

Chapter 112

White Collar Crime

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

I. INTRODUCTION

§ 112:1 Scope note

II. WHO INVESTIGATES FEDERAL CRIMES

- § 112:2 U.S. Department of Justice / Office of the Attorney General
- § 112:3 U.S. Attorneys
- § 112:4 —Southern District of New York
- § 112:5 —Other districts
- § 112:6 Agencies with enforcement powers—Securities and Exchange Commission
- § 112:7 —Department of Health & Human Services
- § 112:8 —Other federal agencies
- § 112:9 Enforcement strategies
- § 112:10 —Specialized units within the DOJ
- § 112:11 —Domestic interagency co-operation
- § 112:12 —Cross-border investigations and collaboration agreements
- § 112:13 —New techniques in investigation of white collar crimes
- § 112:14 Practicalities of interacting with federal authorities
- § 112:15 —Parallel civil/criminal proceedings
- § 112:16 —Voluntary disclosure by corporations

III. FEDERAL CRIMINAL PROCEDURE

- § 112:17 Federal criminal procedure law
- § 112:18 —Pretrial discovery
- § 112:19 *Brady/Jencks* disclosures
- § 112:20 —Jencks disclosures
- § 112:21 —*Brady* material
- § 112:22 Immunity
- § 112:23 —Scope of immunity
- § 112:24 —Grand jury proceedings
- § 112:25 —During trial
- § 112:26 —Proffer agreements and pretrial negotiations

*The authors acknowledge with great appreciation the valuable assistance of our associates Jeremy Chase, Brendon Fleming, Beth Morales Singh, William Moriarty, and Benjamin Wastler in the preparation of this chapter.

- § 112:27 —Co-operation initiatives for corporations
- § 112:28 —Protection of whistleblowers

IV. FEDERAL WHITE COLLAR CRIMES

- § 112:29 Federal white collar crimes generally
- § 112:30 Insider trading
- § 112:31 —Legal standard
- § 112:32 —Recent cases
- § 112:33 Foreign Corrupt Practices Act
- § 112:34 —Legal standard
- § 112:35 Mail and wire fraud
- § 112:36 —Honest services cases / *Skilling*
- § 112:37 Securities fraud
- § 112:38 Health care fraud (Medicare and Medicaid)
- § 112:39 Health care fraud—Health Care Fraud Prevention and Enforcement Action Team
- § 112:40 Antitrust
- § 112:41 —Price-fixing
- § 112:42 —Anti-cartel enforcement
- § 112:43 —Cross-border enforcement co-operation
- § 112:44 Crimes under the Bank Secrecy Act
- § 112:45 Criminal sanctions violations
- § 112:46 Mortgage fraud
- § 112:47 —Recent mortgage fraud prosecutions
- § 112:48 Insurance fraud
- § 112:49 Tax fraud
- § 112:50 Environmental crimes
- § 112:51 —Statutory framework for environmental crimes
- § 112:52 —Prosecutorial discretion in environmental crimes prosecutions
- § 112:53 —Deferred prosecution agreements and nonprosecution agreements in environmental crime cases
- § 112:54 —Recent environment crimes cases
- § 112:55 Intellectual property crimes
- § 112:56 Computer crimes
- § 112:57 Obstruction of justice, perjury, and false statements
- § 112:58 Racketeer Influenced and Corrupt Organizations
- § 112:59 Conspiracy
- § 112:60 Extortion crimes under the Hobbs Act

V. ORGANIZATIONAL LIABILITY FOR CRIMES

- § 112:61 Corporate criminal liability
- § 112:62 —Standards for corporate criminal liability

VI. ISSUES OF PROOF AND DEFENSES

- § 112:63 Proof and defenses in white collar cases
- § 112:64 Principals and accessories
- § 112:65 Rules of evidence

- § 112:66 Defenses
- § 112:67 —Double jeopardy
- § 112:68 —Entrapment
- § 112:69 —Defenses to conspiracy
- § 112:70 Defenses to specific federal statutes

VII. DISPOSITION OF CRIMINAL CASES

- § 112:71 Disposition in the defendant's favor
- § 112:72 Plea agreements and co-operation agreements
- § 112:73 Federal sentencing in general
- § 112:74 Corporate sentencing under federal law
- § 112:75 —General standards for corporate sentencing under U.S. Sentencing Guidelines
- § 112:76 —Existence of corporate compliance program as mitigating factor
- § 112:77 —Use of Non-Prosecution Agreements/Deferred Prosecution Agreements
- § 112:78 —Corporate monitors
- § 112:79 —Financial penalties

VIII. PRACTICE AIDS

- § 112:80 Grand jury considerations checklist
- § 112:81 Internal investigation considerations checklist

IX. FORMS

- § 112:82 Sample proffer agreement
- § 112:83 Sample plea agreement
- § 112:84 Sample deferred prosecution agreement
- § 112:85 Sample non-prosecution agreement
- § 112:86 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

§ 112:1 Scope note

In the post-Madoff and 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 use of wiretaps and undercover informants) to the white collar arena. 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. 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, (b) key federal criminal procedural issues, (c) major federal white collar crimes, (d) unique issues of corporate liability under federal law, (e) key proof and evidentiary issues in federal court, and (f) sentencing issues in the federal system. Related considerations are addressed in Chapter 113 “The Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 113:1 et seq.).

II. WHO INVESTIGATES FEDERAL CRIMES

§ 112:2 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

[Section 112:2]

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. §§ 501-530D; see also U.S. Dep’t of Justice, OAG: About the Office, <http://www.justice.gov/ag/about-oag.html> (last visited Feb. 22, 2011).

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-oag.html> (last visited Feb. 22, 2011).

⁴28 U.S.C.A. §§ 515-517.

⁵28 U.S.C.A. §§ 511-513.

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-oag.html> (last visited Feb. 22, 2011); 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

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 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 112:10.

argue any case in a court of the United States in which the United States is interested . . .").

⁷U.S. Dep't of Justice, About DOJ, <http://www.justice.gov/02organizations/about.html> (last visited Mar. 4, 2011); 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. §§ 501-530D).

⁸U.S. Dep't of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf> (last visited Mar. 4, 2011); see also 28 U.S.C.A. §§ 504-507A (establishing other DOJ leadership positions to be filled by presidential appointment with advice and consent of the Senate).

⁹U.S. Dep't of Justice, DAG: About the Office, <http://www.justice.gov/dag/about-odag.html> (last visited Mar. 4, 2011); 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-oaag.html> (last visited Mar. 4, 2011); 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> (last visited Feb. 22, 2011).

¹²U.S. Dep't of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf> (last visited Mar. 4, 2011).

¹³U.S. Dep't of Justice, U.S. Department of Justice Overview, <http://www.justice.gov/jmd/2011summary/pdf/overview.pdf> (last visited Mar. 4, 2011).

¹⁴U.S. Dep't of Justice, About DOJ, <http://www.justice.gov/02organizations/about.html> (last visited Mar. 4, 2011).

§ 112:3 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 assigned 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.

§ 112:4 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

[Section 112:3]

¹28 U.S.C.A. § 541(a); U.S. Dep’t of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao/> (last visited Mar. 6, 2011).

²28 U.S.C.A. § 541.

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/> (last visited Mar. 6, 2011).

[Section 112:4]

¹U.S. Dep’t of Justice, The United States Attorney’s Office, The Southern District of New York: A Tradition of Excellence, 2, available at <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf> (last visited Mar. 21, 2011).

²U.S. Dep’t of Justice, The United States Attorney’s Office, The Southern District of New York: A Tradition of Excellence, 3, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf> (last visited Mar. 21, 2011).

(including 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 Major Crimes 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 Major Crimes unit investigates and prosecutes "the most varied caseload in the Office," including white collar offenses such as computer crimes, environmental crimes, tax fraud, health care fraud, money laundering, corporate fraud, and embezzlement—in sum, "virtually all major financial crime cases" other than those affecting the markets, which the Securities and Commodities Fraud Task Force handles.⁶

Among high-profile cases, the SDNY recently has litigated the insider trading trial of hedge fund manager Raj Rajaratnam, who allegedly earned, or avoided losses of, more than \$45 million for his hedge fund based on insiders' tips.⁷ On May 11, 2011, a jury convicted Rajaratnam on 14 counts of securities fraud stemming from his illegal trades.⁸ 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.⁹ Madoff pleaded guilty to multiple charges in 2009,¹⁰ for which he was sentenced to 150

³U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, 6-7, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf> (last visited Mar. 21, 2011).

