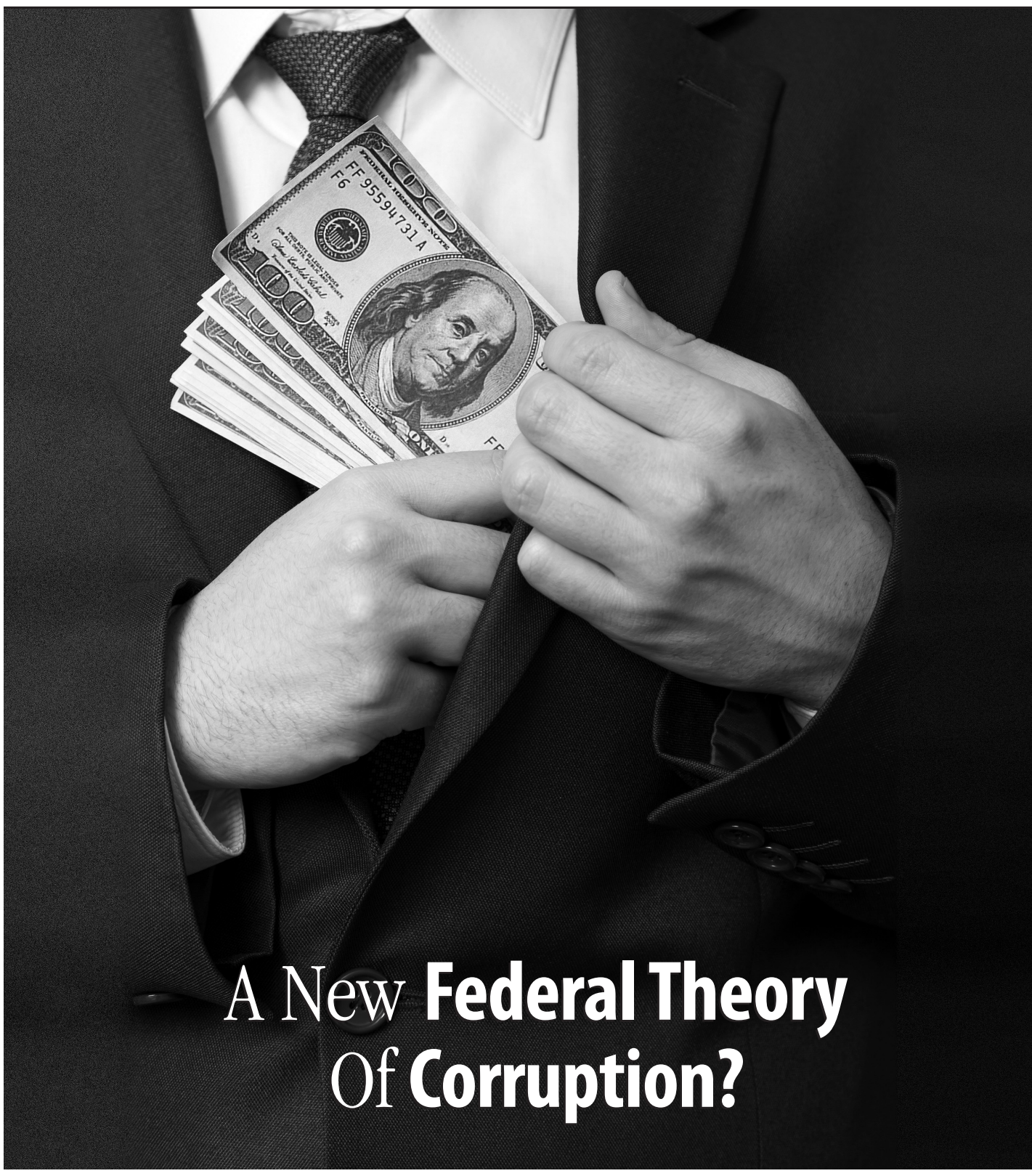
White-Collar Crime



A New **Federal Theory** Of **Corruption?**

SHUTTERSTOCK

BY MATTHEW L. SCHWARTZ AND JOHN T. ZACH

Traditionally, "corruption" investigations—whether domestic political corruption or foreign corruption under the Foreign Corrupt Practices Act—have involved bribes or kickbacks paid to public officials.

