to Drop Insider Trading Cases Against Seven, N.Y. Times, Oct. 22, 2015, <http://www.nytimes.com/2015/10/06/business/dealbook/supreme-court-denies-request-to-hear-insider-trading-case.html>. See §§ 131:31 and 131:32 for additional discussion of *U.S. v. Newman and Chiasson*.

his hedge fund based on insiders' tips.¹⁰ On May 11, 2011, a jury convicted Rajaratnam on 14 counts of securities fraud stemming from his illegal trades.¹¹ Rajaratnam was sentenced to 11 years in prison and ordered to pay more than \$150 million in fines and forfeitures.¹² On June 24, 2013, the Court of Appeals for the Second Circuit upheld Rajaratnam's conviction.¹³ On February 18, 2014, Rajaratnam filed a petition for writ of certiorari in the United States Supreme Court, arguing, among other things, that the trial judge should have suppressed the wiretap evidence.¹⁴ On June 16, 2014, the Supreme Court declined the certiorari petition.¹⁵

One of Rajaratnam's associates, Rajat Gupta, former head of McKinsey & Co. and former board member of Goldman Sachs, was subsequently convicted of insider trading in June 2012 for his role in Rajaratnam's scheme.¹⁶ In October 2012, Gupta was sentenced to two years in prison for his involvement in the insider trading scheme.¹⁷ Gupta also was sentenced to one year of

¹⁰See, e.g., UNITED STATES OF AMERICA, v. Raj RAJARATNAM and Danielle Chiesi, Defendants., 2010 WL 2131195, at *4, 56 (S.D. N.Y. 2010). See § 131:32 for additional discussion of U.S. v. Rajaratnam.

¹¹Michael Rothfeld et al., Fund Titan Found Guilty, Wall St. J., May 12, 2011, <http://online.wsj.com/news/articles/SB10001424052748703864204576317060246641834>.

¹²See § 131:32; see also U.S. v. Rajaratnam, 2012 WL 362031 (S.D. N.Y. 2012); S.E.C. v. Rajaratnam, 822 F. Supp. 2d 432, Fed. Sec. L. Rep. (CCH) P 96582 (S.D. N.Y. 2011); Susan Pulliam and Chad Bray, Trader Draws Record Sentence, Wall St. J., Oct. 13, 2011, <http://online.wsj.com/article/SB10001424052970203914304576627191081876286.html>; Richard Vanderford, Rajaratnam Gets Record \$93M Fine in SEC Case, Law360, Nov. 8, 2011, <http://www.law360.com/articles/284435/rajaratnam-gets-record-93m-fine-in-sec-case>.

¹³U.S. v. Rajaratnam, 719 F.3d 139, Fed. Sec. L. Rep. (CCH) P 97534 (2d Cir. 2013), cert. denied, 134 S. Ct. 2820, 189 L. Ed. 2d 785 (2014).

¹⁴Petition for a Writ of Certiorari, Rajaratnam v. U.S., 134 S. Ct. 2820, 189 L. Ed. 2d 785 (2014); see Matt Chiappardi, Rajaratnam Takes Insider Trading Conviction to High Court, Law360, Feb. 24, 2014, <http://www.law360.com/articles/512733/print?section=appellate>.

¹⁵Rajaratnam v. U.S., 134 S. Ct. 2820, 189 L. Ed. 2d 785 (2014) (denying certiorari).

¹⁶See Peter Lattman and Azam Ahmed, Rajat Gupta Convicted of Insider Trading, N.Y. Times, June 15, 2012, <http://dealbook.nytimes.com/2012/06/15/raja-t-gupta-convicted-of-insider-trading>. See § 131:32 for additional discussion of U.S. v. Gupta.

¹⁷See Press Release, Office of the U.S. Att'y for the S. Dist. of N.Y., Former Chairman of Consulting Firm and Board Director, Rajat Gupta, Sentenced in Manhattan Federal Court to Two Years in Prison for Insider Trading (Oct. 24, 2012), available at <http://www.justice.gov/archive/usao/nys/pressreleases/October12/GuptaSentencing.html>.

supervised release and ordered to pay \$5 million.¹⁸ In May 2013, Gupta appealed his conviction to the United States Court of Appeals for the Second Circuit.¹⁹ In March 2014, the Second Circuit rejected Gupta's appeal and affirmed the 2012 conviction.²⁰ In April 2014, the U.S. District Court for the Southern District of New York ordered Gupta to surrender on June, 17, 2014, the date on which he was to begin serving his two year prison sentence.²¹ In April 2015, Gupta appealed his sentence to the United States Supreme Court which denied his appeal.²² Gupta also was ordered to pay \$13.9 million following a judgment in a separate civil insider trading case brought by the Securities and Exchange Commission ("SEC").²³

On March 20, 2013, Rajaratnam's brother, Rengan, was charged with securities fraud and conspiracy to commit securities fraud for his role as the remote "tippee" in Rajaratnam's scheme.²⁴ On April 17, 2014, Rengan Rajaratnam's motion to dismiss his indictment was denied by the U.S. District Court for the Southern District of New York.²⁵ Rengan Rajaratnam argued that prosecutors failed to allege that he possessed the requisite knowledge that the information he shared would result in personal benefit to the tippers to sustain insider trading charges.²⁶ Subsequently, prosecutors dropped two insider trading charges against Rengan

¹⁸See Press Release, Office of the U.S. Att'y for the S. Dist. of N.Y., Former Chairman of Consulting Firm and Board Director, Rajat Gupta, Sentenced in Manhattan Federal Court to Two Years in Prison for Insider Trading (Oct. 24, 2012), available at <http://www.justice.gov/archive/usao/nys/pressreleases/October12/GuptaSentencing.html>.

¹⁹See Peter Lattman, Fallen Goldman Director Appeals for a New Trial, N.Y. Times, May 21, 2013, <http://dealbook.nytimes.com/2013/05/21/court-hears-appeal-of-ex-director-of-goldman/>.

²⁰U.S. v. Gupta, 747 F.3d 111, 93 Fed. R. Evid. Serv. 1332 (2d Cir. 2014), cert. denied, 135 S. Ct. 1841, 191 L. Ed. 2d 722 (2015).

²¹Kaitlyn Kiernan, Gupta To Surrender For 2-Years Prison Term in June, Law360, Apr. 17, 2014, <http://www.law360.com/articles/529293>.

²²Gupta v. U.S., 135 S. Ct. 1841, 191 L. Ed. 2d 722 (2015).

²³Stewart Bishop, SEC Fines Gupta \$14M For Passing Secrets To Rajaratnam, Law360, July 17, 2013, <http://www.law360.com/articles/458152/sec-fines-gupta-14m-for-passing-secrets-to-rajaratnam>.

²⁴U.S. v. Rajarantnam, 2014 WL 1554078 (S.D. N.Y. 2014). See § 131:32 for additional discussion of U.S. v. Rajaratnam.

²⁵U.S. v. Rajarantnam, 2014 WL 1554078, at *1 (S.D. N.Y. 2014).

²⁶U.S. v. Rajarantnam, 2014 WL 1554078, at *1 (S.D. N.Y. 2014). Notably, in an unrelated case decided in December 2014, the Second Circuit held that "downstream tippees" in insider trading cases must know that they are receiving insider information, and that the tipper was receiving a tangible benefit for that information. See U.S. v. Newman, 773 F.3d 438, 446, Fed. Sec. L. Rep. (CCH) P 98592 (2d Cir. 2014), cert. denied, 136 S. Ct. 242, 193 L. Ed. 2d 133 (2015).

Rajaratnam.²⁷ On July 8, 2014, however, a federal jury acquitted Rengan Rajaratnam of conspiracy to commit insider trading, the sole remaining charge against him.²⁸ Following a streak of 81 convictions for insider trading, this result marked the first defeat for federal prosecutors in an insider trading case in recent years.²⁹ In October 2014, Rengan Rajaratnam settled a related civil case with the SEC in which Rajaratnam accepted a five-year securities industry bar and agreed to pay more than \$840,000.³⁰

Additionally, SDNY attorneys prosecuted the well-known case against Bernard Madoff for orchestrating and running a massive, decades-long Ponzi scheme, in which investors lost billions of dollars.³¹ Madoff pleaded guilty to multiple charges in 2009,³² for which he was sentenced to 150 years of imprisonment.³³ In March 2014, a jury found five of Madoff's long-time former employees guilty of 31 charges related to their roles in Madoff's scheme.³⁴ On June 24, 2014, Paul Konigsberg, a longtime former accountant to Bernard Madoff, pled guilty to two counts of falsifying records and one count of conspiracy in connection with Madoff's Ponzi scheme.³⁵ Although prosecutors stated that Konigsberg did not intend to help defraud Madoff's investors, he knowingly used fraudulently backdated trades provided by Madoff's firm when

²⁷Michael Lipkin, *Feds Drop 2 Counts In Rajaratnam Brother's Indictment*, Law360, May 1, 2014, http://www.law360.com/articles/533917/feds-drop-2-counts-in-rajaratnam-brother-s-indictment?article_related_content=1.