⁴U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, 6-7, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf> (last visited Mar. 21, 2011). See § 112:10 for additional discussion of the SDNY's Securities and Commodities Fraud Task Force and the Major Crimes Unit.

⁵U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, 7, (<http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf>) (last visited Mar. 21, 2011).

⁶U.S. Dep't of Justice, The United States Attorney's Office, The Southern District of New York: A Tradition of Excellence, 7, <http://www.justice.gov/usao/nys/forms/sdnybooklet.pdf> (last visited Mar. 21, 2011).

⁷See, e.g., UNITED STATES OF AMERICA, v. Raj RAJARATNAM and Danielle Chiesi, Defendants., 2010 WL 2131195, at ¶¶ 4, 56 (S.D. N.Y. 2010).

⁸Michael Rothfeld et al., Fund Titan Found Guilty, WALL ST. J., May 12, 2011, at A1.

⁹Diana B. Henriques, Madoff, Apologizing, Is Given 150 Years, N.Y. TIMES, June 30, 2009, at A1.

¹⁰Diana B. Henriques & Jack Healy, Madoff Jailed After Pleading Guilty to

years of imprisonment.¹¹ 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.¹² Ebbers received a sentence of 25 years in federal prison.¹³

§ 112:5 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 Mortgage Fraud Task Force in the spring of 2008, co-ordinating 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 Financial Fraud Enforcement Task Force⁵ that led to the guilty plea of a New York developer whose conspiracy caused \$92 mil-

Fraud, N.Y. TIMES, Mar. 13, 2009, at A1.

¹¹Diana B. Henriques, Madoff, Apologizing, Is Given 150 Years, N.Y. TIMES, June 30, 2009, at A1.

¹²Ken Belson, Ex-Chief of WorldCom Is Found Guilty in \$11 Billion Fraud, N.Y. TIMES, Mar. 16, 2005, at A1.

¹³Ken Belson, WorldCom Head Is Given 25 Years for Huge Fraud, N.Y. TIMES, July 14, 2005, A1.

[Section 112:5]

¹U.S. Dep't of Justice, The United States Attorney's Office, Eastern District of New York, <http://www.justice.gov/usao/nye/district/ednymap.html> (last visited Mar. 21, 2011).

²U.S. Dep't of Justice, Former United States Attorneys, <http://www.justice.gov/usao/nye/district/formerusa.html> (last visited Mar. 21, 2011).

³U.S. Dep't of Justice, Criminal Division, <http://www.justice.gov/usao/nye/divisions/crim/crim.html> (last visited Mar. 21, 2011).

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/2008/05/05/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.

lion in losses on fraudulent mortgages.⁶ 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.⁷

While the New York City area, as 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.⁸ The D.C. office also enforces various public corruption laws, such as federal laws prohibiting bribes and honest services fraud,⁹ false claims, fraud and kickbacks in government contracting, and cases against federal employees.¹⁰ Owing to its unique geographic location, in the nation's capital, the office's jurisdiction also encompasses congressional referrals for perjury and false statements.¹¹

Significant white collar cases also are handled in other U.S. Attorney's Offices around the country. The prosecution of media mogul Conrad Black, whose conviction was largely overturned by the Supreme Court in 2010,¹² applying its decision in *Skilling v. United States*¹³ that limited prosecutions for honest services fraud, began as a prosecution by the U.S. Attorney's Office for the Northern District of Illinois.¹⁴ That office also is well known for its public corruption prosecutions, including that of former Illi-

REP., Feb. 2010, at 1.

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

⁷Patricia Hurtado et al., Bear Managers' Acquittal May Hamper U.S. Fraud Prosecutions, BLOOMBERG, Nov. 11, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1Bcul0c3hPk>.

⁸U.S. Dep't of Justice, Criminal Division, http://www.justice.gov/usao/dc/Divisions/Criminal_Division/index.html (last visited Mar. 21, 2011).

⁹See § 112:36 for a discussion of honest services fraud.

¹⁰U.S. Dep't of Justice, Fraud and Public Corruption, http://www.justice.gov/usao/dc/Divisions/Criminal_Division/Fraud_Public_Corruption/index.html (last visited Mar. 21, 2011).

¹¹U.S. Dep't of Justice, Fraud and Public Corruption, http://www.justice.gov/usao/dc/Divisions/Criminal_Division/Fraud_Public_Corruption/index.html (last visited Mar. 21, 2011).

¹²See *Black v. U.S.*, 130 S. Ct. 2963, 177 L. Ed. 2d 695, R.I.C.O. Bus. Disp. Guide (CCH) P 11876 (2010).

¹³*Skilling v. U.S.*, 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).

¹⁴*Black v. U.S.*, 130 S. Ct. 2963, 2967, 177 L. Ed. 2d 695, R.I.C.O. Bus. Disp. Guide (CCH) P 11876 (2010).

nois Governor Rod Blagojevich,¹⁵ and it touts the prosecution of health care fraud and computer crime as among its current top priorities.¹⁶

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.¹⁷ 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 suppliers and manufacturers of components for Apple products.¹⁸

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,¹⁹ focuses on various areas of criminal enforcement, including intellectual property crimes and financial crimes.²⁰ Recent noteworthy cases include a guilty plea from a Los Angeles man for importing counterfeit exercise machines from China;²¹ 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

¹⁵The 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).

¹⁶U.S. Dep't of Justice, United States Attorney's Office, Northern District of Illinois, <http://www.justice.gov/usao/iln/aboutus/index.html> (last visited Mar. 21, 2011).

¹⁷U.S. Dep't of Justice, United States Attorney's Office, Northern District of California, <http://www.justice.gov/usao/can/divisions/index.html> (last visited May 14, 2011).

¹⁸Press Release, U.S. Attorney's Office for the Northern District of California, Former Apple Employee Pleads Guilty in Kickback Scheme (Feb. 28, 2011), http://www.justice.gov/usao/can/press/2011/2011_02_28_devine.guiltyplea.press.html.

¹⁹U.S. Dep't of Justice, U.S. Attorney's Office: Central District of California, <http://www.justice.gov/usao/cac/index.html> (last visited May 14, 2011).

²⁰See U.S. Dep't of Justice, U.S. Attorney's Office: Central District of California, Criminal Division, <http://www.justice.gov/usao/cac/aboutusao/divisions/criminal.html> (last visited May 14, 2011) (listing the sections within the Criminal Division).

²¹Press Release, U.S. Attorney's Office for the Central District of California, Los Angeles Man Pleads Guilty to Role in Trafficking Counterfeit Exercise Equipment Made in China (May 9, 2011), <http://www.justice.gov/usao/cac/pressroom/pr2011/068.html>.

contained dangerous amounts of lead;²² 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.²³

§ 112:6 Agencies with enforcement powers—Securities and Exchange Commission

The Securities and Exchange Commission (“SEC”) is the federal government’s regulatory and enforcement agency with jurisdiction specifically covering the securities 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 co-ordination 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,

²²Press Release, U.S. Attorney’s Office for the Central District of California, Three Associated with L.A. Jewelry Store Sentenced for Selling Lead-Tainted Counterfeit Designer Jewelry (May 9, 2011), <http://www.justice.gov/usao/cac/pressroom/pr2011/069.html>.

²³Press Release, U.S. Attorney’s Office for the Central District of California, Former Baseball Player Lenny Dykstra Indicted By Federal Grand Jury in Bankruptcy Fraud Case (May 6, 2011), <http://www.justice.gov/usao/cac/pressroom/pr2011/064.html>.

[Section 112:6]

¹See Chapter 68 “Securities” (§§ 68:1 et seq.) and Chapter 69 “Regulatory Litigation with the SEC” (§§ 69:1 et seq.) for additional discussion of the SEC.

²U.S. 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> (last visited Mar. 28, 2011).

³U.S. Sec. & Exch. Comm’n, About the Division of Enforcement, <http://www.sec.gov/enforce/about.htm> (last visited Mar. 28, 2011).

⁴See Chapter 69 “Regulatory Litigation with the SEC” (§§ 69:1 et seq.) for a discussion of civil proceedings brought by the SEC.

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 recent restructuring of the Division enables senior staff to approve formal orders for investigations, streamlining a process that previously required 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 co-ordinates 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 co-ordination efforts in general, see Section 112:11.