But in a series of recent prosecutions, the Department of Justice has reimagined "corruption" to target private, commercial conduct. In doing so, the government may have expanded the definition of the term "corruption" to include behavior that has previously been handled civilly or otherwise within the context of the employee-employer relationship, and created a whole new set of legal risks for employers to evaluate.

Brief History of Corruption Prosecutions

The prosecution of "corruption" has long been a focus of the Department of Justice. Historically, that has meant public corruption: the prosecution of politicians and other public officials who took bribes or kickbacks in exchange for the corrupt exercise of their governmental authority. Bribery of federal officials has been a specific federal offense since at least 1789, when the First Congress made it a crime for "any officer of the customs [to] take or receive any bribe, reward or recompense for conniving … ." Act of July 31, 1789, ch. 5, §35. Since then, Congress has enacted a number of laws that explicitly target public corruption, or are frequently employed by prosecutors in corruption cases. They include the federal bribery statutes, 18 U.S.C. §§201 and 666, so-called "honest services" fraud, 18 U.S.C. §§1343 and 1346, and the federal extortion statute (which criminalizes extortion not only by force, but also "under color of official right), 18 U.S.C. §1951.

> In a series of recent prosecutions, the Department of Justice has **reimagined "corruption"** to target private, commercial conduct.

Over the last several years, public corruption prosecutions have continued to be a particular emphasis of the Justice Department. High-profile examples of public corruption prosecutions have abounded, and have included at least two state governors, several members of Congress, numerous state legislators, and countless local officials. Last month, juries weighed the evidence of corruption against a sitting U.S. Senator and, separately, the head of a public employee union (and in each case, were unable to reach a verdict). Meanwhile, over the last few weeks alone, the Justice Department secured a prison sentence for a corrupt defense contractor who accepted kickbacks in exchange for wrongfully arranging government contracts; a guilty plea from a Homeland Security officer who accepted bribes from a drug trafficker in exchange for having an indictment against the trafficker dismissed; and an indictment against a Veterans Affairs official who allegedly accepted kickbacks in exchange for making improper payments of VA benefits.

In the mid-1970s, the focus on corruption prosecutions turned overseas. The Justice Department having established a dedicated Public Integrity Unit to investigate and prosecute domestic corruption the previous year, Congress in 1977 passed the Foreign Corrupt Practices Act, or FCPA, which criminalizes foreign corruption. 15 U.S.C. §78dd-1, et seq. As many others have examined at length, FCPA investigations and prosecutions have boomed over the last ten years or so. Fiscal year 2016 represented the second-most active year for FCPA enforcement cases ever, by number; for SEC (as opposed to criminal) cases, it was tied for the most active year ever. And by dollars, 2016 was by a wide margin the most aggressive year ever for FCPA enforcement, with a total of approximately $2.5 billion paid in financial penalties. FCPA cases have spanned virtually every industry, and have concerned alleged corruption on five continents.

More recently, the Department of Justice created its so-called Kleptocracy Initiative. Formed by Attorney General Holder in 2010, the Kleptocracy Initiative targets the assets of corrupt foreign officials who have allegedly stolen from their own people, with the goal of repatriating those assets. Cases brought under this Initiative have resulted in the recovery of millions of dollars, and have involved close coordination between the United States and numerous foreign law enforcement agencies likewise focused on official corruption.

Corruption Reimagined

Whether foreign or domestic, corruption investigations and prosecutions » Page 12

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Five Ways to Eliminate The Need for a **Corporate Monitor**

BY JONNY FRANK AND SIMON PLATT

Government-imposed corporate monitors—once a rare occurrence in the U.S.—are now commonplace, not only with domestic regulators but also with regulatory agencies in various other countries, in connection with enforcement proceedings and prosecutions for criminal offenses such as anti-corruption violations and other misconduct.

In 2016, DOJ imposed monitors in nine of the 35 deferred or nonprosecution agreements. James R. Copeland, Rafael Mangual, "The Shadow Regulatory State at the Crossroads: Federal Deferred Prosecution Agreements Face an Uncertain Future" Manhattan Institute (June 27, 2017). These recent cases indicate, however, that by taking appropriate steps, companies can avoid a government-appointed monitor. See Jody Godoy, "Telia's No-Monitor FCPA Deal Could Be a Model," Law360.com (Sept. 28, 2017).