²⁸Christopher M. Matthews, *Jury Acquits Rengan Rajaratnam in Insider-Trading Case*, Wall St. J. July 8, 2014, <http://online.wsj.com/articles/jury-acquits-rengan-rajaratnam-in-insider-trading-case-1404845184>.

²⁹Christopher M. Matthews, *Jury Acquits Rengan Rajaratnam in Insider-Trading Case*, Wall St. J. July 8, 2014, <http://online.wsj.com/articles/jury-acquits-rengan-rajaratnam-in-insider-trading-case-1404845184>.

³⁰Press Release, Sec. & Exch. Comm'n, *Rengan Rajaratnam Agrees to Settle Insider Trading Charges* (Oct. 23, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543274751>.

³¹Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. Times, June 30, 2009, at A1.

³²Diana B. Henriques & Jack Healy, *Madoff Jailed After Pleading Guilty to Fraud*, N.Y. Times, Mar. 13, 2009, at A1.

³³Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. Times, June 30, 2009, at A1.

³⁴Press Release, Fed. Bureau of Investigation, *Five Former Employees of Bernard L. Madoff Investment Securities Found Guilty in Manhattan Federal Court on All Counts* (Mar. 24, 2014), available at <http://www.fbi.gov/newyork/press-releases/2014/five-former-employees-of-bernard-l.-madoff-investment-securities-found-guilty-in-manhattan-federal-court-on-all-counts>.

³⁵Christopher M. Matthews, *Bernard Madoff's Former Accountant Pleads Guilty*, Wall St. J., June 24, 2014, <http://online.wsj.com/articles/bernard-madoff-s-former-accountant-pleads-guilty-1403631726?mod=mktw>.

preparing clients' tax returns.³⁶ Konigsberg agreed to forfeit \$4.4 million in ill-gotten profits and to pay additional fines.³⁷

Another leading SDNY prosecution resulted in the conviction of Bernard Ebbers for orchestrating an \$11 billion fraud that led to the collapse of WorldCom, the company Ebbers founded and directed.³⁸ Ebbers received a sentence of 25 years in federal prison.³⁹

§ 131:5 U.S. Attorneys—Other districts

In addition to the SDNY, federal prosecutors in other districts actively investigate and prosecute white collar crime. 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.¹ Created in 1865,² 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).³

The EDNY led the formation of the Mortgage Fraud Task Force in the spring of 2008, coordinating efforts among federal, state, and local law enforcement in the wake of the subprime mortgage crisis, and before the wider financial crisis unfolded later that year.⁴ This office has handled various mortgage fraud cases in the wake of that crisis, including an investigation by the

³⁶Christopher M. Matthews, Bernard Madoff's Former Accountant Pleads Guilty, Wall St. J., June 24, 2014, <http://online.wsj.com/articles/bernard-madoff-s-former-accountant-pleads-guilty-1403631726?mod=mktw>.

³⁷Christopher M. Matthews, Bernard Madoff's Former Accountant Pleads Guilty, Wall St. J., June 24, 2014, <http://online.wsj.com/articles/bernard-madoff-s-former-accountant-pleads-guilty-1403631726?mod=mktw>.

³⁸Ken Belson, Ex-Chief of WorldCom Is Found Guilty in \$11 Billion Fraud, N.Y. Times, Mar. 16, 2005, at A1.

³⁹Ken Belson, WorldCom Head Is Given 25 Years for Huge Fraud, N.Y. Times, July 14, 2005, A1.

[Section 131:5]

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

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

³U.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>.

⁴Dan Slater, EDNY Forms Federal Task Force to Clean Up Mortgage Mess, Wall St. J. L. Blog (May 5, 2008, 9:04 AM), <http://blogs.wsj.com/law/2008/>

Financial Fraud Enforcement Task Force⁵ that led to the guilty plea of a New York developer whose conspiracy caused \$92 million in losses on fraudulent mortgages.⁶ In May 2014, the EDNY secured the guilty pleas of Adam J. Manson and Brian Callahan for engaging in a \$96 million real estate Ponzi scheme in Long Island, New York.⁷ Manson pleaded guilty to conspiracy to commit securities fraud and faces up to five years in prison and must pay \$96 million in restitution to the victims.⁸ Callahan pleaded guilty to securities and wire fraud and faces up to 40 years in prison.⁹

Despite the EDNY's robust prosecutorial tradition, however, its prosecution of two Bear Stearns hedge fund managers, Ralph Cioffi and Matthew Tannin, on mortgage fraud charges in the wake of the financial firm's rapid collapse in 2008, was unsuccessful.¹⁰

In May 2015, EDNY prosecutors indicted 14 individuals, including nine current and former high-ranking officials of Fédération Internationale de Football Association ("FIFA") in connection with an alleged twenty-four year scheme to enrich themselves through corruption within FIFA. The defendants were charged with racketeering, wire fraud, and money laundering conspiracies, among other charges. The forty-seven count indictment was unsealed on May 27, 2015. On the same day, Swiss officials arrested seven of the named defendants in Zurich. The indictment

05/05/edny-forms-federal-task-force-to-clean-up-mortgage-mess; see also Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles and Tactical Considerations*, Sec. Litig. Rep., Feb. 2010, at 1.

⁵President Barack Obama created the Financial Fraud Enforcement Task Force in November 2009. Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles and Tactical Considerations*, Sec. Litig. Rep., Feb. 2010, at 1.

⁶Press Release, Dep't of Justice, *Leader of \$92 Million Mortgage Fraud Conspiracy Pleads Guilty* (Oct. 15, 2010), available at <http://www.justice.gov/archive/usao/nye/pr/2010/2010oct15.html>.

⁷Press Release, Fed. Bureau of Investigation, *Long Island Real Estate Manager Pleads Guilty in \$96 Million Ponzi Scheme* (May 12, 2014), available at <http://www.fbi.gov/newyork/press-releases/2014/long-island-real-estate-manager-pleads-guilty-in-96-million-ponzi-scheme>.

⁸Press Release, Fed. Bureau of Investigation, *Long Island Real Estate Manager Pleads Guilty in \$96 Million Ponzi Scheme* (May 12, 2014), available at <http://www.fbi.gov/newyork/press-releases/2014/long-island-real-estate-manager-pleads-guilty-in-96-million-ponzi-scheme>.

⁹Press Release, Fed. Bureau of Investigation, *Long Island Real Estate Manager Pleads Guilty in \$96 Million Ponzi Scheme* (May 12, 2014), available at <http://www.fbi.gov/newyork/press-releases/2014/long-island-real-estate-manager-pleads-guilty-in-96-million-ponzi-scheme>.

¹⁰Zachery Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders are Acquitted*, N.Y. Times, Nov. 10, 2009.

alleges that the FIFA officials conspired to solicit and receive over \$150 million in bribes and kickbacks in exchange for their support of the sports marketing executives also named as defendants.¹¹

While the New York City area, the country's financial capital, is a nexus of white collar federal prosecutions, other U.S. Attorney's Offices across the country also investigate and prosecute white collar crime. 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.¹² The D.C. office also enforces various public corruption laws, such as federal laws prohibiting bribes and honest services fraud,¹³ false claims, fraud and kickbacks in government contracting, and cases against federal employees.¹⁴ Owing to its unique geographic location, in the nation's capital, the office's jurisdiction also encompasses congressional referrals for perjury and false statements.¹⁵ For example in June 2012, after a previous mistrial, a jury in the United States District Court for the District of Columbia acquitted former Major League Baseball star pitcher Roger Clemens on charges he lied to Congress about use of illicit performance enhancing drugs.¹⁶

The D.C. U.S. Attorney's Office also prosecutes wrongdoing among local government officials and their associates. In January 2012, Harry L. Thomas Jr., then a member of the Council of the District of Columbia ("D.C. Council"), pleaded guilty to embezzling more than \$350,000 in public money and for filing a false tax return. Thomas spent the money on vehicles, clothes, meals, and vacations. Thomas received a sentence of more than three years in prison. The plea agreement required Thomas to resign

¹¹Press Release, Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), available at <http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>.

¹²U.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.

¹³See § 131:36 for a discussion of honest services fraud.

¹⁴U.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.

¹⁵Deborah 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.

