Lawyer's Bookshelf

Expert Analysis

Defending Corporations and Individuals In Government Investigations

REVIEWED BY JEFFREY M. WINN

Edited by Daniel J. Fetterman & Mark P. Goodman, Thompson Reuters, Toronto, 1206 pages, $233.

Perhaps to verify James Madison's observation that, if men were angels, no government would be necessary, government investigations have become ubiquitous in American life. As such, they have created much work for lawyers. First published in 2011, and now in its fourth edition, this handbook of best practices for handling government investigations makes important contributions to the professionalism of this preeminent area of the law.

The 2017-2018 (fourth) edition does not disappoint. Published at a time when the quality of public discourse and the necessity of telling the truth are both under attack, the latest edition contains a thread of principle throughout each of its 19 chapters: the paramount importance of maintaining a high degree of credibility with
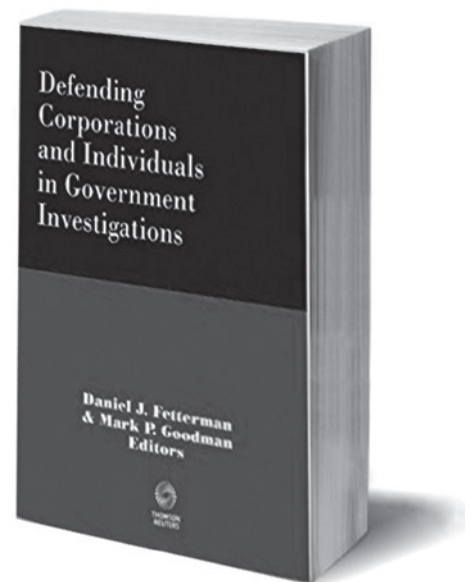
government officials once an investigation has begun.

The book contains an all-star roster of contributors. In addition to editors Daniel Fetterman and Mark Goodman, the authors include Elkan Abramowitz, D. Jarrett Arp, Sean Berkowitz, Bruce Bettigole, Allison Caffarone, James Comey, Courtney Dankworth, Lev Dassin, Eric Dinallo, Reid Figel, Christopher Garcia, Patricia Gorham, Mary Beth Hogan, Brian Jacobs, Boyd Johnson III, Jonathan Kolodner, Douglas Lankler, Andrew Levine, Jeffrey Locke, Guy Petrillo, Amelia Rudolph, Karen Seymour, Deborah Steiner, Jeremy Temkin, Trevor Welch, Carlton Wessel, Mary Jo White, Bruce Yannett, and Ellen Zimiles.

Written for attorneys, three constituencies in particular will benefit from the book, including in-house counsel, law firm practitioners, and their government counterparts.

In supplying an overview of the issues and mechanics associated with defending clients in government investigations, the book not only expertly provides a "wide-lens assessment of the structure, decision-making processes, practices, and priorities of key agencies and independent regulators," but it also provides

"specific suggestions concerning how to make compelling presentations to government officials and to respond to the myriad of regulatory requests a client may receive."

For example, the book provides guidance on developing and executing on an effective compliance program, interacting with the DOJ and SEC, responding to government subpoenas, conducting internal investigations, dealing with data privacy issues, handling challenging media issues, and understanding the unique issues that arise when representing individuals prosecuted by the government.

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As a fitting kickoff, the first chapter, which is written by the editors Fetterman and Goodman, addresses the current state of the white collar crime law enforcement landscape, including regulators, targets, and priorities. Richly supported by government reports and statistics, this chapter recounts the "effective and unforgiving enforcement environment" prevalent during the Obama Administration.

However, the chapter also points out that Obama era enforcement was not always even-handed. For example, although the Obama DOJ charged over 4,000 people with mortgage fraud through 2014, "almost no top executives at the banks or large companies that settled corporate charges were indicted or convicted."

In describing the effect of the major September 2015 DOJ policy statement entitled "Individual Accountability for Corporate Wrongdoing" (the Yates Memo), Fetterman and Goodman concisely sum up the challenges that will develop in the years to come between a target corporation which desires to receive cooperation credit and its employees, because "thorough and complete disclosure of individual culpability is required[.]" As noted by the authors, "individuals almost certainly face increased risk, because the Yates memo creates incentives to settle cases via agreements that incorporate facts harmful to individual wrongdoers."

Another useful chapter in the book is written by James Comey, who served as the general counsel of an advanced technologies company and an investment management firm, in addition to his lengthy federal law enforcement service. Entitled "The Role of General Counsel In a Crisis," Comey perceptively explains the difference between intelligence and judgment, finding an advisor with exceptional judgment, the importance of knowing the local prosecutor's office, choosing the right law firm in a given investigation, and effectively communicating with the company's stakeholders, employees, customers, investors, auditors, and regulators. According to Comey, establishing a high level of credibility with the investigating agency is one of the keys to effective crisis management.

One particularly effective chapter is titled "Defending Individuals in Government Investigations," written by Karen Seymour and Allison Caffarone. The 40-page chapter comprehensively analyzes the wide range of issues that such a client representation entails, including the client's role in the investigation, conflicts of interest, joint representation, understanding and managing your client, accessing documents, whether your client should speak with government counsel and company counsel, obstruction of justice issues, payment issues, and special considerations for clients located outside the United States.

In an enlightening section dealing with the preparation of individual clients to testify under oath, Seymour and Caffarone also list 11 concise bullet point rules that every competent counsel should discuss with her client before their witness appearance. These eleven rules of engagement with opposing counsel have a universal usefulness, not just in government investigations.

In addition to such broadly defined chapters, the book also contains chapters that focus more narrowly on defending clients before specific law enforcement agencies or regulatory bodies (DOJ, SEC, CFPB, FINRA, PCAOB, District Attorneys, and State Attorneys General) and particular types of cases (fraud, securities, financial services, antitrust, consumer, accounting, foreign corrupt practices, insider trading, parallel proceedings, and forfeiture).

The logical progression and editing of the book are superb. While early chapters deal comprehensively with general subjects, the later chapters cover the same ground but with focused attention on specific types of cases. The quality of the writing is consistently first-rate, with referenced sources conveniently footnoted throughout the text.

The book also contains several useful templates for practitioners, such as a sample joint defense agreement, legal hold memorandum, outline of a document retention practices interview, and FOIA request letter.

In sum, the great strength of the book is the expert insight it provides to defense counsel into law enforcement. In the words of Mary Jo White, who has prominently served in so many high level roles in private practice and law enforcement, the book is useful because it explains how the agencies are structured, how they identify their priorities, how the make decisions internally, what they expect from defense counsel, and how to interact with them productively in a variety of contexts.