Even though government imposed monitors help organizations restore trust, recover from past misdeeds, and help prevent future legal and reputational damage, no company volunteers for a government-appointed monitor.

Here are five practical ways to avoid or narrow the scope of a government-imposed corporate monitor:

Assess the likelihood of the government demanding a monitor.

DOJ and SEC consider six factors when determining whether to impose a compliance monitor: (1) seriousness of the offense; (2) duration of the misconduct; (3) pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; (4) nature and size of the company; (5) quality of the company's compliance program at the time of the misconduct; and (6) subsequent remediation efforts. See DOJ and SEC, "A Resource Guide to the U.S. Foreign Corrupt Practices Act," p. 71 (2012).

As they involve historical events, counsel and companies cannot alter the seriousness, duration and pervasiveness of the misconduct. Nevertheless, as the investigation unfolds, counsel and company should anticipate the government's perspective on these issues.

Similarly, the pre-existing corporate compliance program is historical in nature. As to this issue, counsel and companies should consider and develop candid responses to DOJ's guidance on questions the government will ask when it evaluates the effectiveness of the program at the time of the incident. See DOJ, Criminal Division, Fraud Section, "Evaluation of Corporate Compliance Programs" (February 2017).

Perform timely and comprehensive remediation.

Timely and comprehensive remediation is perhaps the most important step that counsel and companies can take to avoid a monitor. Effective remediation coupled with implementation of an effective ethics and compliance program increase the chances that prosecutors and regulators can conclude that a monitor is not needed.

Speed is important. The government expects the company to undertake remediation efforts immediately upon learning of misconduct. Companies too often delay remediation until after the investigation is completed. To address privilege concerns, many companies create separate investigative and remediation work streams. As a practical matter, the remediation team does not have access to privileged information.

As to remediation, expect the prosecutors and regulators to consider: (1) competence and independence of remediation team; (2) timeliness; (3) quality and depth of the root cause analysis; (4) efforts to root out other misconduct by the perpetrators or similar misconduct by others in the organization; (5) adequacy, design and operating effectiveness of corrective measures; (6) discipline of primary and secondary actors; and (7) independent assessment of the remediation program and corrective measures. See Jonny Frank, "'Remediation,' Litigation Services Handbook: The Role of the Financial Expert," 5th Ed., Chapter 13A, Roman L. Weil, Wiley (October 2015).

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Obtain pre-settlement third-party assessment or certification.

It's one thing for the company to self-certify; it's significantly more compelling when an independent third party evaluates the design, audits the operating effectiveness and opines on the company's efforts to remediate its misconduct by implementing an effective ethics and compliance program designed to prevent and detect future violations.

The third-party team, of course, needs to be independent and enjoy credibility with the relevant prosecutors and regulators. While the team need not be large, it should be multidisciplinary and include experts in audit, data, ethics and compliance, and the industries and markets in which the company does business. The team should also follow an established framework and methodology familiar to the prosecutors and regulators. In the United States, » Page 12

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Challenging the Criticism of **Federal Prosecutors** in 'Chicken---- Club'

BY CARRIE H. COHEN

For almost all federal crimes, prosecutors must prove that the defendant had mens rea, or a guilty mind. In the 1952 case, *Morissette v. United States*, the U.S. Supreme Court highlighted the historical footing for this principle.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion," the court noted. "It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent duty of the normal individual to choose between good and evil."

No doubt, mens rea makes it more difficult to prove certain kinds of criminal wrongdoing and to prosecute individuals for particular types of conduct. But is such difficulty a bad thing? There are many important reasons why our system of criminal justice typically requires mens rea. The mens rea requirement protects individuals from government overreach and mob justice. And, it helps ensure that only the appropriate type of conduct is prosecuted criminally.

The intent requirement has, at times, been the cause of public frustration, especially following the financial crisis of 2008. In an interview with The New Yorker published last year, former U.S. Attorney for the Southern District of New York, Preet Bharara, acknowledged those feelings when confronted with criticism regarding why more financial executives were not criminally prosecuted.