§ 112:7 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 touches the U.S. health care system. From enforcing regulatory regimes against corporations that are part of the health care sector, such as those in the pharmaceutical industry, to coordinating investigations and prosecutions of Medicare and Medicaid fraud with the DOJ, HHS’s white collar enforcement role is varied and increasing. At HHS, the Office of the Inspector General (“OIG”) is responsible for the agency’s investigative and law enforcement activity.¹ OIG has more than 1,500 personnel across the country whose mission includes “addressing fraud,

⁵See U.S. 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> (last visited Mar. 28, 2011); U.S. Sec. & Exch. Comm’n, *About the Division of Enforcement*, <http://www.sec.gov/enforce/about.htm> (last visited Mar. 28, 2011).

⁶See SEC. & EXCH. COMM’N DIV. OF ENFORCEMENT, *ENFORCEMENT MANUAL* 15-23 (2011), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

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* 23-24 (2011), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

[Section 112:7]

¹U.S. Dep’t of Health & Human Servs., Office of the Inspector General (OIG), <http://www.hhs.gov/open/contacts/oig.html> (last visited Mar. 21, 2011).

waste, and abuse.”²

OIG’s enforcement role has increased in recent years, especially with regard to imposing Corporate Integrity Agreements (“CIAs”) on corporations seeking to settle investigative and enforcement actions against them, and with regard to HHS’s coordinated, co-operative enforcement efforts in conjunction with the DOJ. OIG often requires companies in the health care sector to enter into CIAs to resolve various federal investigations, including for false claims.³ Similar to Deferred Prosecution Agreements used by the DOJ, entities enter into CIAs to avoid certain penalties—in this case, being excluded from federal health care programs, such as Medicare or Medicaid.⁴ The DOJ’s use of Deferred Prosecution Agreements is discussed further in Section 112:77.

HHS’s OIG and the Centers for Medicare and Medicaid Services, also a part of HHS, work closely 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.⁵ Early in President Barack Obama’s administration, the agencies ramped up their antifraud efforts, bringing the operations of the Medicare Fraud Strike Force under the umbrella of the newly created Health Care Fraud Prevention & Enforcement Action Team (“HEAT”).⁶ The creation of HEAT in May 2009 elevated the fight against Medicare fraud to a “Cabinet level priority” for the agencies.⁷

In addition to HHS’s 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.⁸ The OCR is responsible for enforcing compliance with the HIPAA security

²U.S. Dep’t of Health & Human Servs., Office of the Inspector General (OIG), <http://www.hhs.gov/open/contacts/oig.html> (last visited Mar. 21, 2011).

³U.S. Dep’t of Health & Human Servs., Corporate Integrity Agreements, <http://oig.hhs.gov/fraud/cias.asp> (last visited Mar. 27, 2011). See generally Chapter 118 “False Claims Act” (§§ 118:1 et seq.).

⁴U.S. Dep’t of Health & Human Servs., Corporate Integrity Agreements, <http://oig.hhs.gov/fraud/cias.asp> (last visited Mar. 27, 2011).

⁵See, e.g., Press Release, U.S. Dep’t of Health & Human Servs., Medicare Fraud Strike Force Charges 111 Individuals for More than \$225 Million in False Billing and Expands Operations to Two Additional Cities (Feb. 17, 2011), <http://www.hhs.gov/news/press/2011pres/02/20110217a.html>.

⁶See, e.g., U.S. Dep’t of Health & Human Servs. and U.S. Dep’t of Justice, HEAT Task Force Success, <http://www.stopmedicarefraud.gov/heattaskforce/index.html> (last visited Mar. 28, 2011).

⁷See, e.g., U.S. Dep’t of Health & Human Servs. and U.S. Dep’t of Justice, HEAT Task Force Success, <http://www.stopmedicarefraud.gov/heattaskforce/index.html> (last visited Mar. 28, 2011).

⁸See generally Health Insurance Portability and Accountability Act of

and privacy requirements by various entities covered by HIPAA, which include providers, health plans, and health care clearing-houses that receive and compile health information.⁹ The OCR's enforcement powers include conducting investigations and responding to patient complaints.¹⁰

§ 112:8 Agencies with enforcement powers—Other federal agencies

The Food & Drug Administration's ("FDA") Office of Criminal Investigations is also part of the federal law enforcement apparatus, for issues that arise with regard to health care entities and corporations, including violations of the Food, Drug, and Cosmetic Act and the Anti-Tampering Act, for conduct related to making and selling counterfeit drugs, off-label promotion of drugs and medical devices approved by the FDA for other uses, and trafficking in unapproved products that fall within the FDA's purview.¹ Similarly, the Federal Trade Commission ("FTC") has authority to enforce provisions of the FTC Act designed to protect consumers from unscrupulous trade practices in the market, through various administrative enforcement mechanisms.² The Environmental Protection Agency 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.³ The Department of Labor's Office of Labor-Management Standards has authority to conduct criminal and civil investigations of the Labor-Management Reporting and Disclosure Act and other statutes.⁴

1996, Pub. L. 104-191, 110 Stat 1936 (1996). See also Chapter 106 "Privacy and Security" (§§ 106:1 et seq.) for additional discussion of HIPAA.

⁹U.S. Dep't of Health & Human Servs., For Covered Entities, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html> (last visited May 19, 2011).

¹⁰U.S. Dep't of Health & Human Servs., HIPAA Enforcement, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/index.html> (last visited Mar. 27, 2011).

[Section 112:8]

¹U.S. Food & Drug Admin., What OCI Investigates, <http://www.fda.gov/IC/ECI/CriminalInvestigations/ucm123062.htm> (last visited May 14, 2011). See Chapter 98 "Food and Drug" (§§ 98:1 et seq.).

²U.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> (last visited May 14, 2011).

³See U.S. Env'tl. Prot. Agency, What is an Environmental Crime?, <http://www.epa.gov/compliance/criminal/investigations/environmentalcrime.html> (last visited May 14, 2011). See Chapter 128 "Environmental Claims" (§§ 128:1 et seq.).

⁴U.S. Dep't of Labor, Office of Labor-Management Standards (OLMS),

§ 112:9 Enforcement strategies

In May 2010, Assistant Attorney General Lanny A. Breuer announced “a new era of heightened white-collar crime enforcement” marked by an increase in resources, information-sharing, co-operation, and stiff penalties for corporations and individuals.¹ Government officials have accordingly emphasized several high-level strategies to support their enforcement goals. A summary of those strategies is provided in Sections 112:10 to 112:13.

§ 112:10 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 and respond to geographically shifting crime problems.¹ The Fraud Section also participates in various national, regional, and international working groups. In 2010, a number of attorneys were added to the Fraud Section for immediate deployment to prosecute such crimes as securities fraud, health care fraud, and foreign bribery under the Foreign Corrupt Practices Act (“FCPA”).²

This increased specialization and focus on white collar crime has cascaded down from the DOJ to the U.S. Attorneys’ Offices. For example, the prosecution of white collar crimes historically has been a high priority, and it recently has received heightened attention and resources because of the increased use of technology in various financial frauds and economic espionage.³ For example, depending on their nature, white collar crimes are generally assigned in the SDNY to the Securities and Commodities Fraud Task Force, the Major Crimes Unit, or the Complex Frauds

http://www.dol.gov/olms/regs/compliance/enforcement__1.htm (last visited May 14, 2011).

[Section 112:9]

¹Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

[Section 112:10]

¹U.S. Dep’t of Justice, Fraud Section, (<http://www.justice.gov/criminal/fraud/>) (last visited Feb. 2, 2011).

²Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

³U.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/ny/forms/sdnybooklet.pdf>) (last visited Feb. 2, 2011).

Unit.⁴

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 and environmental crimes, and major financial crime cases, including such crimes as money laundering, tax fraud, customs fraud, and corporate fraud and embezzlement.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 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 FCPA cases,⁸ are usually handled by the Complex Frauds Unit or the Major Crimes Unit; however, other units may handle such cases depending on how the case is brought in—for example, an FCPA issue may arise in a Terrorism Unit investigation.⁹

§ 112:11 Enforcement strategies—Domestic interagency co-operation

Domestic interagency co-operation 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 Work-

⁴See § 112:10 for additional discussion of the SDNY's Securities and Commodities Fraud Task Force and its Major Crimes Unit.

⁵U.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> (last visited Feb. 2, 2011).

⁶Press Release, Office of the United States Attorney for the Southern District of New York, United States Attorney Preet Bharara Announces Supervisory Appointments to Criminal Division (Oct. 19, 2009), available at http://www.justice.gov/usao/nys/pressreleases/October09/criminaldivisionsupervisor_yappointmentspr.pdf.