¹⁶Del Quentin Wilber & Ann E. Marimow, Roger Clemens Acquitted of All Charges, Wash. Post, June 18, 2012, http://www.washingtonpost.com/local/crim/roger-clemens-trial-verdict-reached/2012/06/18/gJQAQxvzIV_story.html.

from the D.C. Council, and he was the first sitting member to face felony charges and to be convicted on them.¹⁷ As of July 2013, six of Thomas's former staff members pled guilty to various charges associated with the misappropriation of government funds and criminal tax charges related to Thomas's scheme.¹⁸ In March 2015, Neil Rodgers, who allegedly aided Thomas in illegally securing funds to pay for an inaugural ball, was found guilty of first degree fraud by a jury in the District of Columbia. The charge of first degree fraud carries a statutory maximum of 10 years in prison.¹⁹ In June 2016, a federal judge sentenced Rodgers to thirty-six days in prison and ordered him to repay \$110,000.²⁰

Less than six months after Thomas's guilty plea, a second member of the D.C. Council also pleaded guilty to a felony. Kwame R. Brown, who had served as the chairman of the D.C. Council since 2011, pleaded guilty in June 2012 to federal bank fraud and violation of D.C.'s campaign finance laws. Brown admitted that he lied on applications for two loans—a home equity loan and a loan used to buy a boat—by falsely inflating his income. Like Thomas's plea, the plea agreement required Brown to resign from the D.C. Council. In November 2012, Brown was sentenced to one day in custody and six months of home detention.²¹

The D.C. U.S. Attorney's Office also investigated an alleged

¹⁷Press Release, Fed. Bureau of Investigation, Former District of Columbia Council Member Harry Thomas Jr. Sentenced to 38 Months in Prison for Theft, Tax Charges in Scheme Involving Government Funds (May 3, 2012), available at <https://www.fbi.gov/washingtondc/press-releases/2012/former-district-of-columbia-council-member-harry-thomas-jr.-sentenced-to-38-months-in-prison-for-theft-tax-charges-in-scheme-involving-government-funds>.

¹⁸Press Release, Fed. Bureau of Investigation, Aide to Former Council Member Harry L. Thomas, Jr. Pleads Guilty to Charge Involving \$110,000 Grant That Funded an Inaugural Ball (July 19, 2013), available at <http://www.fbi.gov/washingtondc/press-releases/2013/aide-to-former-council-member-harry-l.-thomas-jr.-pleads-guilty-to-charge-involving-110-000-grant-that-funded-an-inaugural-ball>.

¹⁹Press Release, Fed. Bureau of Investigation, Former D.C. Government Official Found Guilty of Fraud Involving \$110,000 Grant That Funded a 2009 Inaugural Ball (Mar. 25, 2015), available at <http://www.fbi.gov/washingtondc/press-releases/2015/former-d.c.-government-official-found-guilty-of-fraud-involving-110-000-grant-that-funded-a-2009-inaugural-ball>.

²⁰Spencer S. Hsu, Neil S. Rodgers, Aide to Former D.C. Council Member, Sentenced for Fraud, Wash. Post, June 16, 2016, https://www.washingtonpost.com/local/crime/neil-s-rodgers-aide-to-former-dc-council-member-sentenced-for-fraud/2015/06/16/d1820d06-1394-11e5-9ddc-e3353542100c_story.html.

²¹Del Quentin Wilber & Keith L. Alexander, Ex-D.C. Council Chairman Kwame R. Brown Gets One Day in Custody, Plus Home Detention, Wash. Post, Nov. 12, 2012, http://articles.washingtonpost.com/2012-11-12/local/35504597_1_home-detention-jail-time-federal-court.

“shadow campaign” supporting D.C. Mayor Vincent C. Gray in the 2010 mayoral race. In July 2012, a public relations consultant associated with the campaign pleaded guilty to various charges, including obstruction of justice and conspiracy to violate campaign finance laws, following on the heels of guilty pleas by two Gray campaign workers.²² One campaign worker was sentenced to two years of probation for his role in the “shadow campaign.”²³ On July 26, 2013, the former treasurer of Gray’s campaign was sentenced to six months in prison for campaign finance and obstruction of justice charges.²⁴ More recently, in March 2014, Jeffrey E. Thompson pled guilty to conspiring to violate campaign finance laws for his integral role in Gray’s “shadow campaign.”²⁵ The charges against Thompson stem from a broader election fraud scheme in which more than \$3.3 million in illegal campaign contributions were channeled to at least 28 candidates including candidates for the office of the President of the United States.²⁶ In August 2013, former Congressman Jesse L. Jackson, Jr. was sentenced to 30 months in prison for conspiracy to defraud his re-election campaign of around \$750,000 which he used to conceal illegal activities and to pay for his personal expenses.²⁷

Significant white collar cases also are handled in other U.S. At-

²²Mike DeBonis & Nikita Stewart, Vast “Shadow Campaign” Said to Have Aided Gray in 2010, Wash. Post, July 10, 2012, http://www.washingtonpost.com/local/dc-politics/gray-donor-admits-to-scheme-to-funnel-illegal-campaign-contributions/2012/07/10/gJQA0b5DbW_story.html.

²³Del Quentin Wilber, Former Gray Aide Howard Brooks Sentenced to 2 Years Probation, Wash. Post, Oct. 10, 2012, http://articles.washingtonpost.com/2012-10-10/local/35499256_1_campaign-finance-gray-campaign-campaign-payments.

²⁴Mike DeBonis, Thomas Gore, Ex-Gray Campaign Aide, Sentenced in Payoff Scheme, Wash. Post, July 26, 2013, http://articles.washingtonpost.com/2013-03-28/local/38090343_1_lesser-sentence-campaign-fenty.

²⁵Press Release, Fed. Bureau of Investigation, Businessman Pleads Guilty to Conspiring to Violate Federal and District of Columbia Campaign Finance and Tax Laws (Mar. 10, 2014), available at <http://www.fbi.gov/washingtondc/press-releases/2014/businessman-pleads-guilty-to-conspiring-to-violate-federal-and-district-of-columbia-campaign-finance-and-tax-laws>; see Ann E. Marimow & Carol D. Leonnig, Jeffrey E. Thompson said to be in final plea talks over ‘shadow’ campaign for Gray, Wash. Post, Mar. 6, 2014, www.washingtonpost.com/politics/jeffrey-e-thomson-in-plea-talks-with-prosecutors-about-dc-mayor-gray-s-alleged-shadow-campaign/2014/03/06/595daf70-a549-11e3-8466-d34c451760b9_story.html.

²⁶Press Release, Fed. Bureau of Investigation, Businessman Pleads Guilty to Conspiring to Violate Federal and District of Columbia Campaign Finance and Tax Laws (Mar. 10, 2014), available at <http://www.fbi.gov/washingtondc/press-releases/2014/businessman-pleads-guilty-to-conspiring-to-violate-federal-and-district-of-columbia-campaign-finance-and-tax-laws>.

²⁷Press Release, Fed. Bureau of Investigation, Former Congressman Jesse

torney's Offices around the country. The prosecution of media mogul Conrad Black, whose conviction was largely overturned by the Supreme Court in 2010,²⁸ applying its decision in *Skilling v. United States*²⁹ that limited prosecutions for honest services fraud, began as a prosecution by the U.S. Attorney's Office for the Northern District of Illinois.³⁰ That office also is well known for its public corruption prosecutions, including that of former Illinois Governor Rod Blagojevich,³¹ and it touts the prosecution of health care fraud and computer crime as among its current top priorities.³²

U.S. Attorneys' Offices in California also handle a variety 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.³³ For example, in February 2011, federal prosecutors from the Northern District of California secured a guilty plea from a former Apple, Inc. employee, Paul Devine, by which Devine admitted to causing losses of more than \$2.4 million, by sharing confidential corporate information with

L. Jackson, Jr. Sentenced to 30 Months in Prison for Conspiring to Defraud Campaign (Aug. 14, 2013), available at <http://www.fbi.gov/washingtondc/press-releases/2013/former-congressman-jesse-l.-jackson-jr.-sentenced-to-30-months-in-prison-for-conspiring-to-defraud-campaign>.

²⁸See *Black v. U.S.*, 561 U.S. 465, 130 S. Ct. 2963, 177 L. Ed. 2d 695, R.I.C.O. Bus. Disp. Guide (CCH) P 11876 (2010).

²⁹*Skilling v. U.S.*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619, Fed. Sec. L. Rep. (CCH) P 95808, R.I.C.O. Bus. Disp. Guide (CCH) P 11875 (2010).

³⁰*Black v. U.S.*, 561 U.S. 465, 468–69, 130 S. Ct. 2963, 177 L. Ed. 2d 695, R.I.C.O. Bus. Disp. Guide (CCH) P 11876 (2010).

³¹The 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/>.

³²U.S. Dep't of Justice, United States Attorney's Office, Northern District of Illinois, <http://www.justice.gov/usao-ndil/about>.