"There's a natural frustration, given how bad the consequences were for the country, that more people didn't go to prison for it, because it's clearly true that when you see a bad thing happen, like a building go up in flames, you have to wonder if there's arson," he said.

He added: "Now, sometimes it's not arson, it's an accident. Sometimes it is arson, and you can't prove it."

But that hasn't stopped critics from suggesting that the Justice Department could have and should have done more to prosecute individuals for their role in the financial crisis. Jesse Eisinger, a Pulitzer Prize-winning business reporter at ProPublica, is among those who suggest that with respect to the financial crisis, it was arson » Page 12

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Inside

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SHUTTERSTOCK

DOJ Policies on Corporate And Individual Prosecutions Should Be **Reconsidered, Recalibrated**

BY BARRY H. BERKE AND PAUL H. SCHOEMAN

As practitioners who represent corporations and individuals in Department of Justice investigations, we reliably anticipate that each new administration will revamp the policies and procedures for corporate prosecutions inherited from its predecessors.

The task of articulating new policy has traditionally fallen to the Deputy Attorney General, and the files are filled with memoranda that officially or unofficially bear their names. True to form, Deputy Attorney General Rod Rosenstein, speaking at the NYU Program on Corporate Compliance & Enforcement on Oct. 6, 2017, expressed his desire to reconsider both the form and substance of the Department's past guidance. He criticized the Department's practice of releasing guidance through successive speeches and memoranda, protested that such pronouncements are commonly referred to by the author's name, and proposed consolidating DOJ policy through regular updates to the U.S. Attorneys' Manual. As part of this effort, Rosenstein unsurprisingly announced that the Department would review former Deputy Attorney General Sally Yates' September 2015 memorandum on individual accountability for corporate wrongdoing, known of course as the "Yates Memo."

Issued after widespread public criticism of the DOJ's failure to prosecute corporate leaders in the wake of the 2008 financial crisis, the Yates Memo sought to "strengthen [DOJ's] pursuit of individual corporate wrongdoing." Most notably, the Yates Memo promulgated a new, higher standard for cooperation credit: For a corporation to be eligible for any cooperation credit under DOJ's Principles of Federal Prosecution of Business Organizations, it must provide all relevant information about individual misconduct. In other words, a company cooperating with the DOJ under the Yates Memo is required to identify to prosecutors all individuals involved in the misconduct, along with "complete factual information" about that individual misconduct, in order for its cooperation to be treated as a mitigating factor in the charging decision. Further, federal prosecutors were directed not to resolve cases against a company without also having a firm plan in place to resolve related cases against individuals, and prosecutors were strongly discouraged from agreeing to a corporate resolution that will provide protection from prosecution to individuals.

In his speech at NYU, Rosenstein did not reveal the details of his plans for a new policy to replace the Yates Memo. Though he stated that he "generally agree[d]" with the Yates Memo that federal prosecutors should be wary about resolving investigations through a corporate penalty without also pursuing individual wrongdoers, Rosenstein cautioned that he was not sure that current DOJ policy "got it exactly right." He then offered four "common themes" that would guide any revised DOJ policy: (1) "Any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing;" (2) "They will affirm that the government should not use criminal authority unfairly to extract civil payments;" (3) "Any changes will make the policy more clear and more concise;" and (4) "They will reflect input from stakeholders inside and outside the Department of Justice." These "themes" are unobjectionable because they lack meaningful content. We hope this reflects caution and a desire to proceed deliberately, and not unwillingness to wrestle with difficult underlying issues. Our experience as practitioners under the Yates Memo is that its strict standards for cooperation credit have had a noticeable and often problematic impact on corporate and individual prosecutions, and we would encourage Deputy Rosenstein and his colleagues in the DOJ to thoughtfully reconsider these policies.