⁷Press Release, Office of the United States Attorney for the Southern District of New York, United States Attorney Preet Bharara Announces Supervisory Appointments to Criminal Division (Oct. 19, 2009), available at http://www.justice.gov/usao/nys/pressreleases/October09/criminaldivisionsupervisor_yappointmentspr.pdf.

⁸See § 112:33 and Chapter 115 "Foreign Corrupt Practices Act" (§§ 115:1 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).

ing 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.¹

Another feature of interagency co-operation is the co-ordinated filing of both civil and criminal actions. 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 parallel tracks.² This co-operation was designed to increase efficiencies for criminal and regulatory prosecutions. Accordingly, prosecutors and regulators have formalized their relationships by creating task forces to co-ordinate strategy, set policies, share information, and supervise criminal and regulatory actions related to the financial crisis.³ For instance, federal prosecutors in the EDNY formed the Mortgage Fraud Task Force in May 2008, bringing together federal, state, and local agencies to investigate potential crimes relating to the subprime crisis, ranging from mortgage fraud by brokers to securities fraud, insider trading, and accounting fraud.⁴ In the broadest coalition to fight domestic fraud to date, President Barack Obama established the Interagency Financial Fraud Enforcement Task Force in November 2009.⁵ 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."⁶

[Section 112:11]

¹U.S. Dep't of Justice, Interagency Working Groups, available at <http://www.justice.gov/criminal/fraud/working-grps/> (last visited Feb. 2, 2011).

²Lawrence 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>.

³Lawrence 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>.

⁴Amir Efrati, *Wall Street, Lenders Face Subprime Scrutiny*, WALL ST. J., May 5, 2008, at A4.

⁵Howard W. Goldstein, *New Year's Reflections: Prosecutors Will Be Busy*, N.Y.L.J. CORP. UPDATE, Jan. 6, 2011.

⁶Howard W. Goldstein, *New Year's Reflections: Prosecutors Will Be Busy*, N.Y.L.J. CORP. UPDATE, Jan. 6, 2011; U.S. 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>.

§ 112:12 Enforcement strategies—Cross-border investigations and collaboration agreements

In addition to domestic interagency co-operation, 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. Indeed, at least 25 co-operative requests to foreign governments pursuant to agreements on mutual legal assistance were made in the year ending November 2009.¹ In February 2010, new agreements between the United States and the European Union on mutual legal assistance and extradition were implemented to support cross-border investigations and enforcement actions.² In the same month, the DOJ and the U.K. Serious Fraud Office settled corruption charges with one of Europe's largest defense contractors, marking the first time that the DOJ and SFO co-operated to resolve an investigation.³ Co-operative 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 over-the-counter derivatives.⁴

§ 112:13 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

[Section 112:12]

¹Gibson, Dunn & Crutcher LLP Securities Docket Webcast, FCPA and International Anti-Corruption Enforcement—Trends in 2010, 18 (Apr. 8, 2010), available at <http://www.gibsondunn.com/publications/Documents/WebcastSlides-GibsonDunnFCPASecuritiesDocket-04082010.pdf>.

²Lanny Breuer, Ass't Attorney General, U.S. Dep't of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

³Stanford U. Rock Center for Corporate Governance, Increasing International Cooperation and Other Key Trends in Anti-Corruption Investigations (Feb. 26, 2010), available at <http://rockcenter.stanford.edu/2010/02/26/increasing-international-cooperation-and-other-key-trends-in-anti-corruption-investigations/>.

⁴U.S. Sec. & Exch. Comm'n, SEC and UK FSA Hold Fifth Meeting of the SEC-FSA Strategic Dialogue (Feb. 1, 2010), available at www.sec.gov/news/press/2010/2010-17.htm (last visited May 10, 2011).

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 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 between 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

[Section 112:13]

¹Lanny Breuer, Ass't Attorney General, U.S. Dep't of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

²Press Release, Office of the United States Attorney for the Southern District of New York, 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.justice.gov/usao/nys/pressreleases/October09/hedgefundinsidertradingpr.pdf>.

³Press Release, Office of the United States Attorney for the Southern District of New York, 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.justice.gov/usao/nys/pressreleases/October09/hedgefundinsidertradingpr.pdf>. The *Galleon* case has criminal and civil components. See SEC v. Galleon Management LP, et al., No. 09 Civ. 8811 (S.D.N.Y. Oct. 16, 2009); United States v. Rajaratnam, No. 09 Cr. 1184 (R/JH) (S.D.N.Y. Oct. 16, 2009); United States v. Goffer et al., No. 10 Cr. 056 (S.D.N.Y. 2010).

⁴Sheppard and Anderson, Wiretaps and Undercover Sting Operations: Are White Collar Defendants Ready?, 2 FIN. FRAUD L. REP. 810, 811 (2010).

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

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 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

⁶David Glovin, David Scheer, and Bob Van Voris, Galleon Case Ushers in Wiretaps for Financial Crimes, BLOOMBERG NEWS, Oct. 17, 2009, available at <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, available at <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, available at <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).

¹¹Gibson, Dunn & Crutcher LLP, 2010 Year-End FCPA Update (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.

Gabonese officials to secure a fictitious \$15 million defense equipment contract. The FBI was assisted by co-operating 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, Bistrong agreed to cooperate and utilize his industry connections to help the FBI ensnare other defendants.¹³

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.¹⁴ 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."¹⁵ Federal prosecutors' use of aggressive investigative techniques in white collar cases will help them establish elements of historically difficult cases, and help to decrease their reliance on whistleblowers.¹⁶

§ 112:14 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 proceedings and the question of corporate voluntary disclosure.

§ 112:15 Practicalities of interacting with federal authorities—Parallel civil/criminal proceedings

More than 40 years ago, the Supreme Court recognized the

¹³Gibson, Dunn & Crutcher LLP, 2010 Year-End FCPA Update (Jan. 30, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.

¹⁴F. Joseph Warin et al., FCPA and International Anti-Corruption Enforcement—mTrends in 2010 (Apr. 8, 2010), available at <http://www.gibsondunn.com/publications/Documents/WebcastSlides-GibsonDunnFCPASecuritiesDocket-04082010.pdf>.

¹⁵Diana B. Henriques, F.B.I. Charges Arms Sellers with Foreign Bribes, N.Y. TIMES, Jan. 20, 2010, available at <http://www.nytimes.com/2010/01/21/business/21sting.html>.

¹⁶Stanford U. Rock Center for Corporate Governance, Increasing International Cooperation and Other Key Trends in Anti-Corruption Investigations (Feb. 26, 2010), available at <http://rockcenter.stanford.edu/2010/02/26/increasing-international-cooperation-and-other-key-trends-in-anti-corruption-investigations/>.

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 recently held that information provided to the SEC could be used in either criminal or civil proceedings brought by either the SEC or another government agency. The Ninth Circuit held that there is "nothing improper about the government undertaking simultaneous criminal and civil investigations."² The court also noted that, although the government may not affirmatively mislead witnesses, the SEC had no affirmative duty to inform witnesses of an existing or contemplated criminal investigation.³ Because parallel proceedings may arise in a government investigation of almost any commercial transaction in which allegations of fraud have been made, counsel representing a client in an investigation involving the SEC should carefully consider whether a related criminal investigation may have commenced.⁴ In cases where the existence of a criminal investigation is not obvious, counsel might gain more information by asking alleged victims and other witnesses informally or through formal civil discovery.⁵

In recent years, federal prosecutors, state attorneys general, and federal regulatory agencies increasingly have been coordinating their resources to investigate and prosecute white collar claims on parallel tracks.⁶ As a result of the recent collapse of the financial and credit markets, a burgeoning number of companies are being confronted simultaneously with multiple shareholder class actions, consumer litigation, SEC investigations, arbitrations, state attorney general investigations, and federal grand jury investigations.⁷ When both civil and criminal cases progress simultaneously against the same defendant for conduct arising from the same set of facts, the complexity of proceedings can be significantly increased by layers of intertwined

[Section 112:15]

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

²U.S. v. Stringer, 535 F.3d 929 (9th Cir. 2008).

³U.S. v. Stringer, 535 F.3d 929 (9th Cir. 2008).

⁴See generally Chapter 69 "Regulatory Litigation with the SEC" (§§ 69:1 et seq.).

⁵Ronald J. Nessim, *Parallel Civil and Criminal Litigation*, L.A. LAW., Dec. 1990, at 37-38, available at <http://www.birdmarella.com/articles/doc3.pdf>.