³³U.S. Dep't of Justice, United States Attorney's Office, Northern District of California, <http://www.justice.gov/usao-can/divisions/index.html>.

suppliers and manufacturers of components for Apple products.³⁴

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,³⁵ focuses on various areas of criminal enforcement, including intellectual property crimes and financial crimes.³⁶ Recent noteworthy cases include a guilty plea from a Los Angeles man for importing counterfeit exercise machines from China;³⁷ the sentencing of a married couple who owned a jewelry store and one of their employees for trafficking in fake designer jewelry, including pieces that contained dangerous amounts of lead;³⁸ and the indictment of former Major League Baseball All-Star Lenny Dykstra, who played for the New York Mets and Philadelphia Phillies, on various criminal charges, including bankruptcy fraud, obstruction of justice, and false declarations.³⁹ Dykstra, who was previously sentenced to three years in California state prison on separate charges, pleaded guilty in June 2012 to the bankruptcy fraud charges.⁴⁰

§ 131:6 Agencies with enforcement powers—Securities and Exchange Commission

The SEC is the federal government's regulatory and enforcement agency with jurisdiction specifically covering the securities

³⁴Press Release, Fed. Bureau of Investigation, U.S. Attorney's Office for the Northern District of California, Former Apple Employee Pleads Guilty in Kickback Scheme (July 11, 2014), available at <http://www.fbi.gov/sanfrancisco/press-releases/2011/sf022811.htm>.

³⁵U.S. Dep't of Justice, U.S. Attorney's Office: Central District of California, <http://www.justice.gov/usao-cdca>.

³⁶See 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).

³⁷Press Release, Office of the U.S. Att'y for the Cent. Dist. of Cal., Los Angeles Man Pleads Guilty to Role in Trafficking Counterfeit Exercise Equipment Made in China (May 9, 2011), available at <http://www.justice.gov/archive/usao/cac/Pressroom/2011/068.html>.

³⁸Press Release, Office of the U.S. Att'y for the Cent. Dist. of Cal., Three Associated with L.A. Jewelry Store Sentenced for Selling Lead-Tainted Counterfeit Designer Jewelry (May 9, 2011), available at <http://www.justice.gov/archive/usao/cac/Pressroom/2011/069.html>.

³⁹Press Release, Office of the U.S. Att'y for the Cent. Dist. of Cal., Former Baseball Player Lenny Dykstra Indicted By Federal Grand Jury in Bankruptcy Fraud Case (May 6, 2011), available at <http://www.justice.gov/archive/usao/cac/Pressroom/2011/064.html>.

⁴⁰Lenny Dykstra Agrees to Plea Deal in Bankruptcy Fraud Case, L.A. Times L.A. NOW Blog (June 27, 2012, 11:27 AM), <http://latimesblogs.latimes.com/lanow/2012/06/dykstra-plea-deal-in-bankruptcy-fraud-case.html>.

markets and corporations that are active in those markets.¹ The SEC has broad authority to regulate corporations and individuals and to 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."²

In 1972, the SEC consolidated its enforcement functions by creating the Division of Enforcement ("Enforcement Division") to handle enforcement previously spread across its operating divisions.³ The SEC uses its authority to conduct investigations and bring civil enforcement proceedings against companies and individuals.⁴ 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 where misconduct warrants them. Civil proceedings may seek monetary penalties, disgorgement of profits, or injunctions against behavior in violation of securities laws, among other remedies. Administrative actions include proceedings seeking cease-and-desist orders, disgorgement and civil penalties, employment bars, and registration suspensions or revocations.⁵

The Enforcement Division may investigate through either a relatively informal process or a formal investigative order. The less formal process, known as a "matter under inquiry," ultimately may lead to a formal investigation.⁶ A 2011 restructuring of the Division enables senior staff to approve formal orders for investigations, streamlining a process that previously required

[Section 131:6]

¹See generally Chapter 76 "Securities" (§§ 76:1 et seq.) and Chapter 79 "Regulatory Litigation with the SEC" (§§ 79:1 et seq.) for additional discussion of the SEC.

²Sec. & 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>.

³Sec. & Exch. Comm'n, Enforcement, <http://www.sec.gov/enforce>.

⁴See generally Chapter 79 "Regulatory Litigation with the SEC" (§§ 79:1 et seq.) for a discussion of civil proceedings brought by the SEC.

⁵See 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>.

⁶See Sec. & Exch. Comm'n, Div. of Enforcement, Enforcement Manual 14-18 (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

approval by vote of the Commissioners themselves.⁷ 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 in question.⁸

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 131:11.

On April 8, 2013, the U.S. Senate confirmed Mary Jo White as Chairman of the U.S. SEC.⁹ White previously served as U.S. Attorney for the Southern District of New York between 1993 and 2002.¹⁰ During her confirmation hearing, when asked whether the size of an institution would affect her decision as Chairman to bring charges, White responded, “[a]t the SEC, there’s no institution too big to charge.”¹¹ She also indicated her support of an SEC policy pursuing charges against large financial institutions by stating that “collateral consequences” are only considered by the SEC at the settlement stage, not at the charging stage.¹²

Under Chairman White, the SEC has increased its focus on the whistleblower program. The SEC made its first award under the whistleblower program in August 2012, and White has credited the program with allowing the SEC staff to investigate “more efficiently” and “to better utilize agency resources.”¹³ Since its inception, the whistleblower program has continued to grow, receiving

⁷Robert 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>.

⁸See Sec. & Exch. Comm’n, Div. of Enforcement, Enforcement Manual 22-25 (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

⁹SEC Biography: Chairman Mary Jo White, Sec. & Exch. Comm’n, <http://www.sec.gov/about/commissioner/white.htm>.

¹⁰SEC Biography: Chairman Mary Jo White, Sec. & Exch. Comm’n, <http://www.sec.gov/about/commissioner/white.htm>.

¹¹Evan Weinberger, SEC Nominee Says Wall St. Clients Won’t Influence Her Work, Law360, Mar. 12, 2013, <http://www.law360.com/articles/421090/sec-nominee-says-wall-st-clients-won-t-influence-her-work>.

¹²Michael D. Trager, An Outline of SEC’s Bold Enforcement Plan, Law360, Apr. 26, 2013, <http://www.law360.com/articles/436140>.

¹³Oversight 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>.

3,923 tips in fiscal year 2015.¹⁴ As of January 2016, the whistleblower program had paid out more than \$55 million to 23 whistleblowers.¹⁵

In recent years, the SEC's Division of Enforcement has grown increasingly aggressive in pursuing the enforcement of securities laws. During fiscal year 2014, the Division of Enforcement brought a record number of enforcement actions for a single year and obtained orders for over \$4 billion in monetary sanctions, which was nearly 20% larger than its previous record. In 2014, the Division of Enforcement also tried more cases in federal court than in any of the previous ten years.¹⁶ This posture represents a fulfillment of SEC Chair Mary Jo White's "broken windows" strategy of enforcing often overlooked violations¹⁷—sending a message that the Division is enthusiastic about regulating low level violations—and increasing its commitment to litigating actions in the administrative forum.¹⁸

§ 131:7 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 crime that impacts the U.S. health care system. From enforcing regulatory regimes against corporations that are part of the health care sector,¹ to coordinating investigations and prosecutions of Medicare and Medicaid fraud, the HHS's white collar enforcement role is varied and increasing.

At HHS, the Office of the Inspector General ("OIG") is respon-

¹⁴Sec. & Exch. Comm'n, 2015 Ann. Rep. to Cong. on Dodd-Frank Whistleblower Program at 21, available at <https://www.sec.gov/whistleblower/reportspublics/annual-reports/owb-annual-report-2015.pdf>.

¹⁵Press Release, Sec. & Exch. Comm'n, SEC Awards Whistleblower More than \$700,000 for Detailed Analysis (Jan. 15, 2016), available at <https://www.sec.gov/news/pressrelease/2016-10.html>.

¹⁶See Andrew Ceresney, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), available at www.sec.gov/News/Speech/Detail/Speech/1370543515297.

¹⁷Chair Mary Jo White, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), available at www.sec.gov/News/Speech/Detail/Speech/1370539872100.

¹⁸Gibson, Dunn & Crutcher LLP, 2014 Year-End Securities Enforcement Update 1, 2–3 (Jan. 12, 2015), available at <http://www.gibsondunn.com/publications/Pages/2014-Year-End-Securities-Enforcement-Update.aspx>.