First, the contention that an individual must always be held accountable for corporate criminal activity should be revisited. Holding "individuals accountable for corporate wrongdoing" is a good sound bite, but we believe that the better formulation, and one with which most practitioners would agree, is that individuals should be held accountable for their own individual wrongdoing. While an individual should not be shielded from prosecution because his or her misconduct occurred in a corporate setting, an individual should also not be made to shoulder the blame for an organization's shortcomings just to satisfy a politicized impulse to "hold someone accountable." Whether an individual should be prosecuted has traditionally required consideration of factors far beyond whether the elements of a criminal statute can be satisfied. We can clearly envision, and have in fact seen, many situations in which no individual prosecutions are warranted even where misconduct has occurred. For example, a corporation whose junior-level employees are inadequately trained and learn by imitating the improper practices of fellow employees may be worthy of prosecution even if the individual employees are not. Similarly, where senior executives consulted the corporation's board and sought advice from its accountants and lawyers, prosecution against any individual officer for corporate decision-making also may not be appropriate.

Relatedly, any future guidance should recognize that an important part of the prosecutorial role is weighing evidence and deciding that a crime has not been committed or that insufficient evidence exists to bring charges. Good prosecutors recognize that justice is equally well served by a decision to prosecute and a decision not to prosecute, when both are the result of a diligent investigation and a fair-minded assessment of the facts. In its current form, the DOJ's guidance strongly chills a corporation's defense counsel from reaching, much less advocating to DOJ, the conclusion that a corporate employee has not engaged in misconduct because to receive any cooperation credit for the client, the corporation's attorneys must identify misconduct by someone. A better policy formulation would evaluate corporations on the diligence of their investigative efforts and whether they presented facts fairly and accurately, without requiring a particular conclusion. In other words, a corporation that tells a prosecutor that, based on a thorough investigation, it is unable to find prosecutable misconduct should be met with no more disfavor than the line prosecutor in a typical case who gives the same report in good faith to a supervisor. In our experience, the Yates Memo has unfairly skewed this process by encouraging prosecutors to pressure corporations to search for individuals to prosecute even where the facts and circumstances do not warrant it.

> Though he stated that he "generally agree[d]" with the Yates Memo that federal prosecutors should be wary about resolving investigations through a corporate penalty without also pursuing individual wrongdoers, Rosenstein cautioned that **he was not sure that current DOJ policy "got it exactly right."**

Any new guidance on corporate cooperation should also not overlook the important differences between prosecutors and corporate attorneys when it comes to investigations. Our experience supports the commonly held view that a line prosecutor is among the most powerful government employees in the country. A prosecutor has the ability to compel the production of documents and testimony through grand jury subpoenas, and to make deals for cooperation in exchange for non-prosecution or reduced charges. With court orders that are routinely granted, prosecutors can confer immunity, search homes and offices, wiretap telephones and conduct other kinds of electronic surveillance. While a corporate defense lawyer can read email and talk to employees who consent to be interviewed, it should not come as a surprise that corporations and their counsel cannot always crack the case the way that a determined and methodical prosecutor could using the tools at his or her disposal. Any revised guidance should recognize that corporations can effectively assist prosecutors in investigations but cannot replace them. In addition, the new policy should also respect that corporations have obligations to » Page 12

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Monitor

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for example, it is common to apply the 2013 COSO Internal Control—Integrated Control Framework and relevant PCAOB and AICPA audit standards. Like remediation efforts, pre-settlement, third-party certification provides for a sense of assurance to prosecutors and regulators in concluding against the appointment of a compliance monitor.

Appoint a self-imposed monitor. As the old adage goes, "If you can't beat 'em, join 'em." The seriousness, duration, and pervasiveness of the misconduct are sometimes so severe that remediation and even a third-party pre-settlement certification will not save the organization from a government-appointed monitor. In those situations, counsel and the company should consider voluntarily appointing a monitor—a strategy that seems to be gaining popularity outside the U.S. Barclays Capital, Daimler and Rolls Royce all successfully implemented this strategy when confronted with corruption-related investigations. In these matters, in lieu of appointing a new monitor, the government permitted the companies to retain independent third parties that were engaged previously by the companies to review ethics and compliance programs. More recently, Petrobras and Airbus have made similar moves, appointing independent third parties to handle investigations into allegations of corruption.