⁶Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, SEC. LITIG. REP., Feb. 2010, at 1, 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, at 3, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf>.

policies, procedures, and regulations.⁸ Defendants facing parallel proceedings are particularly vulnerable because strategies and decisions that support the defense of one proceeding may compromise the defense of another. As such, in defending parallel proceedings, counsel must develop global defense strategies that co-ordinate the defense of each proceeding with the defense of all others.⁹ Therefore, it is imperative that criminal counsel be retained as soon as possible if civil counsel lacks criminal defense experience. Additional discussion on this subject can be found in Chapter 113 “The Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 113:1 et seq.).

In defending parallel proceedings, counsel should evaluate whether it would be beneficial to seek or oppose a stay of one of the proceedings, and under what circumstances courts will be likely to impose a stay.¹⁰ While in a civil case both parties are entitled to broad discovery “regarding any non-privileged matter that is relevant to any party’s claim or defense,”¹¹ in a criminal case, a defendant is entitled only to discovery “material to preparing the defense [or that] the government intends to use [] in its case-in-chief at trial.”¹² Because of these differences in the scope of available discovery, the government may seek a stay of the civil proceeding pending completion of the criminal case in order to limit the pretrial discovery available to the defendant.¹³ Depending on the circumstances, however, a defendant may seek

⁸Laura L. Flippin & Morgan J. Miller, Double Teamed: Defending Parallel Investigations Under SEC’s New Cooperation Initiative, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Apr. 23, 2010 at 1, available at http://www.wlf.org/publishing/publication_detail.asp?id=2159.

⁹Lawrence J. Zweifach & Eric M. Creizman, Defending Parallel Proceedings: Basic Principles & Tactical Considerations, SEC. LITIG. REP., Feb. 2010, at 4, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf>. See generally Chapter 113 “The Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 113:1 et seq.) for extensive discussion of defending parallel proceedings.

¹⁰Lawrence J. Zweifach & Eric M. Creizman, Defending Parallel Proceedings: Basic Principles & Tactical Considerations, SEC. LITIG. REP., Feb. 2010, at 4, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf>. See generally Chapter 113 “The Interplay Between Commercial Litigation and Criminal Proceedings” (§§ 113:1 et seq.) for discussion of stays of parallel proceedings.

¹¹Fed. R. Civ. P. 26(b)(1).

¹²Fed. R. Crim. P. 16(a)(1)(E).

¹³See generally Younger & Moshkovich, Parallel Proceedings in Securities Enforcement Actions: The Growing Trend Against Automatic Grants of Government Requests for Stays of Civil Cases, 3 J. SEC. L., REG. & COMPLIANCE 307 (Oct. 2010), available at <http://www.pbwt.com/files/Publication/82e4de3a-40a7-4c45-853a-2c6eaea4fbab/Presentation/PublicationAttachment/29259c03-64d3-4626-b979-32405dd886fc/Parallel%20Proceedings%20in%20Securities%20Enforcement%20Actions.pdf>. Such stays prevent a defendant from using liberal civil discovery rules to get around narrower criminal discovery rules and obtain evidence to defend against a criminal proceeding. While historically these stays have been routinely granted, more recent cases suggest that courts will scruti-

a stay of the civil proceeding to prevent the government from learning of evidence or information produced in the civil case that it would not have learned without such litigation. While a defendant might oppose a stay of civil proceedings out of a preference for the speedy resolution of both cases, he may find a stay desirable for a variety of reasons, such as avoiding the expense of defending two proceedings, or to avoid the Hobson's Choice of either waiving the Fifth Amendment privilege by testifying, or asserting the privilege at the potential price of a possible adverse inference in the civil case.¹⁴

Courts are not constitutionally required to stay regulatory or civil proceedings pending the outcome of a parallel criminal proceeding unless there is "substantial prejudice to the rights of the parties involved."¹⁵ Rather, courts have wide discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem[] to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense."¹⁶ In deciding whether to grant a stay, courts generally focus on the following factors in balancing the parties' various competing interests: the extent to which the criminal and noncriminal proceedings overlap; the status of the proceedings, including whether the defendant has been indicted; whether the government entity that has initiated the criminal case is also a party in the civil case; the private interests of the civil plaintiff in proceeding expeditiously weighed against the potential prejudice to the plaintiff as the result of any delay; the private interests of and burden on the defendant, including the extent to which the defendant's Fifth Amendment rights are implicated; the interests of persons not parties to the civil proceedings; and the interest of the court in the efficient management of cases.¹⁷

When defending parallel proceedings, attorneys also must give

nize such requests more closely.

¹⁴See generally Younger & Moshkovich, *Parallel Proceedings in Securities Enforcement Actions: The Growing Trend Against Automatic Grants of Government Requests for Stays of Civil Cases*, 3 J. SEC. L., REG. & COMPLIANCE 307, 308 (Oct. 2010), available at <http://www.pbwt.com/files/Publication/82e4de3a-40a7-4c45-853a-2c6eaea4fbab/Presentation/PublicationAttachment/29259c03-64d3-4626-b979-32405dd886fc/Parallel%20Proceedings%20in%20Securities%20Enforcement%20Actions.pdf>. It should be noted that corporations do not have a U.S. Const. Amend. V privilege against self-incrimination, but their employees and former employees do. When an employee asserts this privilege in a civil or regulatory proceeding, it may result in an adverse inference against the company in that proceeding.

¹⁵*Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374, Fed. Sec. L. Rep. (CCH) P 97172, Fed. Sec. L. Rep. (CCH) P 97573 (D.C. Cir. 1980); see *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

¹⁶*U.S. v. Kordel*, 397 U.S. 1, 12 n.27, 90 S. Ct. 763, 25 L. Ed. 2d 1, 13 Fed. R. Serv. 2d 868 (1970) (internal citations omitted).

¹⁷Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceed-*

consideration to the potential collateral estoppel consequences of a disposition in each of the proceedings. The doctrine of collateral estoppel limits re-litigation of an issue in an action where the identical issue was decided in a prior action; the issue was actually litigated in the prior action; resolution of the issue was essential to a final judgment in the prior action; and the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the prior action.¹⁸ Understanding the potential collateral estoppel consequences of a disposition will inform important decisions such as whether to seek a stay of civil litigation, whether to seek a trial date in the near or long term, and whether, when, and on what terms to settle an action.¹⁹

§ 112:16 Practicalities of interacting with federal authorities—Voluntary disclosure by corporations

When representing corporate clients in white collar criminal matters, it is imperative for counsel to think strategically about whether and when the corporation should voluntarily disclose suspect conduct to prosecutors and regulators.¹

In many instances, a corporate client will have the legal or

ings: Basic Principles & Tactical Considerations, SEC. LITIG. REP., Feb. 2010, at 8, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf> (citing Keating, 45 F.3d at 324; S.E.C. v. AmeriFirst Funding, Inc., 2008 WL 866065, at *2-*5 (N.D. Tex. 2008); Hollinger Intern., Inc. v. Hollinger Inc., 2008 WL 161683, at *2 (N.D. Ill. 2008); Parker v. Dawson, 2007 WL 2462677, at *3 (E.D. N.Y. 2007); In re CFS-Related Securities Fraud Litigation, 256 F. Supp. 2d 1227 (N.D. Okla. 2003); Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp. 1134, 1139, R.I.C.O. Bus. Disp. Guide (CCH) P 8846 (S.D. N.Y. 1995); Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003). See also Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201 (1990). But see In re Financial Federated Title & Trust, Inc., 252 B.R. 834, 837, 36 Bankr. Ct. Dec. (CRR) 1017, Bankr. L. Rep. (CCH) P 78274 (Bankr. S.D. Fla. 2000) (holding that, under law in the Eleventh Circuit, defendant's motion to stay could be denied unless defendant shows that "invocation of the privilege. . . will result in certain loss by automatic summary judgment") (citations omitted)).

¹⁸Lawrence J. Zweifach & Eric M. Creizman, Defending Parallel Proceedings: Basic Principles & Tactical Considerations, SEC. LITIG. REP., Feb. 2010, at 10, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf> (citing U.S. v. Stauffer Chemical Co., 464 U.S. 165, 170-71, 104 S. Ct. 575, 78 L. Ed. 2d 388, 20 Env't. Rep. Cas. (BNA) 1257, 14 Env'tl. L. Rep. 20064 (1984)). See Chapter 16 "Issue and Claim Preclusion" (§§ 16:1 et seq.) for discussion of collateral estoppel.