[Section 131:7]

¹See generally Chapter 87 "Health Care Institutions" (§§ 87:1 et seq.).

sible for the agency's investigative and law enforcement activity.² OIG has more than 1,600 personnel across the country whose mission includes "fight[ing] waste, fraud and abuse."³ 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.⁴ Similar to Deferred Prosecution Agreements used by the DOJ,⁵ corporations enter into CIAs to avoid certain penalties—in this case, being excluded from federal health care programs, such as Medicare or Medicaid.⁶ The OIG has also increasingly utilized the False Claims Act ("FCA") which prohibits the submission of false reimbursement claims to the government.⁷ In 2015, the DOJ recovered over \$3.5 billion as a result of federal health care fraud.⁸

HHS has more expansive resources when collaborating with the DOJ to investigate and prosecute the perpetrators of various health care frauds. Since 2007, HHS and the DOJ have formally collaborated to combat Medicare fraud across the country through the Medicare Fraud Strike Force.⁹ In 2009, the agencies ramped up their antifraud efforts with the creation of the Health Care Fraud Prevention & Enforcement Action Team ("HEAT").¹⁰ HEAT elevated the fight against Medicare fraud to a "Cabinet level

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

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

⁴U.S. Dep't of Health & Human Servs., Corporate Integrity Agreements, <http://oig.hhs.gov/fraud/cias.asp>. See generally Chapter 138 "The False Claims Act" (§§ 138:1 et seq.).

⁵The DOJ's use of Deferred Prosecution Agreements is discussed further in Section 131:77.

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

⁷See Press Release, 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>.

⁸See Press Release, 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>. See generally Chapter 138 "The False Claims Act" (§§ 138:1 et seq.).

⁹See, e.g., U.S. Dep't of Health & Human Servs., Medicare Fraud Strike Force, <http://oig.hhs.gov/fraud/strike-force>.

¹⁰See, e.g., U.S. Dep't of Health & Human Servs. and U.S. Dep't of Justice, HEAT Task Force, <https://www.stopmedicarefraud.gov/aboutfraud/heattaskforce/index.html>.

priority” for the agencies.¹¹

In addition to the HHS 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.¹² The OCR is responsible for enforcing compliance with the HIPAA security and privacy requirements by entities subject to the HIPAA, which includes providers, health plans, and health care clearinghouses that receive and compile health information.¹³ The OCR’s enforcement powers include conducting investigations and responding to patient complaints.¹⁴ In May 2014, the OCR announced the largest HIPAA settlement to date.¹⁵ The \$4.8 million settlement with New York Presbyterian Hospital and Columbia University concerned a data breach that released the patient status reports, vital signs, medications, and lab results of 6,800 individuals.¹⁶ OCR continues to report significant HIPAA violation settlements.¹⁷ In early 2016, OCR began auditing hundreds of U.S. health care providers in order to determine their compliance with HIPAA requirements.¹⁸

¹¹See, e.g., U.S. Dep’t of Health & Human Servs. and U.S. Dep’t of Justice, HEAT Task Force, <https://www.stopmedicarefraud.gov/aboutfraud/heattaskforce/index.html>.

¹²See generally Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat 1936 (1996). See also Chapter 122 “Privacy and Security” (§§ 122:1 et seq.) for additional discussion of HIPAA.

¹³U.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 87 “Health Care Institutions” (§§ 87:1 et seq.).

¹⁴U.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>.

¹⁵Press Release, Dep’t of Health & Human Servs., Data Breach Results in \$4.8 million HIPAA Settlements (May 7, 2014), available at <http://www.hhs.gov/news/press/2014pres/05/20140507b.html>.

¹⁶Press Release, Dep’t of Health & Human Servs., Data Breach Results in \$4.8 million HIPAA Settlements (May 7, 2014), available at <http://www.hhs.gov/news/press/2014pres/05/20140507b.html>.

¹⁷See generally Press Release, Dep’t of Health & Human Servs., \$750,000 HIPAA Settlement Underscores the Need for Organization-Wide Risk Analysis (Dec. 14, 2015), available at <http://www.hhs.gov/about/news/2015/12/14/750000-hipaa-settlement-underscores-need-for-organization-wide-risk-analysis.html>; Press Release, Dep’t of Health & Human Servs., Triple-S Management Corporation Settles HHS Charges by Agreeing to \$3.5 Million HIPAA Settlement (Nov. 30, 2015), available at <http://www.hhs.gov/about/news/2015/11/30/triple-s-management-corporation-settles-hhs-charges.html>.

¹⁸U.S. Dep’t of Health & Human Servs., OCR Launches Phase 2 of HIPAA

§ 131:8 Agencies with enforcement powers—Other federal agencies

There are several other federal agencies with enforcement powers, including the Food & Drug Administration (“FDA”), the Federal Trade Commission (“FTC”), the Environmental Protection Agency (“EPA”), the Department of Labor (“DOL”), the Consumer Financial Protection Bureau (“CFPB”), and the Commodity Futures Trading Commission (“CFTC”).

The FDA’s Office of Criminal Investigations was established to provide the FDA with a specific office to conduct and coordinate criminal investigations.¹ The FDA’s Office of Criminal Investigations investigates violations of the Food, Drug, and Cosmetic Act, 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.² Similarly, the FTC utilized various administrative enforcement mechanisms to enforce provisions of the FTC Act that was designed to protect consumers from unscrupulous trade practices in the market.³

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 using a contractor to remove asbestos without adhering to the accepted safety standards for such work, in violation of the Clean Air Act.⁴ DOL’s Office of Labor-Management Standards (“OLMS”) has the authority to conduct criminal and civil investigations of the Labor-Management

Audit Program, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/phase2announcement/>.

[Section 131:8]

¹U.S. Food & Drug Admin., What OCI Investigates, <http://www.fda.gov/IC/ECI/CriminalInvestigations/ucm123062.htm>. See generally Chapter 112 “Food and Drug” (§§ 112:1 et seq.).

²U.S. Food & Drug Admin., What OCI Investigates, <http://www.fda.gov/IC/ECI/CriminalInvestigations/ucm123062.htm>. See generally Chapter 112 “Food and Drug” (§§ 112:1 et seq.).

³U.S. Fed. Trade Comm’n, A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfo/vrvw.shtm>. See generally Chapter 95 “Consumer Protection” (§§ 95:1).

⁴See U.S. Env’tl. Prot. Agency, What is an Environmental Crime?, <http://www.epa.gov/compliance/criminal/investigations/environmentalcrime.html>. See generally Chapter 151 “Environmental Claims” (§§ 151:1 et seq.).

Reporting and Disclosure Act.⁵

In the wake of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), two additional federal entities have assumed a more proactive role in enforcement: the CFPB and the CFTC.⁶

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.⁷ 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.”⁸ The CFPB can also conduct hearings and adjudication proceedings, including cease-and-desist proceedings.⁹ In addition, the CFPB is empowered to seek civil penalties and equitable relief in civil court.¹⁰ During its first year of operation, the CFPB launched several high profile investigations against credit card companies¹¹ and mortgage lenders.¹²

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

⁵U.S. Dep’t of Labor, Office of Labor-Management Standards (OLMS) <http://www.dol.gov/olms/regs/compliance/compllrda.htm>.

⁶See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5511(a) (West 2013) (“The [CFPB] shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive”); Enhanced Oversight After the Financial Crisis: The Wall Street Reform Act at One Year: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs, 112th Cong. (2011) (statement of CFTC Chairman Gary Gensler), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-100> (“Dodd-Frank expands the CFTC’s arsenal of enforcement tools. We will use these tools to be a more effective cop on the beat, to promote market integrity and to protect market participants”).

⁷See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5511(a) (West 2013). See generally Chapter 95 “Consumer Protection” (§§ 95:1 et seq.).

⁸Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5562(c) (West 2013).

⁹See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5563 (West 2013).

¹⁰See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5564 (West 2013).

¹¹See 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/>.

¹²See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False

empowered to conduct investigations jointly with other regulators.¹³ 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.”¹⁴

In May 2013, the CFPB made its first-ever criminal referral in a case referred to the United States Attorney for the Southern District of New York.¹⁵ In April 2014, the defendants in that case, a “debt settlement” company, its owner, and several employees, pleaded guilty to conspiracy charges of mail and wire fraud in a scheme which allegedly victimized more than 1,200 people.¹⁶ On September 28, 2015, the CFPB and the DOJ reached an \$18 million settlement with Fifth Third Bank to resolve allegations that the bank discriminated against African Americans and Hispanics in the auto lending business.¹⁷

Although the CFTC existed prior to the enactment of the Dodd-Frank Act, the Dodd-Frank Act empowered the CFTC with a more prominent enforcement role.¹⁸ In particular, the Dodd-Frank Act’s amendments to the Commodities Exchange Act expanded the CFTC’s ability to pursue cases alleging manipulation and

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/>.

¹³See 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/>.

¹⁴Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5566 (West 2013).

¹⁵Patricia Hurtado & David McLaughlin, Debt-Repair Firm Charged in First CFPB Criminal Referral, Bloomberg, May 7, 2013, <http://www.bloomberg.com/news/2013-05-07/debt-repair-firm-charged-in-first-cfpb-criminal-referral.html>.

¹⁶Joseph Ax & Nate Raymond, Debt Settlement Firm Pleads Guilty in First CFPB Referral, Reuters, Apr. 8, 2014, available at <http://www.reuters.com/article/2014/04/08/us-cfpb-crime-idUSBREA3727B20140408>.