The terms of the self-imposed monitor should model terms that the prosecutor or regulator ordinarily requires. The DOJ, for example, typically requires that the compliance monitor be independent and have demonstrated expertise with respect to the particular industry, applicable laws, corporate compliance, and the ability to access and deploy appropriate resources. DOJ also requires its monitors to develop work plans and, ultimately, certify whether the company has reasonably designed and implemented effective remediation and ethics and compliance programs and controls. In selecting a self-imposed monitor, companies should require similar terms to avoid the government insisting upon a post-settlement monitor.

> While it is unlikely that regulators will move away from imposing monitors altogether, it is important for companies to **undertake proactive efforts** to ensure that they are doing everything possible to **prevent misconduct and remediate any incidents that do occur.**

Seek to manage the scope of the monitorship. If the company cannot avoid a monitor, it may be able to control who is appointed and the scope of the monitorship. DOJ policy, for example, allows the company to submit three candidates to serve as monitor. Companies should nominate candidates who; understand that monitor's role is forward-looking; appreciate the difference between an independent and adversarial mindset or approach; and understand that monitors, like auditors, can rely upon the company's work product and resources. Ask candidates to submit a draft of work and staffing plans to gauge their experience and approach.

An inevitable, but often hidden cost of a monitorship is the internal disruption of working with a monitor—anticipating and ensuring they get what they need as efficiently as possible. While retaining an internal monitor liaison, a leader of the PMO, may seem a superfluous cost burden, the savings on internal disruption, miscommunications and time spent in the monitor's learning curve should easily offset such costs.

Finally, if possible, tailor scope to the nature of the misconduct. In corruption cases, for example, try to focus the monitor's scope on the specific incentives and means that the company employed.

Conclusion

Recent DOJ speeches and news reports indicate there is a growing sense among prosecutors and regulators that companies want to "do the right thing" when it comes to corporate compliance. DOJ has indicated it will continue to reward companies for implementing effective compliance programs. While it is unlikely that regulators will move away from imposing monitors altogether, it is important for companies to undertake proactive efforts to ensure that they are doing everything possible to prevent misconduct and remediate any incidents that do occur. If recent examples are any indication, these actions can make a significant difference in the outcome.

DOJ

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treat their employees fairly, and should not be enlisted to unduly pressure their employees to forgo rights they may otherwise have in dealing with the government.

Finally, we question whether it really makes sense to forestall corporate resolutions until there is a "clear plan to resolve individual cases," as the Yates Memo requires. In our experience, DOJ has affirmatively delayed reaching resolutions with corporations that are ready, willing and able to settle, while the quest for prosecutable cases against individuals drags on for months or years. Although the Yates Memo counsels that cases should be resolved within the time allotted by the applicable statute of limitations and suggests that tolling agreements should be used sparingly, we have observed that the ten-year limitations period for crimes affecting a financial institution, the available extension of time while a prosecutor seeks foreign evidence, and expansive views of the length of potential conspiracies or scheme crimes, provide considerable leeway to prosecutors. And when the end of a limitations period is in sight, we have found that most prosecutors have no trouble viewing their own case as the rare one in which tolling is warranted. We would like to see guidance from the Deputy Attorney General telling prosecutors not to delay corporate resolutions when a resolution that serves the public interest, including the interest of blameless corporate stakeholders, is available. Faster resolutions allow corporations and their employees and stockholders to move forward and focus on current issues without prejudicing the prosecution of individuals.

If, as promised, the current Deputy Attorney General learns from the experiences that practitioners have had under the Yates Memo, and revises DOJ's policies to better serve the goals of fairness and efficiency, perhaps he will not mind as much when the new guidance is referred to, as it inevitably will be, as the Rosenstein Memo.

Corruption

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have historically focused on *official* corruption. More recently, however, the Department of Justice has turned its attention to other forms of corruption in a series of aggressive and high-profile cases.

The most significant example of this phenomenon is likely the DOJ's crackdown on corruption in international soccer, including the international body FIFA. Last month, the first criminal trial in the wide-ranging investigation started, against the former heads of major soccer federations—private professional sports organizations—in Brazil, Paraguay, and Peru. (The case is *United States v. Napout, Burga, and Marin*, pending in the Eastern District of New York; numerous others have already pleaded guilty). Prosecutors are explicitly calling this a "corruption" case. In opening arguments, jurors were told that the defendants "abused the system" and "cheated the sport in order to line their own pockets with money that should have been spent to benefit the game." Legally, the FIFA indictments charged the same statutes that the DOJ has historically employed in corruption cases: "honest services" wire fraud, along with other charges such as racketeering, money laundering, and violations of the so-called Travel Act that rely on an underlying corruption violation.