¹⁹Lawrence J. Zweifach & Eric M. Creizman, Defending Parallel Proceedings: Basic Principles & Tactical Considerations, SEC. LITIG. REP., Feb. 2010, at 10, available at <http://www.gibsondunn.com/publications/Documents/DefendingParallelProceedings.pdf> (citing U.S. v. Stauffer Chemical Co., 464 U.S. 165, 170-71, 104 S. Ct. 575, 78 L. Ed. 2d 388, 20 Env't. Rep. Cas. (BNA) 1257, 14 Env'tl. L. Rep. 20064 (1984)).

[Section 112:16]

¹See Chapter 113 "The Interplay Between Commercial Litigation and Criminal Proceedings" (§§ 113:1 et seq.) for additional discussion of voluntary

practical flexibility to decide whether or not to disclose suspicious activity. In such cases, there are several considerations of which the company should be aware when evaluating how to proceed. For one, if the DOJ independently discovers evidence of suspect conduct, the penalty is likely to be substantially higher than it would have been had voluntary disclosure been made. The DOJ frequently has indicated that it will “give corporations ‘meaningful credit’ for voluntarily disclosing their conduct and cooperating with [DOJ] investigations.”² In some cases, “meaningful credit” may mean a Deferred Prosecution Agreement or a Non-Prosecution Agreement, which have recently become mainstays of the DOJ’s efforts to combat corporate crime.³ “Meaningful credit” also may include such incentives as sentencing credit or a below-Guidelines fine.⁴ For a more detailed discussion of Non-Prosecution Agreements and Deferred Prosecution Agreements, see Sections 112:77 and 112:78.

Despite DOJ assurances, however, the benefits of voluntary disclosure can be difficult to predict and quantify, and there have been calls for more certainty and transparency in the process of determining benefits for corporations that voluntarily disclose suspect conduct.⁵ In this regard, the DOJ has acknowledged that while “self-reporting and cooperation carry significant incentives . . . [u]ltimately, every case is fact-specific and requires an assessment of the facts and circumstances, as well as the severity of the conduct and the quality of the corporation’s pre-existing compliance program.”⁶ Finally, in some cases there may be only a remote chance that the DOJ will discover the suspicious activity in question; in such circumstances, voluntarily disclosing will

disclosure.

²U.S. Dep’t of Justice, Remarks as Prepared for Delivery by Assistant Attorney General Lanny A. Breuer at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf> (last visited Feb. 2, 2011); see Gibson, Dunn & Crutcher LLP, 2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements at 7 (Jan. 4, 2011), available at <http://www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf>.

³Gibson, Dunn & Crutcher LLP, 2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements at 1 (Jan. 4, 2011), available at <http://www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf>.

⁴Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

⁵Melissa Aguilar, FCPA Research Stirs Debate on Voluntary Disclosure, COMPLIANCE WEEK, Aug. 6, 2010, available at <http://www.complianceweek.com/fcpa-research-stirs-debate-on-voluntary-disclsoure/article/187412/#>.

⁶Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

make a previously improbable government investigation—with all of its attendant costs—all but inevitable.⁷

If the decision to disclose has been made, the tactical issue of when to make that disclosure must be carefully considered. It is crucial for counsel to recognize that a pivotal moment in the representation occurs immediately after a problem has been discovered: a swift and appropriate response to the revelation of potential criminality can lead to a significant increase in credibility with prosecutors and regulators, especially given the DOJ's increased focus upon effective compliance and ethics programs, including “tone from the top” within corporations.⁸ At the same time, the impulse to make potentially premature statements or promises to prosecutors or regulators before a defense strategy has been fully developed and the facts have been explored should be restrained when possible. Counsel should avoid rushing to share information with prosecutors before the basis of that information is established, the context is understood, and the availability of corroboration is ascertained.⁹ Deciding when to disclose can therefore be a delicate balance of competing considerations. Until recently, conventional wisdom held that a company should conduct an internal investigation before deciding whether to self-disclose, to enable it to “characterize the wrongdoing and demonstrate good faith and responsibility.”¹⁰ However, Assistant Attorney General Lanny A. Breuer recently has stated that “the corporation should seriously consider seeking the government’s input on the front end of its internal investigation. . . . [T]he dialogue can be very helpful in ensuring at the outset that the corporation has an effective, cost-effective plan in place to investigate and deal with the problem.”¹¹

A recent example of the benefits of voluntary disclosure is the

⁷Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosure Rules* (Mar. 27 & 28, 2007), available at <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf>.

⁸Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

⁹Mei Lin Kwan-Gett, *Developing Effective Strategies in White Collar Cases*, in *MANAGING WHITE COLLAR LEGAL ISSUES: LEADING LAWYERS ON UNDERSTANDING RECENT NOTABLE CASES, ESTABLISHING KEY DEFENSE STRATEGIES, AND DEVELOPING CLIENT RELATIONSHIPS*, 2010 WL 5312572 (Dec. 2010).

¹⁰Squire Sanders, *Papa’s Got a Brand New Bag: Is DOJ Criminal Division Changing its Tune on Voluntary Disclosure?*, *ANTICORRUPTION COMPLIANCE & FOREIGN CORRUPT PRAC. ACT ALERT*, June 2010, available at http://www.ssd.com/papas_got_a_brand_new_bag/. See Chapter 5 “Internal Investigations” (§§ 5:1 et seq.).

¹¹Lanny Breuer, Ass’t Attorney General, U.S. Dep’t of Justice, Remarks at the Compliance Week Conference (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>.

case of RAE Systems Inc. A publicly traded U.S. corporation headquartered in San Jose, California, RAE Systems voluntarily disclosed FCPA violations to the DOJ. The voluntary disclosure resulted in a Non-Prosecution Agreement, and the company agreed to pay a \$1.7 million criminal penalty to resolve the violations. According to the Non-Prosecution Agreement, RAE Systems “accepted responsibility for violating the internal controls and books and records provisions of the FCPA arising from and related to improper benefits corruptly paid by employees of RAE . . . [entities] to foreign officials in the PRC.”¹²

On the other hand, there are many cases where it is hard to see the obvious benefit, if any, derived from the corporation’s voluntary disclosure to federal prosecutors. For example, in exchange for the government’s promise not to prosecute under the Antitrust Division’s Amnesty Program, Stolt-Nielsen Limited voluntarily disclosed its role in a criminal antitrust conspiracy.¹³ The Antitrust Division threatened to indict the company a year later, however, alleging that Stolt-Nielsen misstated the duration of its participation in the conspiracy. The company moved for an injunction, and the district court found that Stolt-Nielsen had complied with the Non-Prosecution Agreement and enjoined the DOJ from indicting. The Court of Appeals for the Third Circuit reversed this decision, however, holding that the DOJ alone could make the decision not to indict, and, as a result, Stolt-Nielsen was indicted in 2006.¹⁴ It is clear, then, that the voluntary disclosure decision is a crucial decision point for each company and its outside counsel, is not “one size fits all,” and requires a detailed review and analysis of the specific facts and issues facing the corporation.

III. FEDERAL CRIMINAL PROCEDURE

§ 112:17 Federal criminal procedure law

The Federal Rules of Criminal Procedure govern procedure for criminal proceedings in federal courts. Some substantive criminal acts are exclusively federal offenses and must be charged in U.S. District Court. Criminal acts that are offenses under both state and federal laws can be brought in either U.S. District Court or

¹²Press Release, U.S. Dep’t of Justice, RAE Systems Agrees to Pay \$1.7 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 10, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1428.html>.

¹³See *Stolt-Nielsen, S.A. v. U.S.*, 442 F.3d 177, 180, 2006-1 Trade Cas. (CCH) ¶ 75172, 2006 A.M.C. 722 (3d Cir. 2006), as amended, (May 16, 2006).

¹⁴The Supreme Court refused to grant *Stolt-Nielsen* certiorari. *Stolt-Nielsen, S.A. v. U.S.*, 549 U.S. 1015, 127 S. Ct. 494, 166 L. Ed. 2d 404 (2006).

state court.¹ Sections 112:17 to 112:28 provide an overview of key selected portions of the Federal Rules of Criminal Procedure and federal statutory and case law governing criminal procedure intended to alert white collar crime practitioners to some of the unique aspects of federal criminal procedure.