¹⁷Press Release, Dep’t of Justice, Justice Department and Consumer Financial Protection Bureau Reach Settlement to Resolve Allegations of Auto Lending Discrimination by Fifth Third Bank (Sept. 28, 2015), available at <http://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-resolve>.

¹⁸Ben 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.”).

fraud by enacting language more akin to the language in Section 10(b) of the Securities Exchange Act of 1934.¹⁹ Under this revised language, the CFTC adopted Regulation 180.1, modeled after Rule 10b-5.²⁰ The amended language reduces the burden of proving manipulative or fraudulent conduct by requiring only a showing of recklessness, rather than specific intent.²¹

In 2014 and 2015, the CFTC provided a glimpse into its increasing enforcement role through a number of high profile cases alleging manipulation of benchmark interest rates. These cases included the imposition of a \$115 million penalty against Barclays PLC for attempted manipulation of ISDAFIX, a leading global benchmark reference in a range of interest rate products,²² an \$800 million penalty against Deutsche Bank for the attempted manipulation of the London Interbank Offered Rate (“LIBOR”) and the Euro Interbank Offered Rate, both financial benchmark rates that form the basis of trillions of dollars of financial instruments,²³ and penalties totaling over \$1.4 billion against Citibank, HSBC, JPMorgan, RBS, and UBS for attempted manipulation of Foreign Exchange Benchmark Rates, a benchmark rate used to

¹⁹See 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 81 “Commodities and Futures” (§§ 81:1 et seq.).

²⁰See 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.’”).

²¹See 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.”).

²²See Order Instituting Proceeding Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 15 — 25 (May 20, 2015), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder052015.pdf>.

²³See Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Finding, and Imposing Remedial Sanctions, CFTC Docket No. 15-20 (Apr. 23, 2015), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutscheorder042315.pdf>.

value currencies.²⁴

§ 131:9 Enforcement strategies

In September 2015, Attorney General Loretta Lynch announced a new policy that “prioritized the prosecution of individual employees, not just their companies, and put pressure on corporations to turn over evidence against their executives.”¹ This policy was enacted following criticism that under the Obama Administration, the DOJ coddled executives and failed to punish them for the housing crisis, the financial meltdown and corporate scandals.² Government officials have accordingly emphasized several high-level strategies to support their enforcement goals. A summary of those strategies is provided in Sections 131:10 to 131:13.

In the same vein, also in September 2015, Deputy Attorney General Sally Yates issued a new policy memorandum on behalf of the DOJ entitled “Individual Accountability for Corporate Wrongdoing.”³ This “Yates Memo,” as it is commonly called, establishes six steps to further the DOJ’s effort to “fully leverage its resources to identify culpable individuals at all levels in corporate cases.”⁴ Thus, the Yates Memo focuses on how the DOJ will identify and hold accountable more individuals engaging in corporate wrongdoing.⁵ The impact of the Yates Memo on

²⁴See Press Release, Commodity Futures Trading Comm’n, CFTC Orders Five Banks to Pay Over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7056-14>.

[Section 131:9]

¹See Matt Apuzzo & Ben Protess, Justice Department Sets Sights on Wall Street Executives, N.Y. Times, Sept. 9, 2015, <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html? r=1>.

²See Matt Apuzzo & Ben Protess, Justice Department Sets Sights on Wall Street Executives, N.Y. Times, Sept. 9, 2015, <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html? r=1>.

³Gibson, Dunn & Crutcher LLP, DOJ’s Newest Policy Pronouncement: The Hunt for Corporate Executives (Sept. 11, 2015), available at <http://www.gibsondunn.com/publications/pages/Yates-Memo—DOJ-New-Posture-on-Prosecutions-of-Individuals—Consequences-for-Companies.aspx>. See § 131:16 and Chapter 5 “Internal Investigations” (§§ 5:1 et seq.) for additional discussion of the Yates Memo.

⁴Gibson, Dunn & Crutcher LLP, DOJ’s Newest Policy Pronouncement: The Hunt for Corporate Executives (Sept. 11, 2015), available at <http://www.gibsondunn.com/publications/pages/Yates-Memo—DOJ-New-Posture-on-Prosecutions-of-Individuals—Consequences-for-Companies.aspx>.

⁵Gibson, Dunn & Crutcher LLP, DOJ’s Newest Policy Pronouncement: The

corporate cooperation and the rates of individual investigation and prosecution remain to be seen, but it is clear that the DOJ has prioritized its interest in individuals moving forward.

§ 131:10 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.¹

In November 2015, the DOJ established the Fraud Section's Compliance Counsel position, signaling the DOJ's commitment to prosecuting corporate entities that fail to put in place robust compliance programs. The Compliance Counsel's duties include providing expert guidance to Fraud Section prosecutors when deciding which corporate entities to prosecute, to assist prosecutors in developing appropriate benchmarks for evaluating corporate compliance and remediation measures, and evaluating the effectiveness of such measures.² The DOJ hired Hui Chen, a former AUSA from EDNY, as the first Compliance Counsel.³

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, 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.⁴

For example, within SDNY, white collar crimes are generally assigned to the Securities and Commodities Fraud Task Force, the Major Crimes Unit, or the Complex Frauds and Cybercrime

Hunt for Corporate Executives (Sept. 11, 2015), available at <http://www.gibsondunn.com/publications/pages/Yates-Memo—DOJ-New-Posture-on-Prosecutions-of-Individuals—Consequences-for-Companies.aspx>.

[Section 131:10]

¹U.S. Dep't of Justice, Fraud Section, <http://www.justice.gov/criminal-fraud>. See generally Chapter 130 "Fraud" (§§ 130:1 et seq.).

²U.S. Dep't of Justice, Fraud Section, <http://www.justice.gov/criminal-fraud>.

³Gibson, Dunn & Crutcher LLP, 2015 Year-End FCPA Update 10 (Jan. 4, 2016), available at <http://www.gibsondunn.com/publications/pages/2015-Year-End-FCPA-Update.aspx>.

⁴U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf>.

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 regulatory reporting frauds, and penny stock "pump and dump" schemes. The Major Crimes Unit is responsible for matters such as computer hacking, bank robbery, art theft, environmental crimes, and major financial crime cases.⁵ In 2009, the SDNY created the Complex Frauds Unit to provide renewed focus and additional resources towards combating large-scale sophisticated frauds and emerging cybercrimes.⁶ The Complex Frauds and Cybercrime Unit oversees the investigation and prosecution of bank fraud, mortgage fraud, health care fraud, tax fraud, and cybercrimes.⁷ Crimes with a particular international focus, such as Foreign Corrupt Practices Act ("FCPA") cases,⁸ are usually handled by the Complex Frauds and Cybercrimes Unit or the Major Crimes 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 Terrorism Unit investigation.⁹

§ 131:11 Enforcement strategies—Domestic interagency cooperation

In April 2015, Assistant Attorney General Leslie Caldwell, head of the DOJ's Criminal Division, commented on the DOJ's enforcement strategies. In particular, the DOJ has increased its focus on fraud investigations and prosecutions, partnering with the SEC, CFTC, and the UK's Financial Conduct Authority to

⁵This includes money laundering, tax fraud, customs fraud, and corporate fraud and embezzlement. U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf>.

⁶Press 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 <http://www.justice.gov/usao/nys/pressreleases/October09/criminaldivisionsupervisoryappointmentspr.pdf>.

⁷Press 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 <http://www.justice.gov/usao/nys/pressreleases/October09/criminaldivisionsupervisoryappointmentspr.pdf>.

⁸See § 131:33 and Chapter 134 "The Foreign Corrupt Practices Act" (§§ 134:1 et seq.).

⁹Harry 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).

identify fraud in the financial services and health care industries.¹ Caldwell emphasized that the DOJ highly values its cooperation with these regulatory bodies, noting that while some matters could be handled through a DOJ criminal investigation, there may be more appropriate civil, administrative, or regulatory remedies to punish and deter the conduct.² Similarly, Caldwell noted that the DOJ and regulatory bodies like the SEC have different investigative tools at their disposal, and by working together, they can provide the broadest level of consumer protection by pooling these resources.³

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.⁴

Another feature of interagency cooperation is the coordinated filing of both civil and criminal actions.⁵ The 2008 near-collapse of the financial and credit markets spurred federal prosecutors, state attorneys general, and federal regulatory agencies to synchronize their efforts and investigate and prosecute claims on

[Section 131:11]

¹Leslie R. Caldwell, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the New York University Center on the Administration of Criminal Law's Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), available at <https://www.justice.gov/opa/speech/assistant-at-torney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center>.

²Leslie R. Caldwell, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the New York University Center on the Administration of Criminal Law's Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), available at <https://www.justice.gov/opa/speech/assistant-at-torney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center>.