But the alleged FIFA corruption scheme involved no public officials or acts. Instead, the cases concern *commercial* bribery: the defendants and others allegedly received corrupt payments in order to favor certain sports marketing companies over others, award events and contracts to certain countries over others, and otherwise to prioritize their personal enrichment over the proper functioning of the enterprise.

More recently, the U.S. Attorney's Office for the Southern District of New York charged numerous individuals in connection with what was, as alleged, a broad corruption scheme in NCAA collegiate athletics in which young student-athletes were steered to financial advisors, business managers, and others in exchange for bribes to their college coaches and others; and in which high school athletes and their families were "bribed" (the government's word) to attend one college over another. The press release issued by the Department of Justice announcing the arrests referred to "corruption" no fewer than ten times, including twice in the headline alone. (The cases are *United States v. Evans*, *United States v. Gatto*, and *United States v. Person*).

As in the FIFA case, the government in the NCAA prosecutions employed many of the same legal theories that it traditionally uses in public corruption cases, including "honest services" wire fraud and violations of the Travel Act. But also as in the FIFA case, virtually all of the conduct alleged in the indictments concerns purely private parties. (Because some of the college coaches worked for state schools, the government was also able to charge certain defendants under the federal bribery statutes, 18 U.S.C. §666), but the DOJ's overall legal theory does not rely upon the quasi-official nature of coaches at state schools).

> Whether these indictments are legally sufficient is a question that the courts will ultimately need to decide.

New Risks

The FIFA and NCAA cases, and other smaller cases like them, represent a significant potential shift in the Department of Justice's enforcement of the laws against "corruption." Unlike traditional public or foreign corruption cases, which involve officials who are alleged to have abused their political power for personal gain, these cases involve commercial actors who failed to act in the best interests of their organizations or clients for personal gain. In many ways, these cases constitute federal criminal prosecutions for alleged breach of fiduciary duty. Indeed, some of the charges say so explicitly. For example, one of the FIFA indictments charges that "[a]lthough they also helped pursue the principal purpose of the enterprise [i.e., FIFA and its constituents], the defendant and their co-conspirators corrupted the enterprise," including "by conspiring with and aiding and abetting their co-conspirators in the abuse of their positions of trust and the violation of their fiduciary duties." And the FIFA prosecutors dedicated substantial time on the very first day of the *Napout* trial to evidence that purports to establish the fiduciary duties the defendants owed the soccer federations in question.

The Justice Department's use of traditional corruption statutes to target commercial actors is by no means novel. Most famously, the government prosecuted Enron chief executive officer Jeffrey Skilling under the honest services fraud statutes in connection with his alleged scheme to manipulate Enron's share price. The Supreme Court reversed Skilling's conviction, but not because the honest services fraud statute does not apply to private actors. To the contrary, the majority recognized that while not common, since at least the 1940s, courts had recognized that a private employee could be convicted of depriving his or her employer of the employee's honest services, if he or she accepted bribes or kickbacks. Instead, the court reversed because Skilling's alleged crime did not involve bribes or kickbacks. See 561 U.S. 358 (2010).

But the schemes alleged in the FIFA and NCAA cases come close to relying on a theory that the Supreme Court explicitly rejected in *Skilling*. There, the government asked the court to find a violation of the honest services fraud statutes not only where bribes and kickbacks are involved, but also in cases involving "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." The court rejected the government's argument, holding that "a reasonable limiting construction of [the honest services statute] must exclude this amorphous category of cases."

As alleged, the government's recent prosecutions seem animated by the defendants' perceived breach of their fiduciary duties. At the same time, there are allegations that as part of the offense, money changed hands in the form of what the government characterizes as bribes or kickbacks. Whether these indictments are legally sufficient is a question that the courts will ultimately need to decide. But in the meanwhile, employees and employers alike face a significant new set of risks, with the specter that putting oneself ahead of one's employer or clients—even in professions that do not traditionally entail a fiduciary relationship—may be not only a fireable offense, but a federal crime.