§ 112:18 Federal criminal procedure law—Pretrial discovery

There are no general constitutional rights to pretrial discovery in criminal cases.¹ Instead, criminal defendants in federal cases are entitled to only those discovery mechanisms available to them under Rule 16 of the Federal Rules of Criminal Procedure.² Pursuant to this rule, the government has a pretrial duty to preserve discovery evidence and to disclose specific categories of evidence in the government's "possession, custody, or control" that the government intends to produce at trial or which would be material to the preparation of the defense case.³ These categories include: the defendant's own statements; the defendant's prior criminal record; certain documents and objects; certain examination and test reports; and the content and bases of expert testimony upon which the government intends to rely.⁴

Unlike civil discovery, criminal discovery is not mandatory and is produced only at the request of the defense. Thus, the government's right to discovery is contingent upon the defendant's first requesting disclosure by the government and the government's compliance with the defendant's request.⁵ Once the defendant requests discovery, however, the government is entitled to reciprocal production of documents the defendant intends to introduce during his own case-in-chief.⁶

Defense counsel must balance their need for discovery with risks posed by opening the door to discovery to the government. White collar cases frequently require production of a massive amount of documents, including financial data and material particular to a corporation. In order to fully understand such documents, it is often imperative to seek input from all custodians of

[Section 112:17]

¹See, e.g., Office of the United States Attorney for the District of Minnesota, Criminal Procedures, available at http://www.justice.gov/usao/mn/criminal_proc.html (last visited Feb. 22, 2011).

[Section 112:18]

¹*Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

²E.g., Fed. R. Crim. P. 16(a)(1)(B)(i).

³See Fed. R. Crim. P. 16(a)(1).

⁴See Fed. R. Crim. P. 16(a)(1)(A)-(G).

⁵Fed. R. Crim. P. 16(a)(1).

⁶Fed. R. Crim. P. 16(b)(1)(A)(ii); see also *U.S. v. Medearis*, 380 F.3d 1049, 1057 (8th Cir. 2004).

the documents and those familiar with the nuances of a corporation's day-to-day business. Because white collar prosecutions are so document-intensive, defendants often have no choice but to open the door to reciprocal discovery requests from the government and suffer the high price imposed by the Federal Rules of Criminal Procedure, which require defendants to provide the government with materials they plan to use in their own cases in-chief.⁷

In fact, the Federal Rules of Criminal Procedure impose unequal discovery obligations upon defendants and the government. Rule 16(a)(1)(E) provides that “[u]pon a defendant's request, the government must permit the defendant to inspect” documents that are “within the government's possession, custody, or control” and that (1) are material for preparing the defense; (2) the government intends to use in its case-in-chief; or (3) were obtained from or belong to the defendant. Because the government's discovery obligation is expressed in the disjunctive, Rule 16 permits the government to potentially bury its “evidence-in-chief” within its much larger overall discovery instead of identifying it specifically. Conversely, Rule 16 compels the defendant to disclose items within its possession *and* items it intends to use in its case-in-chief. As a result, defendants must mine through often overwhelming numbers of documents yet deliver to the government their own evidence-in-chief in a more coherent format.⁸

In recent years, rather than resisting defendants' request for documents, the government has frequently adopted the opposite approach—producing a document dump that inundates the defendant with thousands of pages of documents, many of which are completely irrelevant to the case. Furthermore, the government is permitted to producing documents in either hard copy or electronic format, forcing the defendant to conduct needle-in-a-haystack searches through boxes of documents.⁹ Consequently, white collar defendants often allocate valuable resources to reviewing documents for the mere benefit of being able to speculate which documents the government will use in its case-in-chief.¹⁰

The defendant's burdensome document review is exacerbated

⁷See Fed. R. Crim. P. 16(b)(1)(a)(ii).

⁸Fed. R. Crim. P. 16(b)(1)(A)(ii).

⁹See, e.g., U.S. v. Nachamie, 91 F. Supp. 2d 565, 568-69 (S.D. N.Y. 2000) (“Defendants essentially argue that the Government has failed to comply with its obligations under Rule 16(a)(1)(C) because it has produced a huge volume of documents for inspection and copying, somewhere in the range of 200,000 pages Defendants' complaint is that because of the enormity of the production, they cannot determine which documents were simply material to the preparation of their defense and which documents the Government intends to use at trial The clear language of Rule 16(a)(1), however, does not require the Government to identify which documents fall in each category—it only requires the production of documents responsive to any category.”).

¹⁰See, e.g., U.S. v. Smirlock, 2001 WL 913911, at *2 (S.D. N.Y. 2001)

by the fact that there are no predetermined timelines governing how far in advance of the trial material must be exchanged.¹¹ Strategically, the government often will share this evidence with the defense just before trial, which greatly impedes the defendant's trial preparation. It is not uncommon for the government to delay the production of evidence and reveal it to the defense only a few weeks before trial. While 11th-hour disclosure can hamper any criminal defendant, it is especially prejudicial to white collar criminal defendants who are already forced to review and analyze massive amounts of documents.¹²

Moreover, the discovery rules do not require the government to disclose witness lists or the statements of any codefendants in advance of trial.¹³ As a result, prosecutors often disclose witness statements just prior to cross-examination, providing the defendant with only a limited time to prepare.¹⁴ The discovery-intensive nature of white collar criminal cases amplifies the problems created by rules that deprive defendants of early disclosure of information related to witnesses and an opportunity to meaningfully prepare. Although Rule 16 does not govern the timing of discovery requests, Rule 12 of the Federal Rules of Criminal Procedure vests the trial judge with the authority to both set deadlines for filing pretrial discovery motions and schedule motion hearings.¹⁵ A defendant's failure to make a timely request for discovery constitutes waiver, which can only be overcome by a showing of "good cause."¹⁶ Additionally, judges can impose sanctions to enforce the government's discovery obligations.¹⁷

A white collar defendant is not powerless in dealing with these discovery related issues. For example, in an extremely document intensive case, white collar practitioners often make early demands for the production of documents and do not hesitate to

("[D]efendant's principal point is that the government has provided access to such a wealth of undifferentiated material that preparation for trial is impeded rather than advanced.").

¹¹THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 8 (2007).

¹²U.S. v. Wilson, 2001 WL 727026, at *1 (S.D. N.Y. 2001) ("denying defense counsel's motion to have Section 3500 material produced two weeks before trial in lieu of the Government's proposal to have the material delivered the Thursday before a witness testifies, while also noting that the Government had produced 225 boxes of documents").

¹³U.S. v. Pearson, 340 F.3d 459, 468 (7th Cir. 2003), cert. granted, judgment vacated on other grounds, 543 U.S. 1097, 125 S. Ct. 1109, 160 L. Ed. 2d 988 (2005).

¹⁴U.S. v. Villanueva Madrid, 302 F. Supp. 2d 187, 193 (S.D. N.Y. 2003) (in case involving money laundering and bank and wire fraud, court ordered government to disclose witness lists one week before trial).

¹⁵Fed. R. Crim. P. 12(c).

¹⁶Fed. R. Crim. P. 12(e).

¹⁷See Fed. R. Crim. P. 16(d)(2).

take up the issue with the federal judge if the government is dragging its heels in producing documents. Similarly, if the government adopts the “document dump” approach, white collar counsel can seek the court’s assistance in getting the government to narrow the production or at least direct the defendant to the relevant documents contained therein. At the same time, the white collar defendant, when faced with a government production of potentially millions of pages of documents, can cite the burdensome task of reviewing this material as a basis for seeking a delay in the trial date to permit his counsel to adequately prepare for trial.

§ 112:19 *Brady/Jencks disclosures*

The scope of the government’s obligation to disclose potentially exculpatory information is a central issue in white collar criminal practice. The government is obligated to disclose certain exculpatory evidence pursuant to the Jencks Act¹ and the United States Supreme Court’s decision in *Brady v. Maryland*.² Sections 112:20 to 112:21 provide an overview of the government’s *Brady/Jencks* disclosure obligations.

§ 112:20 *Brady/Jencks disclosures—Jencks disclosures*

In 1957, Congress passed the Jencks Act in response to confusion in the lower courts created by *Jencks v. United States*, in which the Supreme Court held that criminal defendants may inspect all reports made by the government about a government witness and relating to the witness’ direct examination.¹ The Jencks Act clarified the scope and timing of the government’s required disclosures. It provided that the government is required to disclose the prior statements of a government witness after the witness testifies at a criminal trial.² In 1980, the substance of the Jencks Act was incorporated into Rule 26.2 of the Federal Rules of Criminal Procedure, which provides that “[a]fter a witness other than the defendant has testified on direct examination, the court . . . must order an attorney for the government or the defendant and the defendant’s attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter

[Section 112:19]

¹18 U.S.C.A. § 3500.