³Leslie R. Caldwell, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the New York University Center on the Administration of Criminal Law's Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), available at <https://www.justice.gov/opa/speech/assistant-at-torney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center>.

⁴U.S. Dep't of Justice, Interagency Working Groups, available at <http://www.justice.gov/criminal/fraud/working-grps/>.

⁵See generally Chapter 78 "Regulatory Litigation" (§§ 78:1 et seq.) and Chapter 132 "Interplay Between Commercial Litigation and Criminal Proceedings" (§§ 132:1 et seq.).

parallel tracks.⁶ This cooperation was designed to increase efficiencies for criminal and regulatory prosecutions. Accordingly, prosecutors and regulators have formalized their relationships by creating task forces to coordinate strategy, set policies, share information, and supervise criminal and regulatory actions related to the financial crisis.⁷ For example, in November 2009, President Barack Obama created the Interagency Financial Fraud Enforcement Task Force.⁸ The Force is composed of senior officers from more than 20 federal agencies, 94 U.S. Attorneys' offices, and various state and local entities. Its mission is to "work with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets and recover proceeds for victims."⁹

§ 131:12 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 fines 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.¹ Indeed, at least 25 cooperative requests to foreign governments pursuant to agreements on mutual legal assistance were made in the year ending November 2009.² In February 2010, new agreements between the United States and

⁶Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, Sec. Litig. Rep., Feb. 2010, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf>.

⁷Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, Sec. Litig. Rep., Feb. 2010, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf>.

⁸Howard W. Goldstein, *New Year's Reflections: Prosecutors Will Be Busy*, N.Y.L.J. Corp. Update, Jan. 6, 2011. See § 131:6.

⁹Howard W. Goldstein, *New Year's Reflections: Prosecutors Will Be Busy*, N.Y.L.J. Corp. Update, Jan. 6, 2011; Sec. & Exch. Comm'n, *President Obama Establishes Interagency Financial Fraud Enforcement Task Force* (Nov. 17, 2009), available at <http://www.sec.gov/news/digest/2009/dig111709.htm>.

[Section 131:12]

¹See generally Chapter 22 "Cross-Border Litigation" (§§ 22:1 et seq.).

²Gibson, Dunn & Crutcher LLP, *Securities Docket Webcast: FCPA and International Anti-Corruption Enforcement—Trends in 2010* 18 (Apr. 8, 2010),

the European Union on mutual legal assistance and extradition were implemented to support cross-border investigations and enforcement actions.³ In the same month, the DOJ and the U.K. Serious Fraud Office (“SFO”) settled corruption charges with one of Europe’s largest defense contractors, marking the first time that the DOJ and SFO cooperated to resolve an investigation.⁴ Cooperative efforts between the SEC and the U.K. Financial Services Authority have increased in such areas as oversight of credit rating agencies, hedge fund advisers, and the clearing of over-the-counter derivatives.⁵ 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.⁶

One example of successful cross-border cooperation is the partnership between the DOJ and Switzerland’s Office of the Attorney General in an investigation regarding the international soccer governing body, FIFA, and its executives.⁷ After Swiss officials launched a criminal investigation into FIFA president Sepp Blatter for bribery in May 2015, FIFA cooperated with the Attorney General by providing documents and data, as well as making numerous employees available for interviews.⁸ In November 2015, the Swiss office agreed to issue an order to a Swiss bank to turn over FIFA records to the DOJ for its own corruption investigation.⁹ Although the Swiss are typically hesitant to cooperate with foreign law enforcement agencies, the FIFA

available at <http://www.gibsondunn.com/publications/pages/WebcastFCPAInternationalAntiCorruptionEnforcementTrends2010.aspx>.

³U.S. Dep’t of Justice, U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force (Feb. 1, 2010) available at <http://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force>.

⁴John F. Saverese, Ralph M. Levene, & Carol Miller, *Increasing International Cooperation and Other Key Trends in Anti-Corruption Investigations*, 7 *Sec. Litig. Rep.* 9, 13 (Thomson Reuters, 2010).

⁵Sec. & 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.

⁶The complete list of memoranda of understanding is available on the SEC’s Web site at http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

⁷Joshua Franklin, FIFA says it will continue to cooperate with Swiss authorities, Reuters, Sept. 25, 2015, <http://www.reuters.com/article/us-soccer-fifa-swiss-idUSKCNORP10O20150925>.

⁸Joshua Franklin, FIFA says it will continue to cooperate with Swiss authorities, Reuters, Sept. 25, 2015, <http://www.reuters.com/article/us-soccer-fifa-swiss-idUSKCNORP10O20150925>.

⁹John Miller, Swiss agree to send bank info regarding FIFA cases to U.S., Reuters, Nov. 26, 2015, <http://uk.reuters.com/article/uk-soccer-fifa-banks-idUKK>

case may lead to increased levels of communication and cooperation.

§ 131:13 Enforcement strategies—New techniques in investigation of white collar crimes

The DOJ recently has begun using a variety of aggressive investigative techniques in its fight against white collar crime, including court-authorized electronic surveillance and undercover sting operations.¹ The use of these techniques, reserved historically for drug and organized crime conspiracies, demonstrates the government's new willingness to use all the tools at its disposal in this new era of heightened enforcement. Two notable examples in which prosecutors deployed new investigative techniques include the Raj Rajaratnam and related insider trading cases in New York and the arrests of numerous defendants on Foreign Corrupt Practices Act ("FCPA") charges at a Las Vegas gun show.

On October 16, 2009, the SDNY announced charges against hedge fund managers, Fortune 500 executives, and a management consulting director "arising out of their alleged involvement in the largest hedge fund insider trading case in history."² The case, emerging from an investigation of the Galleon Group hedge fund and its founder, Raj Rajaratnam, and alleging more than \$20 million in illegal insider trading profits, was "the first time that court-authorized wiretaps [were] . . . used to target significant insider trading on Wall Street."³ Indeed, the criminal investigation into the Galleon Group insider trading ring be-

BN0TF1XS20151126.

[Section 131:13]

¹Robert H. Hotz, Jr. and 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 (Jan. 5, 2014), available at <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

²Press Release, Office of the U.S. Att'y for the S. Dist. of N.Y., Manhattan U.S. Attorney Charges Hedge Fund Managers, Fortune 500 Executives, and Management Consulting Director in \$20 Million Insider Trading Case (Oct. 16, 2009), available at <http://www.fbi.gov/newyork/press-releases/2009/nyfo101609.htm>.

³Press Release, Office of the U.S. Att'y for the S. Dist. of N.Y., Manhattan U.S. Attorney Charges Hedge Fund Managers, Fortune 500 Executives, and Management Consulting Director in \$20 Million Insider Trading Case (Oct. 16, 2009), available at <http://www.fbi.gov/newyork/press-releases/2009/nyfo101609.htm>; The Galleon case has criminal and civil components; See *S.E.C. v. Galleon Management, LP*, 274 F.R.D. 120 (S.D. N.Y. 2011); *U.S. v. Rajaratnam*, No. 09 Cr. 1184 (RJH) (S.D.N.Y. Oct. 16, 2009); *U.S. v. Goffer et al.*, No. 10 Cr. 056 (S.D.N.Y. 2010). See § 131:32 for additional discussion of the use of wiretaps in white collar criminal investigations.

tween 2003 and 2009 involved thousands of hours of wiretaps and intercepted over 18,000 recordings.⁴ Noting that the case against Raj Rajaratnam read “like a thriller,” *The Wall Street Journal* reported that “[a]n unnamed cooperating witness, described as a onetime Galleon employee, helped spark the investigation, taping conversations with Mr. Rajaratnam . . . [which] led to broader wiretaps . . .”⁵ During a press conference on October 16, 2009, U.S. Attorney Preet Bharara stated that the DOJ would employ the same kind of electronic surveillance traditionally reserved for organized crime, drug syndicates, and terrorism prosecutions to fight future crimes on Wall Street.⁶

Although Rajaratnam challenged the admissibility of prosecutors’ wiretap evidence, such efforts have failed to date, as U.S. District Judge Richard J. Holwell ruled that prosecutors could use recordings of thousands of conversations by Rajaratnam in his criminal trial,⁷ and U.S. District Judge Richard Sullivan similarly ruled that prosecutors could use secretly recorded telephone conversations of ex-Galleon Group employee Zvi Goffer and other defendants.⁸ These unsuccessful attempts to challenge wiretaps and the strict procedural and evidentiary requirements of the Federal Wiretap Act⁹ provide white collar practitioners with ample room to pursue creative defense strategies.¹⁰

Federal prosecutors also have begun to use large-scale sting

⁴Evan Weinberger, *Rajaratnam Wins Stay on DOJ Wiretap Evidence*, Law 360, (Mar. 24, 2010), <http://www.law360.com/articles/157361/rajaratnam-wins-stay-on-doj-wiretap-evidence>.

