Preface

Over the past two decades, corporate criminal liability has developed into one of the fastest growing and most dynamic areas of legal practice. Consider that in 2000, U.S. authorities assessed $250 million in criminal penalties against corporate entities. By 2020, corporate criminal penalties had grown 40-fold, reaching over $10 billion. Notably, this dramatic growth in fines has not stemmed from significant changes to, or expansion of, the legal authority governing corporate criminal liability. For example, the Foreign Corrupt Practices Act (FCPA), one of the most frequently used laws to prosecute corporations, was originally enacted in 1977, but until 2000, the Department of Justice (DOJ) prosecuted an average of less than two cases per year. Moreover, during this time, penalties were typically in tens or hundreds of thousands of dollars. These statistics stand in stark contrast to the DOJ’s FCPA corporate enforcement activity between 2016 and 2020. During that five-year period alone, the DOJ entered into 41 corporate resolutions with criminal penalties of more than $6.7 billion. The increase in the number and size of corporate resolutions has also been seen across other corporate offenses, including, for example, fraud, antitrust, environmental, and tax crimes.

The growth of corporate criminal enforcement has correlated with a broad shift in how the government investigates and resolves corporate criminal violations. Some of these changes are a result of an evolution in enforcement policies and principles, while others reflect evolving and increased use of alternative mechanisms to resolve corporate criminal cases, such as non-prosecution agreements, deferred prosecution agreements, and declinations. Even more recently, there has been a significant increase in foreign enforcement of corporate crime and a resulting spike in cross-border investigations and resolutions.

As a result of these developments, the area of corporate criminal liability has many significant differences from other areas of criminal or civil law. For example, the incentives to voluntarily self-report violations and cooperate with government investigations are quite unique in this context, as are the multijurisdictional coordination of investigations and resolutions and the complexity of many corporate criminal investigations. Companies have also invested heavily in compliance programs given their importance to the government in making charging decisions. Other substantial differences include the more frequent use of alternative prosecution arrangements (e.g., deferred and non-prosecution agreements), considerations that generally apply only to corporate defendants (e.g., collateral consequences), and corporate enforcement tools (e.g., independent compliance monitors).

Notably, one of the most significant aspects that distinguishes corporate criminal practice is that much of it occurs outside of the traditional judicial system. In particular, because nearly all of the DOJ corporate criminal matters are resolved through negotiated settlements and very few cases involve judicial proceedings or go to trial, many parts of this practice area remain relatively unknown to students and practitioners. This book provides readers with a window into all aspects of the practice of corporate criminal investigations and prosecutions. Readers will find comparatively fewer references to and excerpts from court cases than books on other areas of law because many of the most important aspects of the investigation and resolution process are not available in public case documents.

This book is roughly divided into two parts. The material in the first part of the book addresses areas that are generally applicable to all corporate criminal cases. Chapters 1 and 2 address the legal principles underlying corporate criminal liability, including the attribution of the criminal acts and mental states of employees and agents to the corporation. Chapter 3 addresses the individual liability of corporate officers for corporate crimes under the so-called Responsible Corporate Officer Doctrine. Chapter 4 examines the constitutional rights of criminal corporate defendants. Chapters 5 through 8 address the investigatory process, including internal corporate investigations, government investigations, and parallel and multijurisdictional investigations. Chapter 9 presents a discussion of corporate compliance programs, and in particular how such programs are relevant in criminal matters. Chapter 10 examines the resolution process unique to corporate criminal cases. Chapters 11 and 12 address corporate criminal trials and sentencings, and Chapter 13 focuses on independent compliance monitorships. Finally, Chapter 14 examines the subject of asset forfeiture in the corporate criminal context.

The material in the second part of the book addresses specific categories of federal crimes that are commonly used to charge corporate defendants: conspiracy, food and drug offenses, the FCPA, the Bank Secrecy Act and tax offenses, antitrust, international economic sanctions, environmental crimes, and the Racketeer Influenced and Corrupt Organizations Act. Part 2 of the book also includes a chapter that focuses on a specific technology sector, virtual currency, which in recent years has seen substantial growth in both criminal activity and corresponding law enforcement activity.

The co-authors of this book bring a unique perspective on corporate criminal liability. Daniel Kahn is the former acting Deputy Assistant Attorney General of the Criminal Division and, earlier, was the Chief of the Fraud Section and FCPA Unit. Leo Tsao is the former Principal Deputy Chief of the Money Laundering and Asset Recovery Section and also held supervisory positions within the Bank Integrity Unit and FCPA Unit within the DOJ’s Criminal Division. Together, they have supervised hundreds of corporate criminal investigations, more than 50 corporate resolutions, and more than 20 independent compliance monitorships; their collective experience in criminal enforcement spans more than 25 years. Eugene Soltes is a Professor at Harvard Business School whose work over the past decade has focused on the internal processes that companies rely on to prevent, detect, and respond to misconduct. Our collaboration began with a popular seminar we taught together at Harvard Law School on corporate criminal investigations and prosecutions. Seeing the demand for a greater understanding of this emerging area of criminal law, we wrote this book to provide an in-depth exploration of the field for a wider audience.

We have written this text so that it is suitable for a variety of audiences. The text itself can be utilized as a legal treatise that synthesizes relevant processes around corporate criminal liability for practitioners. At the same time, we hope to generate interest in and provide a foundation for law school courses focused on corporate criminal investigations and prosecutions, like the one we began teaching together at Harvard Law School. In this spirit, we have created an extensive set of online resources, available at https://www.aspenpublishing.com/Tsao-CrimInvest and on CasebookConnect, including discussion questions and relevant case material for key chapters.

Corporate criminal liability, investigations, and prosecutions have not only been a professional focus for each of the co-authors of this book, but it is also an area we believe is critical to creating well-functioning business and commerce. We hope this book illuminates that critical role and inspires new interest in the field for readers.