²*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[Section 112:20]

¹*Jencks v. U.S.*, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio L. Abs. 465, 40 L.R.R.M. (BNA) 2147, 32 Lab. Cas. (CCH) P 70731 (1957).

²18 U.S.C.A. § 3500(b).

of the witness's testimony."³ Despite its incorporation into the Federal Rules of Criminal Procedure, Congress has never repealed the Jencks Act, and courts and litigants continue to rely on it in dealing with criminal defendants' discovery motions.⁴

Whether material constitutes a Jencks Act statement is an issue of fact to be determined by the district court.⁵ Jencks statements include written statements signed, adopted, or approved by a witness, substantially verbatim and contemporaneously made recordings or transcriptions of the witness' oral statements, and grand jury testimony.⁶ The Jencks Act does not necessarily encompass notes taken by prosecutors or their agents during witness interviews.⁷ Some courts have held that notes of a law enforcement agent summarizing witness statements, however, may be subject to the Jencks Act and therefore discoverable if the law enforcement agent testifies at trial.⁸

The government's obligation to disclose Jencks statements is not an affirmative duty; rather, the defendant must make a request for access to Jencks statements. This is, of course, just a pro forma request that white collar practitioners do early on in every case. The defendant's request must be timely made⁹ and sufficiently precise to identify the particular statements the defendant is seeking.¹⁰ Prior to the witness' testimony, the district court determines as an issue of fact whether requests for statements are invalid for being overly broad or premature.¹¹ Under Rule 26.2, the government may challenge a criminal defendant's request for witness statements.¹² If the government claims the information requested is privileged or does not relate to the subject matter of the witness' testimony, the district court must conduct an *in camera* inspection of the disputed material and redact any

³Fed. R. Crim. P. 26.2(a).

⁴See 18 U.S.C.A. § 3500.

⁵See *Goldberg v. U. S.*, 425 U.S. 94, 108, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976) ("[A] Government objection to production may require that the trial court inspect documents or hold a hearing to gather extrinsic evidence bearing on the extent to which the documents are statements producible under § 3500.").

⁶Fed. R. Crim. P. 26.2(f).

⁷See *U.S. v. Brown*, 303 F.3d 582, 590, 59 Fed. R. Evid. Serv. 1032 (5th Cir. 2002) (holding that defendant is not entitled to handwritten notes of FBI agent made in preparation of witness interview because type-written reports containing content of interviews were provided).

⁸See *U.S. v. Welch*, 810 F.2d 485, 490-91 (5th Cir. 1987).

⁹See *U.S. v. Scotti*, 47 F.3d 1237, 1250 (2d Cir. 1995) (ordering waiver of Jencks Act discovery because defendant failed to make discovery request until cross-examination).

¹⁰See *U.S. v. Sanchez-Gonzalez*, 294 F.3d 563, 568, 9 A.L.R. Fed. 2d 813 (3d Cir. 2002); *U.S. v. Boyd*, 53 F.3d 631, 634, 42 Fed. R. Evid. Serv. 196 (4th Cir. 1995).

¹¹See *Goldberg v. U. S.*, 425 U.S. 94, 108, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976).

¹²See Fed. R. Crim. P. 26.2(c).

portions that are privileged, that do not constitute witness' statements, or that do not relate to the subject matter of the witness' testimony.¹³

If the government's failure to comply with a discovery order pursuant to Rule 26.2 results in prejudice for the defendant, the district court may (and under certain circumstances, must) strike the witness' testimony from the record or "declare a mistrial if justice so requires."¹⁴ The government's failure to disclose Jencks statements prejudices the defendant if the statements deviate from the witness' testimony or other available evidence. The Jencks Act has been interpreted to provide district courts with broad discretion as to whether to impose these sanctions and which sanction is consistent with the fair administration of justice.¹⁵ Accordingly, if the government belatedly produces Jencks statements during the trial without prejudicing the defendant, the court will craft a remedy to address the harm caused without striking testimony or ordering a new trial.¹⁶ In fact, in most cases, if nondisclosure is the result of negligence or inadvertence, if there is no bad faith on the part of the government, or if there is no prejudice to the defendant, sanctions generally are not imposed.¹⁷ Thus, despite the mandates of Rule 26.2, courts typically reserve the harsh sanctions of striking testimony or ordering a mistrial for the rare cases in which the government has deliberately decided not to produce witness statements or the prejudice to the defendant is too high to overcome with any remedial measures.¹⁸

District courts are without authority to order disclosure of Jencks statements prior to witness testimony.¹⁹ Nevertheless, district courts frequently encourage prosecutors to disclose wit-

¹³See Fed. R. Crim. P. 26.2(c).

¹⁴See Fed. R. Crim. P. 26.2(e).

¹⁵See, e.g., *U.S. v. Taylor*, 13 F.3d 986, 990, 1994 FED App. 0009P (6th Cir. 1994) (rejected on other grounds by, *State v. Marlowe*, 277 Ga. 383, 589 S.E.2d 69 (2003)) and cases cited therein.

¹⁶See, e.g., *U.S. v. Wables*, 731 F.2d 440, 445-48, 15 Fed. R. Evid. Serv. 394 (7th Cir. 1984) and cases cited therein.

¹⁷See, e.g., *U.S. v. Sanchez*, 635 F.2d 47, 66 (2d Cir. 1980) ("As to the notes Perdomo gave to Crawford in 1978, which were lost by him in January 1979, when his car was stolen, the district court correctly declined to impose sanctions against the government since the loss was inadvertent."); *Taylor*, 13 F.3d at 990 ("The court ordered the government to provide the statements to the defendants and gave the defendants the opportunity to recall and cross examine both witnesses. Such a remedy cures any possible prejudice the defendant might otherwise suffer from a tardy Jencks disclosure.").

¹⁸See *Taylor*, 13 F.3d at 990 ("The District Court is limited to these harsh remedies of subsection (d) only when the government 'elects' not to comply; in other words, only when the government intentionally or consciously chooses to ignore the disclosure requirements under the statute. When there is no bad faith or motive to suppress, and when any prejudice is curable at trial, the government has not 'elected not to comply' and subsection (d) does not control.").

¹⁹See, e.g., *In re U.S.*, 834 F.2d 283, 287 (2d Cir. 1987) ("as to the district

ness statements in advance of trial.²⁰ Production of witness statements after the witness' testimony can be very prejudicial to criminal defendants because it diminishes defense counsel's ability to cross-examine and may result in needless delays at trial.

Rule 26.2 and the Jencks Act attempt to remedy the prejudice problem by permitting the district court to recess the proceedings to allow time for a party to examine the statement and prepare to use it.²¹ Criminal defendants remain at a disadvantage, however, because courts may not provide defense counsel sufficient time to thoroughly review Jencks Act material and assimilate it into cross-examination. Even more problematic is the fact that courts, in their discretion, may determine that a recess is not warranted at all. Such late disclosure is particularly burdensome for white collar defendants who typically confront especially voluminous or complex material.

Moreover, late disclosure of one witness' Jencks statements undermines defense counsel's ability to prepare for other witnesses' testimony at trial. The testimony of one government witness is often relevant to the testimony of other government witnesses in a criminal case. If defense counsel cannot obtain access to one witness' Jencks statements until after that witness testifies, she cannot use Jencks material from that witness to cross-examine other witnesses. Instead, defense counsel is frequently forced to re-call government witnesses, which lengthens trial and may prejudice the defense as it is perceived by the jury.

To address this problem, white collar practitioners typically keep up the drumbeat over time of demanding the production of potentially exculpatory material in the government's possession. By repeatedly and consistently seeking the production of Jencks statements, the white collar defendant puts the government on notice of the demand and can put the government in an uncomfortable position with the district court if any such material is produced late in the case or even during trial. As such, this can assist in the defense of the case as district court judges may be willing to delay the trial or, in extreme cases, place limitations on the government's case to address the government's missteps in producing Jencks statements. However, only repeated demands by white collar counsel for such exculpatory material can make this remotely possible.

§ 112:21 *Brady*/Jencks disclosures—*Brady* material

The government's disclosure obligations are further governed by the Supreme Court's decision in *Brady v. Maryland* and

court's order for the production of statements of government witnesses, the Jencks Act controlled, and the district court had no inherent power to modify or amend the provisions of the Act").

²⁰See, e.g., *U.S. v. Gotti*, 2004 WL 602689, at *15 (S.D. N.Y. 2004).

²¹Fed. R. Crim. P. 26.2(d); 18 U.S.C.A. § 3500(c).