⁵Jenny Strasburg and Chad Bray, *Six Charged in Vast Insider-Trading Ring*, Wall St. J., Oct. 17, 2009, at A1.

⁶David Glovin, David Scheer, and Bob Van Voris, *Galleon Case Ushers in Wiretaps for Financial Crimes*, Bloomberg News, Oct. 17, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4lprQ.E3WqE>.

⁷Chad Bray, *Judge Allows Wiretaps in Case Against Galleon’s Rajaratnam*, Wall St. J., Nov. 24., 2010, <http://online.wsj.com/article/SB10001424052748703572404575634661283319870.html?KEYWORDS=rajaratnam>.

⁸Chad Bray, *Judge Allows Wiretaps Against Defendants in Galleon Case*, Wall St. J., Jan. 6, 2011, <http://online.wsj.com/article/SB10001424052748704405704576063734119118202.html?KEYWORDS=galleon>. On June 13, 2011, a federal jury convicted Goffer on 14 counts of conspiracy and securities fraud, and two other defendants of three counts of conspiracy and securities fraud. Bob Von Voris and Patricia Hurtado, *Ex-Galleon Group Trader Zvi Goffer Found Guilty by Jury of Insider Trading*, Bloomberg News, June 14, 2011, available at <http://www.bloomberg.com/news/2011-06-13/former-galleon-trader-zvi-goffer-convicted-on-all-counts-of-inside-trading.html>.

⁹Enacted by Congress as part of the Omnibus Crime Control and Safe Streets Act of 1968.

¹⁰Sheppard and Anderson, *Wiretaps and Undercover Sting Operations: Are White Collar Defendants Ready?*, 2 Fin. Fraud L. Rep. 810, 811-12 (2010).

operations in pursuit of white collar criminals. For example, on January 18, 2010, with the support of undercover agents and electronic and video surveillance, hundreds of FBI agents in the United States and City of London police officers in the United Kingdom executed 21 search warrants and arrested 22 employees of defense and security products companies on FCPA-related charges.¹¹ Most of these individuals were arrested at the “SHOT Show,” the annual gun industry trade convention in Las Vegas, Nevada.¹² The massive undercover sting operation entailed FBI agents posing as representatives of the Ministry of Defense from the African nation of Gabon. The agents met with the defendants to organize an allegedly corrupt deal to pay nearly \$1.5 million to Gabonese officials to secure a fictitious \$15 million defense equipment contract. The FBI was assisted by cooperating defendant Richard T. Bistrong, the former Vice President of International Sales for Armor Holdings, Inc. After being charged with unrelated FCPA and export control violations,¹³ Bistrong agreed to cooperate and utilize his industry connections to help the FBI ensnare other defendants.¹⁴

The FBI’s FCPA SHOT Show sting represents the first large-scale undercover operation in the history of FCPA investigations and prosecutions, and the largest single investigation and prosecution of individuals in the history of the FCPA.¹⁵ Acknowledging the DOJ’s use of these new aggressive enforcement techniques, Lanny A. Breuer, Assistant Attorney General for the Criminal Division, stated “the message is that we are going to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals.”¹⁶ Federal prosecutors’ use of aggressive investigative techniques in white collar cases will help them establish elements of historically difficult cases, and help to

¹¹Gibson, Dunn & Crutcher LLP, 2010 Year-End FCPA Update 15 (Jan. 30, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.

¹²Paul M. Barrett, Big Shots Go Down at Gun Show, Bloomberg Businessweek, Jan. 20, 2010, available at http://www.businessweek.com/magazine/content/10_05/b4165000370242.htm.

¹³See generally Chapter 135 “Export Controls” (§§ 135:1 et seq.).

¹⁴Gibson, Dunn & Crutcher LLP, 2010 Year-End FCPA Update 15 (Jan. 30, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.

¹⁵F. Joseph Warin et al., FCPA and International Anti-Corruption Enforcement—Trends in 2010 (Apr. 8, 2010), available at <http://www.gibsondunn.com/publications/pages/WebcastFCPAInternationalAntiCorruptionEnforcementTrends2010.aspx>.

¹⁶Diana B. Henriques, F.B.I. Charges Arms Sellers with Foreign Bribes, N.Y. Times, Jan. 20, 2010, <http://www.nytimes.com/2010/01/21/business/21sting.html>.

decrease their reliance on whistleblowers.¹⁷ However, after 10 defendants in the SHOT Show sting were acquitted in 2012, some questioned the validity of such tactics.¹⁸

Nonetheless, three years later, the deputy chief of the Justice Department's criminal division, Marshall L. Miller, said 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."¹⁹ In a 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.²⁰ However, in the middle of Sigelman's bribery trial, the defense accepted an unexpected plea deal. In June 2015, Sigelman pled guilty to conspiring to violate the FCPA in connection with authorizing payments to a Colombian employee of state-owned Ecopetrol SA in an effort to secure a \$39 million oil services contract. Sigelman was sentenced to three years of probation and ordered to pay \$339,000 in fines and restitution to PetroTiger.²¹

The DOJ's use of these techniques is no longer aberrational as the trend continues to develop.²² These techniques are not only being used in high-profile cases.²³ In both 2011 and 2014, the DOJ and SEC brought a series of criminal prosecutions in Boston against executives of smaller, "penny stock" companies.²⁴ Specifically, the DOJ planted an undercover FBI agent who posed as a

¹⁷John F. Saverese, Ralph M. Levene, & Carol Miller, *Increasing International Cooperation and Other Key Trends in Anti-Corruption Investigations*, 7 Sec. Litig. Rep. 9, 13 (Thomson Reuters, 2010).

¹⁸Leslie Wayne, *Bribery Case Falls Apart, and Tactics are Doubted*, N.Y. Times, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?_r=0. See § 131:33 for additional discussion of the Shot Show trials.

¹⁹Joel Schectman, *DOJ Returns to Bare-Knuckle tactics in Bribery Case*, Wall St. J., Feb. 11, 2015, <http://blogs.wsj.com/riskandcompliance/2015/02/11/us-justice-dept-returns-to-bare-knuckle-tactics-in-bribery-case/?mod=ST1>.

²⁰Joel Schectman, *DOJ Returns to Bare-Knuckle tactics in Bribery Case*, Wall St. J., Feb. 11, 2015, <http://blogs.wsj.com/riskandcompliance/2015/02/11/us-justice-dept-returns-to-bare-knuckle-tactics-in-bribery-case/?mod=ST1>.

²¹Joel Schectman, *Ex-CEO Sigelman of PetroTiger Sentenced to Probation Over Bribery*, Wall St. J., June 16, 2015, <http://www.wsj.com/articles/ex-ceo-of-petrotiger-sentenced-to-probation-over-bribery-1434469990>.

²²Michael D. Ricciuti, *2014 Saw the Arrival of 'Gray Collar' Crime*, Law360, Jan. 5, 2015, <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

²³Michael D. Ricciuti, *2014 Saw the Arrival of 'Gray Collar' Crime*, Law360, Jan. 5, 2015, <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

²⁴Michael D. Ricciuti, *2014 Saw the Arrival of 'Gray Collar' Crime*, Law360,

corrupt manager of a hedge fund. In July 2014, the U.S. Attorney and the SEC brought criminal and civil charges against five individuals for attempt to manipulate the “penny stock market.” Massachusetts U.S. Attorney Carmen Ortiz declared “[w]e will continue to develop new techniques to detect and prosecute those engaged in market abuse.” In discussing future operations, the special agent in charge of the Boston FBI Division stated: “[f]und representatives, CEOs, traders, fund managers, equities analysts, lawyers and publicists should take note that Boston FBI agents purposefully designed multiple undercover operations aimed directly at rooting out market manipulation and insider trading. As the scope and design of our undercover operations become well-known, no one should think that future undercover operations will be the same as prior ones.”²⁵

§ 131:14 Practicalities of interacting with federal authorities

In the wake of the 2008 financial crisis, a wide array of prosecutors and regulators are investigating and prosecuting white collar crime. However, white collar cases continue to most frequently involve the DOJ working collaboratively with the SEC. White collar criminal defense practitioners should be sensitive to the considerations that accompany interactions with federal authorities, particularly the unique strategic issues when faced with parallel proceedings¹ and the question of corporate voluntary disclosure.²

§ 131:15 Practicalities of interacting with federal authorities—Parallel civil/criminal proceedings

More than 40 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.¹ In recognition of this principle, the U.S. Court of Appeals for the Ninth Circuit held that information provided to

Jan. 5, 2015, <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

²⁵Michael D. Ricciuti, 2014 Saw the Arrival of ‘Gray Collar’ Crime, Law360, Jan. 5, 2015, <http://www.law360.com/articles/606293/2014-saw-the-arrival-of-gray-collar-crime>.

[Section 131:14]

¹See § 131:15.

²See § 131:16.

[Section 131:15]

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