Criticism

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and there was a way for criminal prosecutors to prove it.

After reporting on some of the causes of the financial crisis, Eisinger shares that he was sure that criminal indictments would follow. But, to his amazement, they never materialized. In his book, "The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives," Eisinger digs for an explanation. His primary thesis: Federal prosecutors have lost the skill and will to prosecute complex white-collar crime.

This alleged lack of will is reflected in the title of Eisinger's book, which comes from a speech delivered by James Comey to federal prosecutors in 2002. Before he became the FBI Director, Comey served as U.S. Attorney for the Southern District of New York.

After being on the job for several months, Comey addressed the prosecutors in the criminal division of the Southern District of New York. Comey, according to Eisinger, asked everyone in the room to hold up their hand if they had never experienced a hung jury or an acquittal.

When many eager hands shot up, Comey delivered a punch to their egos: "Me and my friends have a name for you guys," he said. "You are members of what we like to call the Chickenshit Club."

By all accounts, Comey was imploring the prosecutors not to worry about losing a case but to focus on whether individuals or corporations deserved to be prosecuted based on the facts and the law. But that message would go unheeded when it came to complex white-collar crime related to the financial crisis, claims Eisinger. Around the time of the Comey speech, a "dramatic and little-understood shift in how the government prosecutes white-collar crime" was beginning to take shape.

According to Eisinger, high-profile government losses in court, coupled with other fiascos, including cases of prosecutorial abuse and corporate lobbying, caused prosecutors to "ease up." Further, he notes, the skills required of prosecutors to take complex white-collar cases to trial eroded as the Justice Department began favoring negotiated settlements with large corporations over prosecuting individuals.

> What I saw from the inside and now see on the outside are **federal and state prosecutors aggressively pursuing white-collar investigations** without fear or favor guided by the facts and the law.

No question, Eisinger has produced a deeply reported book that offers a compelling narrative for those frustrated that few Wall Street executives were prosecuted for their role in the financial crisis. But what Eisinger misses is a full appreciation and understanding of the difficulties of proving a criminal case and what evidence may or may not have existed to determine whether a criminal prosecution was warranted as well as the standard of proof prosecutors face and the various legal limitations of certain statutes and interpretations thereof.

What exactly did prosecutors investigate? What evidence was obtained by grand juries? Due to grand jury secrecy laws, the answers to these questions will never be known, but it is unfair to assume no such investigations existed or that they were not aggressively pursued.

To be sure, Eisinger does not blame only the Justice Department for what he considers lackluster white-collar crime enforcement. He acknowledges, for example, that appellate decisions increasingly have overturned jury convictions on various legal grounds. He also notes that Congress has not stepped in to make certain statutory changes that might help prosecutors bring the very cases he complains are not brought.

But the courts and Congress take a backseat to the criticism Eisinger lobs at prosecutors, especially in the Southern District of New York where many banks and financial institutions are headquartered. Eisinger asserts that prosecutors and Justice Department officials both lost the nerve to take on powerful executives. This view does not reflect what I experienced as a federal prosecutor in the Southern District for nearly nine years and what I see now as a white-collar defense lawyer. Eisinger also fails to appreciate the complexity of the insider trading cases he claims were a "prosecutorial non sequitur," and ignores the many complex financial crime and other financial fraud cases that have been brought both by the criminal and civil divisions of the Southern District of New York and other U.S. Attorney Offices as well as state prosecutors throughout the country.

I am aware of no prosecutor "easing up" on investigating executives for potential white-collar criminal conduct or fearful to take a case to trial. To the contrary. What I saw from the inside and now see on the outside are federal and state prosecutors aggressively pursuing white-collar investigations without fear or favor guided by the facts and the law. The results of those inquiries should not, as some have suggested, be influenced by the aftermath of a calamity or public opinion. That is not the way justice is delivered nor served.

The power a prosecutor wields is awesome. We should take comfort that Justice Department policies and our criminal laws help prevent that power from being misused to satisfy public opinion. We also should also be thankful for those government attorneys who resist the klaxon call for some sort of instinctual justice. They are not chickens, much less chicken—. They are courageous.

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